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INTRODUCTORY WORD

Miodrag JOVANOVIĆ, PhD*

Bojan SPAIĆ, PhD**

THE MOST IMPORTANT PROBLEM OF CONTEMPORARY LEGAL PHILOSOPHY

We have recently come across a documented discussion, held at the Faculty of Law, University of Belgrade in April and May 1963 and subsequently published in Volume 11 of the *Annals of the Faculty of Law*.[1] It was dedicated to the concept of law and, although it was organized by professors from the Department of Theory, Sociology and Philosophy of Law, it brought together

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1 Diskusija – O pojmu prava (Discussion – On the concept of law), Vol. 11, No. 3–4, 445–529.

scholars from both the legal theory and non-theoretical fields of law. It is interesting to see from a distance of nearly half a century how lively and occasionally blistering these discussions were. As expected, they addressed both substantive and methodological issues. In fact, the debate regarding the defining features of the concept of law was largely methodologically inclined. In particular, the focus of criticism of several discussants was the approach of Kelsen's *Reine Rechtslehre*, which was labeled *normativism*, insofar as it claimed that jurisprudential inquiry, properly understood, is exhausted in the study of legal norms (rules). The leading legal philosophers of the time argued, instead, that legal methodology should be integralistic in nature, which, among other things, implied the study of law's function(s), its underlying social relations, as well as the behavior of norm-addressees. And although one may be inclined to think that those ideas mostly resonated with central ideas from Hart's then freshly-published *The Concept of Law*, this would be a wrong conclusion. Simply put, Yugoslav legal theory of that time was mainly oriented towards European continental tradition and largely unaffected by the dominant trends in Anglo-American jurisprudence.

In contrast, legal theorists of the present generation at the University of Belgrade, Faculty of Law have always been interested in establishing effective bridges between the two most important traditions in legal philosophizing. This Symposium is the outcome of one of the latest attempts of that sort – an online one-afternoon event on the purposefully broadly conceived topic "The most important problem of contemporary legal philosophy", which was sponsored by the Serbian section of IVR (International Association for the Philosophy of Law and Social Philosophy) and held on 28 May 2021. The hiatus in meetings, conferences, seminars, symposiums, and lectures caused by the COVID-19 pandemic, motivated us to survey the state of the field on both sides of the Atlantic. The idea was to summon distinguished representatives of the present-day jurisprudence to share their thoughts on views, topics, approaches and insights that are or should be at the center of jurisprudential inquiries. We were fortunate enough that Brian Leiter, Frederick Schauer, Pierluigi Chiassoni, Tomasz Gizbert-Studnicki, and Torben Spaak gladly accepted the invitation to take part in the event. This was probably the most visited jurisprudential conference in 2021, with more than 150 participants from all over the world in remote attendance.

It transpired that some of the issues that are highlighted as the most important for the present-day legal philosophers are, in fact, perennial problems of jurisprudence, albeit discussed within novel heuristic and terminological frameworks. Hence, just as Yugoslav scholars in 1963 were concerned that the methodological obsession with normativism may impoverish our understanding of the legal phenomenon, so some of 2021

discussions warn about "pointless metaphysical inquiry" as a dangerous methodological stray, which has taken analytical jurisprudence away from Hart's path (Leiter); while our predecessors debated about law's ultimate role and purpose within the official Marxist doctrine of "withering away of the state and law", contemporary legal philosophers tend to wonder whether law matters (Schauer), and in what sense, if any, can jurisprudence "contrast the morally disgusting state of the world" (Chiassoni); whereas legal philosophers in the socialist era were puzzled about the relationship between official, state created law and autonomous, spontaneously developed norms of "self-governing" (*samoupravnih*) bodies, nowadays scholars inquire as to the usefulness of the old paradigm of "legal pluralism" for assessing the new and complex reality of the global legal landscape; similarly, while Yugoslav legal philosophers were at pains to reconcile newly developed legal concepts, such as "social ownership", with the traditional ones, the jurisprudents of today face similar problems related to new manifestations of legal subjectivity, of the likes of autonomous machines, environmental legal persons and animals (Gizbert-Studnicki).

One topic conspicuously absent from the 1963 Belgrade discussion, which was addressed in the 2021 online meeting, is the nature of legal reasoning (Spaak). Lawyers from both practice and academia have unquestionably always been aware that theirs is to provide adequate reasons and arguments, but this feature of legal life has often not been sufficiently stressed in legal philosophy or in legal education.[2] Being primarily focused on the philosophical method of analysis, at times jurisprudential inquires resemble the scene from Rembrandt's famous painting *The Anatomy Lesson of Dr. Nicolaes Tulp* (1632), which depicts knowledge about the human body being acquired by inspecting a corpse. The philosophical analysis of law is frequently practiced in a similar fashion, as if we are not dealing with a living and pulsating body.

The breadth of the discussed issues and topics, as well as the way they were addressed by the Symposium speakers, has aptly demonstrated that jurisprudence is, after all, well equipped to elucidate the most vital aspects of the complex social practice called *law*.[3]

[2] Since the current generation of legal theorists at the University of Belgrade Faculty of Law is of the opinion that Serbian legal education acutely suffers from this deficiency, a significant part of our educational efforts is directed towards overcoming it.

[3] The order of the written contributions follows the order of the talks at the symposium.

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Brian LEITER, JD, PhD[*]

BACK TO HART

The essay addresses two different senses of important "problems" for contemporary legal philosophy. In the first case, the "problem" is having forgotten things we learned from H.L.A. Hart, and, partly as a result, encouraging pointless metaphysical inquiries in other directions that take us very far from questions about the nature of law and legal reasoning. In the second case, the "problem" is to attend more carefully to Hart's views and his philosophical context to think about the problem of theoretical disagreement, and to understand the way in which later commentators have misunderstood his behaviorist (Rylean) analysis of "accepting a rule from an internal point of view."

Key words: *H.L.A. Hart*. – *Gilbert Ryle*. – *Internal point of view*. – *Theoretical disagreement*. – *Metaphysical grounding*.

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Our subject – the most important "problem" in contemporary legal philosophy – is ambiguous in a funny way, between current puzzles or questions that are very important to address, versus problems in legal philosophy in the sense of features of contemporary legal philosophy that handicap intellectual progress. I am going to talk about both. And I'm going to start with what I take to be the problematic situation in legal philosophy, especially in Anglophone legal philosophy, and especially in the United States.[1] So those of you who are working in legal philosophy in jurisdictions not afflicted with these problems, you can all be grateful, as it were. But given the hegemony of the English language in academia these days, students of legal philosophy everywhere should be concerned.

My worry is that legal philosophy in the United States is seriously backsliding. We are losing sight of a lot of things that, I thought, we had learned from H.L.A. Hart and from Hans Kelsen, though often Kelsen through Hart. To be sure, I think we learned a lot from aspects of Dworkin's engagement with Hart, from Raz's additions to and disagreements with Hart, and also from the major natural law challenges to Hart – I'm thinking of John Finnis and Mark Murphy. Even those latter challenges, in effect, accepted a lot of Hart's way of framing the issues and questions of legal philosophy. In my own work, I only took issue with Hart, as it were, at the margins, namely the questions about the methodology of legal philosophy (Leiter 2007),[2] reflected in my earlier naturalistic challenges to aspects of Hart's legal philosophy. The real problem now is well-captured by something that my friend Leslie Green often says, that is very apt: "too many legal philosophers want to say something new rather than something true." And, of course, the incentive structure of academia encourages finding something new to say, regardless of whether it is true or even plausible. I think that we are suffering from that in the United States, in particular, with a proliferation of "new" theories of law, some of which are new, but none of which, as far as I can see, are true or even illuminating; some are slightly ridiculous, even. This is always a risk in a discipline which is largely immune to empirical evidence and which is so dependent on the intuitions of its practitioners and their social and professional status.

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1 The situation is, right now, less bad in Britain, although with John Gardner's untimely death, the retirement of Leslie Green, and the fact that the current "Professor of Jurisprudence" (Gardner's successor) does not work in jurisprudence, there are reasons to worry.

2 For some revisions to my view, see Langlinais, Leiter 2016.

I want to comment, in particular, on Scott Shapiro's so-called "planning theory of law" (Shapiro 2011), because I think it is a particularly unfortunate case, since he did present himself as trying to continue in the tradition of legal positivism associated with Hart, even though he abandoned it in several crucial respects. Some of what I have to say about this is discussed in more detail in a paper that you can get online at SSRN, called "Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence" (Leiter 2020). I'm not going to go over everything I said there. I just want to highlight a couple things that seem to be a real move backwards in the field.

Let's start with the most obvious problem, which is that the whole idea that you can have a theory of law based on the idea of people making *plans* shows that Shapiro has already forgotten something that I thought we had all learned from H.L.A. Hart, which is that law can result from the unintentional activities and practices of officials in a legal system. Some law does result from plans (e.g., legal systems with written constitutions) but a great deal of it does not. And this was in fact one of Hart's important insights, yet that is already off the table in Shapiro's account.

Shapiro has also popularized the idea that Hart committed a "category mistake" by allegedly equating rules with practices, since rules are abstract objects, while social practices are concrete activities. This is the weakest objection to H.L.A. Hart I have ever heard from a serious person.[3] Hart did not in fact equate rules and practices. Hart offered a behavioral analysis of what it is to "accept a rule from an internal point of view";[4] Hart's analysis concerns *accepting a rule,* the latter being a concrete practice, not an abstract object. This is explicit in *The Concept of Law,* where he says he is answering the question, "What is the acceptance of a rule?" (Hart 2012, 55):

> What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expressions in the normative terminology of "ought", "must", and "should", "right" and "wrong." (Hart 2012, 57).

[3] There are far worse objections from unserious people out there, needless to say.

[4] This way of formulating the point I owe to Kevin Toh.

Hart here describes the behavioral evidence that people accept a rule from an internal point of view; he does not offer any analysis of what a "rule" is here, or elsewhere ("rule" functions as a kind of theoretical primitive in his account of law). Shapiro's "category mistake" objection to Hart is – to, once again, quote Les Green – "categorically mistaken."[5]

Another mistake Shapiro makes is he claims that in order to know what the law is in a particular case – and I quote him now – "it is not enough to know who has authority within the jurisdiction, which texts they have produced, approved and how to interpret it" (Shapiro 2011, 25). It is mysterious, however, how it could not be enough to know what the law is if you know who has authority within the jurisdiction, which texts they produced, and how to interpret them. Shapiro gives this example: "if it is against the law to jaywalk in New York City, then this legal fact obtains in virtue of the fact that, say, the city council voted to approve a bill that set out in writing that jaywalking is prohibited within the city and the fact that they mayor signed this bill" (Shapiro 2011, 26). From these banal facts (which is all a lawyer or citizen would need to know), he proceeds to ask, "What facts might we appeal to in order to establish the authoritative status of fundamental laws such as the Constitution?" (Shapiro 2011, 27).[6] Why do we need to know the answer to that question, if we already know that the Constitution "has authority within the jurisdiction...and how to interpret" it? That is, after all, exactly what Shapiro earlier said (Shapiro 2011, 25) we were entitled to assume. So Shapiro's question seems a non-sequitur.

Part of what is going on here, I suspect, is that Shapiro got the Dworkinian "bug", which has always been anathema to legal positivism – the "bug" being that judicial decision actually requires you to have a general or foundational view about the nature of law. For positivists, however, "what the law is" is one thing, and "what judges ought to do" is another. Legal positivism is a theory about which norms are legally valid, not a theory of judicial decision: law exists primarily outside the courts, one of Hart's key realistic insights into modern law (see Leiter 2021).

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5 There is an interesting question about the social epistemology of academia here. Every expert in legal philosophy knows that the "category mistake" objection to Hart is mistaken, but the *jejune* do not, even the *jejune* with jobs teaching law. Fortunately, mistakes by legal philosophers are not as important as mistakes by doctors: on the "why does it matter?" scorecard, mistakes by those doing general jurisprudence do not kill anyone (contrary to Lon Fuller).

6 As Tom Adams reminds me, this also sounds like the arch anti-positivist Dworkin in the early parts of *Law's Empire* (1986), a point to which I return in the text.

I've mentioned some particular theses that Shapiro has advanced in his book that represent a step backwards in general jurisprudence, though I worry the real damage that his book has done is not so much the particular false claims that it has made – I think a lot of people are by now aware of these mistakes – it is rather that it popularized a strange and unproductive way of framing the problems in general jurisprudence, namely, in terms of metaphysical grounding relations, which is, as it were, the current fad in analytic philosophy. Analytic philosophy, as many of you may know, is a degenerating research program in something like Lakatos's sense: there is no agreement on its methods, on its problems, on whether the problems have solutions, and so on. As a result, the research program of self-identified analytic philosophers lurches from one intellectual fad to another – the current one being metaphysical grounding.[7]

What is puzzling about this "grounding" turn in general jurisprudence is that it makes it sound like the real problem in philosophy of law is to find law's place in what you might call a metaphysical layer cake: one layer of the cake is supposed to be the "law facts", and then there are these other layers: social facts, moral facts, psychological facts, and so on–all kinds of facts are somewhere in this cake! And the problem is to figure out how the different layers are all connected to each other. It would be as if philosophers of art thought the central problem about the nature of art was the relationship between art facts and social facts, psychological facts, and physical facts; or if philosophers of science thought the central problem about the nature of science was the relationship between "science facts", and all the other kinds of facts. But no one concerned with understanding the nature of art or science has fallen prey to such pointless metaphysical speculation. Philosophers of science, for example, have suggested that what distinguishes science from non-science is, *inter alia*, verifiability, or falsifiability, and so on. The connections between metaphysical strata are irrelevant.

The "grounding turn" that Shapiro has popularized arises textually, it seems, from the fact that Joseph Raz sometimes would say things like, "the positivist social thesis is that what is law and what is not is a matter of social fact", which he himself called a "crude formulation" (Raz 1979, 37). Shapiro takes the crude formulation quite literally. Raz's formulation wasn't meant to be an invitation to general metaphysics, it was rather a shorthand for the complex of ideas that we in fact got from Hart. These are ideas like: law is

[7] Those outside philosophy, or who don't know much intellectual history, probably think "naturalism" is a fad too. If so, it is the "fad" of the entire modern era since the scientific revolution. It is also a "fad" at a much higher level, one that many of those committed to "grounding" talk also accept.

conventional, not transcendent; which norms are legally valid in a particular society are those treated as such in the purely conventional practice of officials in a legal system when they converge on certain criteria of legal validity and accept them from an internal point of view, and so on.

Is Hartian positivism correct about law in the preceding respects? That is the real issue, and it is lost when you frame the question of general jurisprudence as a question about metaphysical grounding relations. I also – just as an aside – worry that we are setting an impossible and thus pointless task if we treat this as a metaphysical grounding issue. I would have thought we learned from Saul Kripke's meaning skepticism (we cannot specify the facts in virtue of which some sentence – or rule – has a particular meaning), and from Nelson Goodman's new paradox of induction (we cannot specify the facts that will allow us to reliably project any particular predicate into the future) that we have no good metaphysical account, in any domain, of how particular facts determine particular contents. These kinds of famous examples in philosophy would suggest that "how facts make law" – to use Mark Greenberg's phrase (2004), and Greenberg was the main influence on Shapiro's framing of this – isn't going to be a successful undertaking. If that is right (and nothing in the literature so far leads me to think otherwise), then this is a serious obstacle to progress in legal philosophy, in the sense that it has derailed inquiry in an unproductive way–although it has appealed, unsurprisingly, to people who have recently gotten Ph.D.s in analytical philosophy departments.

So with that let me turn to what I think is the main problem in the other sense (i.e., what issues we really need to address), although it is closely related to what I have just said. I think what we need in Anglophone jurisprudence is something like a "Back to Hart" movement. In mid-19th century Germany, they had a Back-to-Kant movement, after they got through with Fichte and Hegel, which was an ordeal. The German "Back to Kant" movement got a lot of momentum from developments in physiology; Herman von Helmholtz, in particular, thought that the physiology of the human sensory apparatus vindicated Kant's transcendental idealism, by demonstrating the dependence of our cognition of the world on the peculiar features of the human sensory apparatus. Hart has no Helmholtz to come to his defense,[8] although we may at least note on Hart's behalf that most social scientific research into law continues to rely on what are recognizable positivist assumptions (see Leiter 2007, 188–90).

[8] This kind of "defense" of Kant is vexed for many reasons, but those need not concern us here.

Getting "Back to Hart" requires more than simply avoiding derailment by mistakes like Shapiro's. Rather, I think a better understanding of Hart's contributions are particularly important for our current debates. Tom Adams (Adams 2021) at Oxford has shown us, for example, that the common attribution of a "practice theory of rules" to Hart is a mistake – a mistake not unrelated to the one Shapiro commits, noted earlier. This is a mistake that some well-known figures, including Raz, have helped propagate. It is astounding that it has taken a half-century to set the record straight, but it is important to have done so, since the alleged "practice theory of rules" also derailed an earlier generation into many unproductive debates about Hart's theory. Perhaps there is an analysis of rules that will be of jurisprudential interest, but Hart treated them as theoretical primitives, which was fine for his purposes.

I want to focus, however, on two other issues. One is the question of theoretical disagreements. Although the Hart-Dworkin debate is a kind of zombie, the more recent version of it, the problem of theoretical disagreements, does actually raise an interesting question for positivist theories of law. Now, Dworkin himself made the claim in *Law's Empire* (1986) that because positivism could not explain the face value of theoretical disagreements, disagreements about the criteria legal validity, this shows that positivism fails as a theory of law – and that was an obvious non sequitur. Theoretical disagreements are one kind of phenomenon that we associate with legal systems, but they aren't the only one that a theory of law is supposed to explain. As I've argued (Leiter 2009), positivists can give an explanation of theoretical disagreement, though it is one that explains them away.[9] The fact that you explain something away is not, without a lot more argument, an objection to the explanation. My view is that where we have genuine theoretical disagreements – and I think that they are uncommon, except in the higher appellate courts – the participants are making a certain kind of very abstract error about the nature of law. If there really is no fact of the matter about what criteria the officials converge upon and accept from an internal point of view, then there is simply no fact the matter what the criteria of legal validity are. Those who say otherwise are simply making a mistake – a totally understandable mistake, since judges can be perfectly competent at what they are doing without having a worked-out theory about the nature of law. As I said earlier, what the law is, and what judges ought to do, are two separate questions.

[9] I have also argued that this was Hart's view, against scholars like Kevin Toh. See Leiter 2019; and for Toh's view see Toh 2019.

There's another possibility here, however, an alternative to my error-theoretic interpretation of theoretical disagreements, and this has been less explored: Torben Spaak in his paper in *The Cambridge Companion to Legal Positivism* (Spaak 2021) touches on this possibility. I have a Ph.D. student here at the University of Chicago, Aaron Graham, who is working on this, namely, the idea that it is a mistake to grant Dworkin that a rule of recognition has to include among the criteria of legal validity particular theses about how the sources of law are to be interpreted as applied. Maybe a rule of recognition only specifies the valid sources of law and nothing more? And so even in *Riggs v. Palmer* (Dworkin's favorite case) the judges agree on the sources of law and they're disagreeing on how to apply them in this particular case. The difficulty that confronts this approach – and I raised this with Torben a while ago at a conference preceding *The Cambridge Companion to Legal Positivism* – is that the rule of recognition is supposed to fulfill an epistemic function, i.e., it is supposed to enable us to identify which norms are legally valid norms. And so it seems we have to know a little bit more than just what the sources of law are. We have to know, as it where, what norms the sources actually enact, which might seem to drag us into questions of how the sources are to be interpreted, unless we can, as it were, distinguish between the sorts of interpretive disputes that form the bases for the theoretical disagreements Dworkin talks about and the way in which the sources of law have meaning prior to that kind of interpretive dispute. This is something like Mr. Graham's strategy, and he may well be right about this, and also that this is actually consistent with what Hart says about the rule of recognition. So getting clearer about Hart's views may reveal a different way of responding to the problem of theoretical disagreement.

The second issue where I think we could benefit from further investigation in our effort to get back to Hart concerns how he conceives of the internal point of view, the idea so distinctive and crucial to his theory of law. Is it enough simply to "talk the talk" and "walk the walk" to adopt an internal point of view, i.e., is it enough to say the right things and do the right things? And if so, does that mean that someone can take the internal point of view while only doing the job for the money, as it were, which some recent writers suggest is possible.

Now it seems to me that this recent debate is taking advantage of the fact that Hart himself was in the grips of something like Gilbert Ryle's view about what it is to be in a mental state (e.g., to have a certain "attitude"). Gilbert Ryle wrote *The Concept of Mind* in 1949, which is why H.L.A. Hart, misleadingly, called his 1961 book *The Concept of Law*, since that's what Oxford philosophers did: offer an analysis of a "concept." But I think the Ryle influence goes a little deeper and requires more examination. Ryle claimed

that to be in a mental state is just equivalent to manifesting certain behaviors, or having the disposition to engage in certain kinds of behavior.[10] And I think that Hart takes this over in the sense that he wants to characterize the internal point of view in purely behavioral terms, i.e. people take the "internal point of view" only insofar as they do and say certain things: they say you must use these criteria of legal validity, they criticize those who deviate from those criteria, and so on. And, of course, Hart goes out of his way to criticize the suggestion he associates with Alf Ross, that adopting the internal point of view is a matter of having a certain feeling (Hart 2012, 88). But one of the reasons he is doing that is because he's operating with Ryle's assumption that it suffices for the ascription of an internal attitude to an agent simply to identify the behavior that the agent manifests. Ross, to his credit, was less hostile to appeal to *actual mental states* than behaviorists like Hart, an ironic fact given the effect Hart's critique had on the reception of Ross in Anglophone legal philosophy.

The problem now is very few of us are behaviorists about the mental,[11] and I think this leads contemporary readers to object that since Hart only says you have to "talk the talk" and "walk the walk" to have the internal point of view, one could reply: "wait a minute, we know that people can say things and do things but not really mean it!" So judges who accept the internal point of view in Hart's behavioral sense might, after all, just be doing it for the money! In making such an objection, however, we are appealing to the very un-Rylean distinction between what the agent *really believes in their private mental theater* and what the agent's actions and talk are presenting to the world. But this distinction is not one Hart, following Ryle, thinks is available. If that is right, then we should be skeptical of the idea that a judge could in fact adopt "the internal point of view" simply by "talking the talk" and "walking the walk," but not really believe any of it, i.e. not feel – there's that word "feel" – that the rule of recognition is in some sense obligatory, or something like obligatory. (I say "something like obligatory", because obligation for Hart is also just analyzed in the terms of the use of certain language and certain behavior (Hart 2012, 82–91).) The evidence from "wicked" legal regimes, in particular, strongly suggests that the judges *really do believe* that what they are doing is right, good, worthy, obligatory. As Pauer-Studer (2020, 205) reminds us, the notorious Nazi judge Roland Freisler stated that, "There can be no divide between a requirement of law

[10] More precisely, Ryle spoke about sentences about mental states being equivalent in meaning to sentences about behavioral dispositions. I give this a metaphysical, rather than semantic, gloss in the text.

[11] Some have even denied Ryle was even a behaviorist about the mental, but that revisionary view need not concern us.

and a requirement of morality. For requirements of law are requirements of decency...". Other jurists in the Nazi era echoed that view: "law can only mean the lived morality of decency of a *Volk* [a people]" (Pauer-Studer 2020, 206). Obviously judges who think of law that way are adopting the "internal point of view" in a morally demanding sense. If this were just pretense, it is surprising how long they persisted in the pretense even in the face of defeat.

There is, of course, a tendency in Anglophone jurisprudence to focus on foreigners (e.g., Germany in the 1930s, the Soviet Union in the 1930s, East Germany in the 1950s and 1960s, South Africa in the 1960s and 1970s) for examples of "wicked" legal systems, but the truth is that human beings far removed from our times and parochial prejudices will perceive the American legal system as "wicked" too, albeit not generally on the Nazi scale. Take only the most obvious example: racial apartheid was legally sanctioned for a century in the United States after the end of chattel slavery;[12] even after its end, remedies for its harm were circumscribed or eliminated by the courts; laws continue to be enacted meant to deny the vote to the descendants of the victims of apartheid; and on and on. But American laws permitting the wide availability of firearms, the intrusion of religion into most aspects of civil society, the dominance of money in elections, the spreading of racial and ethnic hatred: all these already seem, at best, morally peculiar and, at worst, morally depraved, to many outside the United States, and to an increasing number inside it. Yet I can attest, from first-hand knowledge, that judges and other important legal actors in the American system take the "internal point of view" and are not simply enforcing and upholding these laws "for the money" or for other merely prudential reasons. They think they are acting rightly, promoting justice, doing good.

So these are a couple of suggestions where getting "Back to Hart" might help us deal with some important problems in legal philosophy: the question of theoretical disagreements and the content of the rule of recognition; and the nature of the internal point of view. Our answers to these problems may not be Hart's, of course; in the case of the internal point of view, most obviously, we have good reason to reject behaviorism about the mental. But having done that, we should still ask what account of that point of view is really consistent with the evidence about legal systems. And if there is a positivist alternative to the error-theoretic interpretation of theoretical disagreements, we will want to know how it fits with the rest of Hart's theoretical apparatus for understanding law.

[12] Wage slavery proceeds apace everywhere, of course.

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DOES LAW MATTER?

Implicit in almost all of legal philosophy is the belief that law matters. But is that belief sound, and, if it is, then why, when, where, and how does law matter? Thus, exploring the conceptual, normative, and empirical dimensions of the proposition that law matters represents a cluster of questions that, if not the most important questions in legal philosophy, are certainly among the most important.

Key words: *Philosophy of law. – Legal obligation. – Legal decision-making. – Legal Realism*

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1. PREFACE

This essay responds to the charge to identify the most important question in legal philosophy. In responding to this assignment, there is a temptation to equate the most important question with the question that I myself work on. I want to resist this temptation, and thus to describe as the most important question something that I genuinely believe to be the most important question, only a small corner of which is something, for reasons of time, talent, and training, that characterizes my own scholarly efforts. In addition, I will avoid using the word "theory." I don't have a theory of law, and I am not sure that many others have one either. It seems often better to use the word "account," because an account of law seems more amenable to offering something that accounts for some aspect of some of law, and most often that is the best we can do. I have considerable sympathy, therefore, for Oliver Wendell Holmes's observation that "I care nothing for the systems. – only the insights." (Holmes 1953, 300). Perhaps the best that most of us can do is to offer smaller and interstitial insights or suggestions, and in any event that is all I seek to do here, and in all of my academic work. And here I will maintain that the most important question in legal philosophy, or at least one very important question in legal philosophy, is "Does law matter?," and I will suggest here four different aspects of this question.

2. ON THE ONTOLOGY OF LAW

If we are concerned with the question, "Does law matter?," the first question is just what law is, such that it might or might not matter. It is impossible to ask the question about whether law matters without some conception of what it is that could or could not matter. To a significant extent this is a conceptual question about the concept of law, but there is a difference between the idea of a conceptual question, on the one hand, and the methods we might employ to answer that conceptual question.

One method of answering a conceptual question is to sit in our armchairs and speculate, presumably informed by the experiences and observations of the speculator. But although this is a common method of thinking about what a word means or what some concept means, it is by no means the only one. Consider, for example, Kenneth Himma's recent work on coercion, a project with which I have considerable sympathy.[1] And that sympathy extends not

[1] Especially Himma (2020), which builds on some of Himma's earlier work.

only to Himma's general conclusions,[2] but also, and most relevantly here, to Himma's methodology. Methodologically, Himma makes clear that if we are trying to determine what some culture's concept of law actually is, we must look at what members of that culture say, what they believe, how they act, and so on. This is a non-introspective empirical inquiry, and emphasizes that the introspection of only one member of that culture – the author, or the theorist – is hardly the most satisfactory approach to determining what a culture, as a whole, thinks, or believes, or understands. In other words, saying that something is a conceptual question, and recognizing that conceptual clarification might be necessary at the beginning of an inquiry, is not necessarily to say that the answer to that question can come entirely or even substantially from abstract non-empirical speculation or introspection.

Methodological observations aside, the reason that addressing the question "What is law?" is important for addressing the question "Does law matter?" is that the latter question is more or less interesting depending on how broad our understanding of law is. If we have an understanding of law that resembles Ronald Dworkin's, for example, such that the boundaries between law, morality, and political theory are somewhere between permeable and non-existent,[3] then "Does law matter?" becomes almost tautologically true. And the more an affirmative answer to that question approaches being tautologically true, then the less interesting it becomes. If law is everywhere and everything, if there is no discrete "thing" that is law, then "Does law matter?" is hardly sensible.[4] On the other hand, if we adopt[5] a narrower

[2] My substantive sympathy is best embodied in Schauer (2015).

[3] This is of course a gross oversimplification of Dworkin's views as developed in, most importantly, *Taking Rights Seriously* (1977), *Law's Empire* (1986), and *Justice in Robes* (2006), and it ignores Dworkin's theoretically interesting but descriptively erroneous view that questions of policy are not for courts and not part of law. Nevertheless, it is roughly accurate to describe Dworkin's view of the domain (or empire) of law as a capacious one, and certainly as resisting the idea that either morality or a society's political principles are external to that domain.

[4] Such a capacious understanding of law, although not demanded by so-called inclusive legal positivism, is at least permitted by it. See Waluchow (1994); Himma (2002, 125–165). And to the extent that inclusive legal positivism allows the realm of law to include anything and everything, it allows an understanding of "Does law matter?" that, in turn, produces an answer that is both affirmative and uninteresting.

[5] I want to say something about both "we" and "adopt" in "we adopt." With respect to the latter, it presupposes that a concept of law is something that can be chosen by a society, community, etc. How a society understands the non-natural-kind institutions of that society or of the world is a matter of choice and not of natural necessity. See Schauer (2021, 61–78). As to "we," those theorists who have recognized that a concept of law is something that a society chooses or adopts, including both Lon Fuller and (early) H.L.A. Hart (as explained and supported

conception of law, for example (and only as one example) one somewhat closer to that offered by excusive legal positivism,[6] or perhaps (as another example) one allowed but not demanded by inclusive legal positivism, then we can ask a somewhat more sensible question. More specifically, if, as exclusive positivism maintains, law is only a subset of legitimate reasons for action or reasons for decision, or only a subset of accepted social sources, then we can sensibly ask the question about whether that subset makes a difference to behavior or makes a difference to the decisions of some group of decision-makers. All of which is to say that asking the question "Does law matter?" requires conceptual work at the outset to determine just what it is that might, or might not, matter to decisions or to actions.

3. HOW MIGHT LAW MATTER?

The second question, the one to be addressed after having done the just-described conceptual work, is "How could it matter?". That is, under what circumstances might the subset of social sources that we understand as law make a difference to human reasoning and human decision-making. A few examples will make this idea clearer. Consider, for example, some of the recent work of Mark Greenberg, and the similar earlier work by Donald Regan.[7] For both Greenberg and Regan, law does not so much create reasons for action or decision as it operates *on* already extant reasons for action or decision. Thus, when Regan discusses what he labels as "indicator rules," or when he understands law as having an indicative function, he offers an explanation of how law could make a difference, by pointing out – indicating – to us the reasons we already have, but whose recognition might have escaped our consideration. Under this view, the fact of law, or the fact of law prescribing this or that action or decision, does not create new reason for action or decision, and does not operate entirely independently, but makes

in Schauer, *ibid.*) cannot plausibly be understood as doing anything other than engaging in the kind of prescriptive scholarship that characterizes, for example, most of moral philosophy. Just as John Rawls cannot plausibly or charitably be read as claiming that moral philosophers have a direct impact on social organization, so too cannot Fuller or Hart be plausibly read as claiming that either individual legal philosophers or legal philosophers in the aggregate have a direct effect on the creation and understanding of social institutions, including legal institutions. They claimed, to the contrary, that it would be better (or worse) if society understood law in such-and-such a way, but said close to nothing about the role of legal philosophers *qua* legal philosophers in bringing about such a state of affairs.

6 See Marmor (2001); Raz (2004, 1–17); Shapiro (2009, 326–338).

7 See Greenberg (2016, 1932–1979); Regan (1990, 3–28).

a difference nevertheless by exposing and making salient in a decisional process those reasons we might otherwise have ignored. Law is under this view not a reason itself but operates on other reasons.

This explanation of Regan's view, and, *mutatis mutandis*, Greenberg's, is offered only as an example of just *how* law might matter. And there are other possibilities. Raz's service conception of authority, and thus his service conception of legal authority, is a hypothesis (Raz would describe it in stronger terms) about how law might matter. It might matter, according to Raz, by assisting us in making the decisions that in theory we would like to make but that in practice we have difficulty in making (Raz 2006, 1003–1044). And for a very different conception of how law might matter, consider much of the writing of the Scandinavian Realist Vilhem Lundstedt (1956). For Lundstedt, law's importance lay in its ability to influence and perhaps even determine the moral views of a population. With his fellow Scandinavian Realists, Lundstedt did not believe that morality had any kind of ontological reality, but he believed that people had moral views nonetheless, and that those moral views were often influenced by what the law permitted and what the law prohibited. This fundamentally empirical view about law's influence on moral beliefs may or may not be correct,[8] generally or at particular times and places, but it is another example of *how* law might make a difference.

4. DOES LAW MATTER?

It is one thing to examine how law might make a difference – how it might matter. But the third question, which follows on the second, is whether law *does* make a difference. Does law actually matter. Importantly, this third question is not the same as the second. Even if we can identify how law might matter, it remains to be seen whether it actually does.[9] Although we have, since Hume, worried about the fallacy of deriving ought from is, a common pathology in much legal scholarship is the tendency of deriving is from ought. Legal scholars, especially those with limited empirical sensibilities or skills, often think it is sufficient to point out what can or might happen. But equally important is what does happen, and what does happen does

[8] Although Lundstedt shares with many American constitutionalists the view that what law and the courts do is causal of public opinion about what is right and what is wrong, there have been influential dissenters, perhaps most notably Rosenberg (2008).

[9] See Schauer (2016, 350–359).

not necessarily flow from what can happen. And here, with respect to the question of whether law actually does matter, we find ourselves in the middle of the American Legal Realist research program. The American Legal Realists were not themselves fancy legal theorists, although the knowledge of legal philosophy by people like Karl Llewellyn and even Jerome Frank is often underestimated or caricatured. But whatever their knowledge of legal theory, they nevertheless presupposed that that there was a subset of the universe of social sources, and that this subset was what we could label as law. But although they recognized that the traditional assumption was that this subset – the subset we call legal sources – actually mattered to legal decision-making, especially by judges (and, derivatively, lawyers), they insisted on two things. One, that the degree of influence on judicial decision-making by traditional legal sources (statutes, judicial opinions, etc.) was an empirical question. And, second, that those sources, especially in common law legal systems, had much less influence than was (and remains) commonly believed. More precisely, most of the American Legal Realists believed that conventional legal sources, the kinds of things published by legal publishers and that one would find in something labeled as a law library, had less of a causal effect on judicial decisions and legal outcomes than the traditional view believed.[10] And thus perhaps the best answer we can give to the question whether law *does* matter is – sometimes, but less than we might think.

5. SHOULD LAW MATTER?

Finally, we have the normative question: Apart from how law might matter, and apart from whether it does matter, is the question whether it should matter. There are, of course, both ordinary people and legal theorists who argue that law should not matter. In legal theory, these are the philosophical anarchists, although that unfortunate label suggests people lurking around government buildings at night and planting bombs. But philosophical anarchists, people like John Simmons and Robert Paul Wolff, are nothing of

[10] In a more modern version, systematic work by American political scientists on the decisions of United States Supreme Court justices confirms the suspicions of the Realists, and supports the conclusion that the pre-legal or extra-legal political and moral attitudes of the justices have much more of an effect on the votes of those justices in litigated cases than do precedents, text, history, or any of the other formal sources of constitutional doctrine. See, for example, Brenner, Spaeth (1995); Segal, Spaeth (2004).

the sort.[11] They believe that there is a *moral* duty to do the right thing, but they do not believe that obeying the law *qua* law is one of our moral duties. In other words, they do not believe that the existence of law or the existence of legal prescription matters to our moral obligations. For the anarchists, the mere fact that some legislature, some court, or some king happens to have said something – even with all of the trappings that legal positivists would associate with making law properly so called – should have no effect on what we actually *should* do.

Of course, there are dissenters from the anarchists. From Socrates in the *Crito* to John Locke to John Rawls, among countless others, theorists of legal obligation have argued that for reasons of social contract, or reciprocity, or gratitude, or fair play, in fact have an obligation to follow the prescriptions of political and legal authorities just because of their status. And more recently, Gerald Postema, among others, has found the roots of legal obligation in the virtues of social coordination and cooperation (Postema 1982, 165–203).[12] Of course this is not the occasion to resolve this debate, but it is nevertheless worth noting that the decidedly non-empirical question of whether law should matter is the natural conclusion of a progression that starts with conceptual clarification, goes from that to the question of how law could matter, from there to the empirical question of whether law does matter, and finally to the question of whether law should matter. These are plausibly among the most important questions of legal philosophy, and taken together, might well be the single most important question of all.

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[11] See Simmons (1979); Wolff (1970); Smith (1973, 950–976). A valuable overview of the issues and the literature is Edmundson (2004, 215–259).

[12] Compare the more skeptical Green (1983, 299–324).

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THE MOST IMPORTANT PROBLEMS OF LEGAL PHILOSOPHY AND THE NATURE OF LAW

The purpose of legal philosophy is frequently defined as the discovery or exploration of the nature of law. The nature of law is usually understood as a set of necessary properties of law. Such an identification of the purpose of legal philosophy raises some doubts. Irrespective of those doubts, I claim that that focusing exclusively on the nature of law may be detrimental to legal philosophy as a whole, as it may be an obstacle to the investigation of certain issues that seem important. Or, at least, not all fundamental problems of legal philosophy may be perceived as pertaining to the nature of the law. Two such problems are briefly discussed: (i) legal pluralism and (ii) certain new categories of non-human legal subjects, such as autonomous machines, environmental legal persons and animals. I argue that focusing on the nature of law does not help the exploration of those important topics.

Key words: *Legal persons. – Legal pluralism. – Nature of law. – Non-state law. – Social ontology.*

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The purpose of legal philosophy is frequently defined as the discovery or exploration of the nature of law (for the sake of simplicity, I will not make a distinction between legal philosophy and general jurisprudence and will use those terms interchangeably). Andrei Marmor (2018, 151) noted a few years ago that 'there is a widespread sentiment that the traditional debates about the nature of law have reached a dead end, not worthy of further investigation'.

Some legal philosophers have expressed the view that legal philosophy is no longer interesting and (probably) should be abandoned (Enoch 2015). Marmor rejects such scepticism and claims that general jurisprudence 'is in no need of reinvention' (Marmor 2018, 151). He endorses the view that the subject matter of general jurisprudence is 'the nature of law'. He claims that there are three main debates about the nature of law that answer three different questions: the question of the ontology of law, the question of the determinants of legal content, and the question of legal normativity (the ability of law to generate reasons for actions).

Such a view on the subject matter of general jurisprudence is shared by many legal philosophers from both the positivistic camp, such as Joseph Raz (2009, 92), Scott Shapiro (2011, 9) and Julie Dickson (2001, 17), and the non-positivistic camp, such as Robert Alexy (2004, 162).

> I am, however, not certain whether the subject matter of legal philosophy can be identified through the exploration of the nature of law. My doubts are based on two major issues. First, the very notion of the 'nature of law' seems to me rather obscure and philosophically dubious. The nature of law is usually understood as a set of necessary properties of law. For example, Raz (2009, 92) writes:

In as much as the general theory of law is about the nature of law, it strives to elucidate law's essential features, i.e. those features which are possessed by every legal system just in virtue of its being legal, by every legislative institution in virtue of its being legislative, by every practice of legal reasoning in virtue of its being a practice of legal reasoning, and so on. A claim to necessity is in the nature of the enterprise.

This view assumes that law has a nature or essence. Even if we leave aside philosophical objections against essentialism, some specific problems related to law remain. Law is a social artefact and, as such, is a free creation of humans. Do human artefacts have natures or essences? Further, law varies in time and space. English law is very different from Chinese law. English law today is very different from English law in the seventeenth century. Do all these laws,

notwithstanding those differences, have a common nature? Second, it is very unclear what 'necessity' means in this context. Legal philosophers tend to avoid answering this question.[1] It is also unclear whether the modal or non-modal conception of essence is adopted, and, therefore, what the relation is between necessary and essential features of law.

Many legal philosophers oppose (for various reasons) the view that the subject matter of general jurisprudence is the elucidation of the nature of law. It is interesting that such legal philosophers come from both positivistic and non-positivistic camps. Let me name just a few of them. Ronald Dworkin famously claimed that the 'nature of law' is a 'mantra' or a 'positivistic phlogiston' (Dworkin 2006, 216). Dennis Patterson argues that the failure of attempts to identify the nature or of law indicates that no such nature exists (Patterson 2016). Brian Tamanaha claims quite radically that the nature of law is that law has no nature at all (Tamanaha 2001, 195).

I am not certain who is right in this dispute, and it is not my aim to answer this question. My claim is much weaker. Namely, I claim that focusing exclusively on the nature of law may be detrimental to legal philosophy as a whole, as it may be an obstacle to the investigation of certain issues that seem important to me. Or, at least, not all fundamental problems of legal philosophy may be perceived as pertaining to the nature of the law.

Before I explain this point, let me make one general remark. The question 'Is legal philosophy interesting?' posed by David Enoch is not equivalent to the question 'Is legal philosophy important?'.

The answer to the former question seems, at first sight, to be a matter of personal taste. Being interesting is not a property of the object in question (say, legal philosophy), but of a relation between it and a person.[2] What is interesting to me can be boring to you. However, as people tend to share tastes, at least to some extent, we can say that something is interesting if enough people find it interesting. Considering the number of participants in world congresses of legal philosophy, journals publishing texts pertaining to legal philosophy, books that appear every year, etc., we may conclude that legal philosophy is interesting in this sense. Enoch (2015, 2) does not go this way (which he calls Millian). Instead, he compares legal philosophy to metaethics and concludes that metaethics is far more interesting than legal philosophy. That is surprising.

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1 Raz (2009, 91) writes, 'I will leave the question of the kind of necessity involved unexplored.' Similarly, Dickson (2001, 17 n. 24).

2 Lesli Green (2012, lV) refers to David Hume, for whom the law was impossibly boring.

The question of importance does not seem to be exclusively a matter of personal taste. Something may be terribly boring, but at the same time important. As I think, no general definition of 'important' may be given, as being important is heavily context dependent. An enquiry is important if its effects successfully satisfy (or at least have a chance to satisfy) certain social needs, either cognitive or practical, provided that such needs are socially shared. What legal philosophers are doing may be important in the sense that the effects of legal-philosophical enquiry may help people understand the social reality in which we all live. We are confronted with certain phenomena in social reality, and we are frequently puzzled. We ask questions such as 'How is it possible that...' and 'What does it mean that...'. It seems to me that, in this sense, legal philosophy is far more important than metaethics. People are more frequently puzzled by legal philosophical and moral questions than by metaethical questions. Questions people are usually puzzled by are first-order questions rather than meta-questions. People ask, 'Is an unjust law a law?', 'Is coercion justified?', 'Do I have a moral obligation to obey the law?'. Typical metaethical questions, such as 'Are moral judgements truth-apt?', are probably very rarely asked by ordinary people.

This assumes that the purpose of legal philosophy is hermeneutic rather than explanatory. What we as legal philosophers strive for is not so much scientific explanation, and in particular, causal explanation. Our aim is rather to understand what is going on in social reality. It is our desire to better understand our position in social reality that drives us into legal-philosophical enquiry. As Raz says (1995, 237):

> Legal theory contributes...to an improved understanding of society. But it would be wrong to conclude, as D. Lyons has done, that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.

The concept of law is a hermeneutic concept; therefore, the main purpose of legal philosophy is hermeneutic. Yet, of course, it is not so simple. Usually, the distinction between the explanatory and hermeneutic purpose of general jurisprudence is linked to the distinction between an empirical or scientific approach and a hermeneutic approach (Bix 1999, 186). However, as I think, opposing an explanatory purpose to a hermeneutical purpose is a sort of

over-simplification, as it assumes that explanation does not contribute to understanding. A lack of space does not allow me to say more about the relationship between explanation and understanding.

My thesis is that if general jurisprudence concentrates its hermeneutical efforts exclusively or almost exclusively on the exploration of the nature of law, it runs the risk of overlooking certain phenomena that trigger important changes in the legal landscape and materially influence the social position of people and their perceptions of law. Such omissions may significantly diminish the social understanding of law. In what follows, I will briefly describe two such phenomena selected from a much longer list. I will try to demonstrate that the analysis and elucidation of these phenomena cannot be reduced to the matter of the nature of law (or, at least, such a reduction does not generate any added value).

The first issue I would like to mention is the problem of legal pluralism. My strong impression is that legal pluralism is underestimated by mainstream jurisprudence. Mainstream jurisprudence focuses on municipal law. This is quite evident in Herbert Hart's writings. His theory is a theory of contemporary municipal law. The same applies to Raz (1995, 116). Of course, neither Hart nor Raz claim that municipal law is the only sort of law that may exist. They are just not interested so much in other types of law, and their ambition is to elaborate a general theory of municipal law. Legal pluralism is simply not their topic.

The phenomenon of non-municipal law may be uninteresting to mainstream legal philosophers, but this does not imply that this phenomenon is not important. Let me briefly explain why I believe that it is one of the most important problems of contemporary law.

I will begin with a few historical remarks. The phenomenon of legal pluralism is by no means new for legal scholars. Let me recall Eugen Ehrlich (1913) and his profound study of two parallel legal orders in Austrian Bukowina (a small territory in the very east of the Austro-Hungarian Empire, now a part of Ukraine) before the First World War. Out of those two legal orders, only one was the product of the state.

Initially, legal pluralism (as studied by Ehrlich and others) was understood as the parallel existence of two legal orders in a certain territory—indigenous law and colonial law imposed by the colonial power on the same territory. Thus, legal pluralism, understood as the co-existence of two legal orders, used to be a rather peripheral phenomenon strongly linked to various forms of colonialism. It may have been interesting from a theoretical perspective, but it had only a minor and purely local practical importance. Non-state law has not been perceived as an important phenomenon occurring in the developed

societies of Europe and North America. Therefore, this phenomenon has long been ignored by mainstream general jurisprudence.[3] However, I do not think that mainstream general jurisprudence can afford to continue ignoring it in light of the development of non-state law in new forms at an extended scope in the last 40 or 50 years. Previously, non-state legal orders derived their strength from ethnic communities. That is not the case with respect to the non-state normative orders we have to do with presently. They are global, not local. As Gunther Teubner says, we have now to do with global Bukowina (1997, 3). New, highly important non-state normative orders have emerged and shape our social life on a global scale, sometimes being more significant than classical municipal laws. Teubner has no doubts that these orders are legal orders. In any case, although these normative orders are not products of any state agencies, they are in some respects similar to municipal laws and very different from morality. They sometimes influence our social behaviour to a greater extent than state law.

The following are some examples:[4]

(i) *Lex mercatoria*, the transnational law of economic transactions rooted in various practices of merchants, corporations, private arbitration tribunals, international business associations, etc., constitutes a powerful instance of global law without a state.

(ii) The internal regulatory regimes of multinational corporations operating worldwide influence the conduct of many people independently of the state law applicable to them. They include *inter alia* rules relating to sexual misconduct in the workplace, whistleblowing, mobbing, etc.

(iii) Labour regulations agreed upon between enterprises and labour unions quite frequently transcend state borders.

(iv) Professional regulations (for example, for auditors, accountants, lawyers, doctors, etc.) are created frequently without any intervention by the state.

(v) Regulations applied in various internet networks and platforms (such as Facebook) influence the social lives of a great many people in our time.

[3] I skip here the matter of customary law, which is in a sense a non-state law (as it has not been created by any state agencies). However, in another sense, it can be perceived as a state law, as it needs to be recognized by the state.

[4] This list is partially based on Teubner (1997, 3).

Of course, this list is by no means exhaustive. What is common to all these types of rules is that (i) they have been created without the intervention of state agencies (or with only minimal intervention), (ii) they relate to important aspects of social life, (iii) they are, to a high degree, formalised (unlike morality or etiquette) and (iv) some of them provide for sanctions and enforcement agencies. The relations between such normative orders and municipal law may take various forms. Sometimes the rules of those orders conflict with municipal law; sometimes they merely supplement the rules of municipal law; and sometimes they refer to matters that are outside the scope of municipal law.

General jurisprudence can adopt various approaches to such normative orders. The simplest approach would be to deny that these orders are legal. One might argue that these normative orders do not fall under the concept of law. Certainly, those normative orders are important and interesting, but they are simply not legal orders and, as such, they remain outside the scope of interest of general jurisprudence and should be studied by other disciplines. I do not, however, think that such an approach should be recommended for at least two reasons. First, such an approach is based on a stipulative definition of law as a normative order created (or at least recognised) by the state. Hart (2012, 13) has demonstrated that the problems of general jurisprudence cannot be solved by adopting a definition of law. The mere fact that those normative orders have peculiar characteristics distinguishing them from the traditional law of the nation states does not mean that they are not fully fledged laws (Teubner 1997, 3). The second reason is more practical: if we deny the legal nature of such normative orders, we imply that general jurisprudence is not interested in certain phenomena that, for many people, are indistinguishable from law.

There are many excellent books and papers on legal pluralism published beginning in the second half of the 20th century: just to name a few, Gunther Teubner (1997), William Twining (2009), and Brian Tamanaha (2001).[5] Generally, however, almost all of these books have been written from a sociological point of view. To my knowledge, there are very few analytical works, so many important questions of analytical jurisprudence relating to those non-state legal orders remain unanswered.[6]

I think that two fundamental questions for general jurisprudence arise here. The first question is whether the diversity of state and non-state legal orders allows us to continue the search for the nature of law as the

[5] See also the *Journal of Legal Pluralism and Unofficial Law*, published since 1969.

[6] One of the few exceptions is Culver, Guidice (2010).

main task of general jurisprudence. Such orders have different features, and the probability that certain of these features do not characterise all instantiations of the law seems to be rather high. Therefore, if general jurisprudence focuses exclusively on the nature of law, it runs the risk of failing to describe certain important features of the various instantiations of law. General jurisprudence, when defining its task as the search for the nature of law, seems to assume that law constitutes a classical category in the Aristotelian sense (all instances of law are characterised by a certain set of common features). This assumption remains unjustified.

The second fundamental question is whether the conceptual apparatus of general jurisprudence is sufficient to deal with non-state law. Can non-state law be explained and understood in terms of the rule of recognition, primary and secondary rules, and pre-emptive or exclusionary reasons? Is the relation between those regulations and morality the same as that between state law and morality? Is the role of coercion the same as in state law? Is non-state law authoritative in the same sense as state law? Culver and Guidice claim that the focus of general jurisprudence on state law '...is simply a symptom of an underlying inability of dominant analytical approaches to capture legal phenomena outside the model of the law-state' (Culver, Guidice 2010, XVI). The question arises as to whether the problems of non-state law can be successfully investigated within the framework of the traditional enquiry into the nature of law. I do not think that is the case.

The second phenomenon that I would like to use for the purpose of supporting my thesis belongs to the realm of the social ontology of law and, in particular, the theory of institutional artefacts. Again, this topic is by no means new. However, in the most recent years, social ontology has gained increasing attention from general jurisprudence. There is a rapidly growing number of publications on law as an artefact. Let me mention only Luka Burazin, Kenneth Einar Himma and Corrado Roversi (2018). Social ontology of law is certainly a fascinating topic. However, I am mentioning it for a specific reason: social ontology of law is not only a purely speculative philosophical discipline, it also has certain practical implications that, in recent years, have become more and more important. The question is whether the social ontology of law may help us deal with certain new legal phenomena. What I have in mind here are certain new categories of non-human legal subjects. I mean here, for example, software agents (or, more generally, autonomous machines), environmental legal persons (such as rivers and mountains), and animals and species in connection with the discussion on animal rights. There are probably more categories. Each of these new categories is very different and triggers quite a few problems. One thing is certain: the traditional juristic theory of legal persons (what we in continental traditions call *juristische*

Person or *personne juridique ou morale*) is not fully applicable to these new types of legal entities. There arises a fundamental question about whether anything can be a legal person or whether there are some conceptual or other limitations that restrict our ability to create still new sorts of legal persons (Kurki 2020; Pietrzykowski 2018).

Such new types of legal persons trigger quite a few difficult problems related to certain fundamental legal concepts, such as liability, action, right, claim, privilege, etc. These concepts, which have a long history and form an important part of the conceptual apparatus of jurisprudence and legal practice, probably require revision, enabling us to face new problems triggered by the development of law. Again, I do not think that framing these problems as pertaining to the nature of the law would bring any progress.

The list of problems of general jurisprudence that seem to exceed the traditional problem formulation is probably quite long. I have mentioned only two of them as examples. Even a superficial examination of these problems leads to the conclusion that they probably cannot be solved in terms of the necessary features of law, a natural essence of law, etc. They rather demonstrate that law is a family of various phenomena, and as such, a cluster concept rather than a classical Aristotelian category.

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PROMOTING THE RULE OF RATIONALITY OVER POSITIVE LAW AND LEGAL THINKING

The paper makes the following claims. First, the most important problem for contemporary legal philosophy is contrasting the morally disgusting state of the world. Second, qua jurisprudents, the problem must be dealt with indirectly. Third, the indirect way of dealing with the problem requires pursuing the goal of promoting the rule of reason, the dominance of rationality, over law and legal thinking. Fourth, such an overall goal is to be pursued by breaking it down into five more specific goals: namely, promoting the epistemic, methodological, conceptual, instrumental, and substantive rationality of law and/or legal thinking. Fifth, pretentious and idle ways of doing jurisprudence must be put aside.

Key words: *Epistemic rationality*. – *Methodological rationality*. – *Conceptual rationality*. – *Instrumental rationality*. – *Substantive rationality*.

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1. "WHAT IS THE MOST IMPORTANT PROBLEM IN CURRENT LEGAL PHILOSOPHY?"

What is the most important problem in contemporary legal philosophy? The question posed by the organizers of the discussion panel, our colleagues and dear friends Miodrag Jovanović and Bojan Spaić, is simultaneously *momentous* and *ambiguous*.

It is *momentous*, since it is about nothing less than "the *most important problem* in contemporary legal philosophy".

It is *ambiguous*, since it may be understood in (no fewer than) two different ways: namely, as a question asking for a piece of *information*, or, alternatively, as a question asking for a piece of *direction*.

As a question asking for a piece of *information,* the question commands an answer that belongs to the *sociology of* ("our") *legal culture*; more precisely, to the sociology of ("our") legal philosophy as an intellectual enterprise, as a (millenary) discipline, inside of that culture.

In this first reading, the appropriate answer to Miodrag and Bojan's question is one that brings to the fore *which problem*, if any, is *in fact, here and now, regarded* as *the most important one* by legal philosophers as a whole, or, at least, by a large majority, or the most influential part, of them.

As a question asking for a piece of *direction*, contrariwise, the question commands an answer that belongs to *prescriptive meta-philosophy of law* (prescriptive meta-jurisprudence): i.e., to the second-level line of philosophical investigations that purports to establish what the goal(s), the matter(s), and the tools of (a certain branch of) legal philosophy *should* be.

In this second reading, the appropriate answer to Miodrag and Bojan's question is one that *tells* legal philosophers *what* the most important problem for contemporary legal philosophy *should be*: what (we) the jurisprudents, here and now, *should aim for*, and *how*.

Of the two alternative readings of Miodrag and Bojan's question, I will adopt the latter. In what follows, therefore, assuming the standpoint of prescriptive meta-jurisprudence, I will state *what we*, the legal philosophers, *here and now*, *should regard* as *the most important problem* we should deal with.

2. PROMOTING THE RULE OF RATIONALITY OVER POSITIVE LAW AND LEGAL THINKING

The age we live is not only a (very) busy age,[1] it is also, and still, and for an immense number of humans, be they dwelling in the "first", the "second", or the "third" world, a morally disgusting age.

This remark of mines may sound outrageously trivial – and perhaps, even a bit off the mark. Nonetheless, it allows me to fix a first, basic, point in my normative proposal:

We, the jurisprudents, *should* consider the *moral nastiness* of our age as the paramount problem we should deal with, here and now, *qua* jurisprudents.

But *how* can we do this? *In which way* should we, *acting in our capacity of* jurisprudents, contribute to alleviating the moral nastiness of our age?

Upon reflection, I submit that we, *qua* jurisprudents, cannot cope with the moral nastiness problem *directly* (cannot pursue the goal of alleviating the moral nastiness of our age *directly*), but only *indirectly*.

Our *most important problem* (and our most important *goal*), therefore, must be a different, though related, one. Taking stock of the analytic tradition and of the glorious experience of post WWII "neo-enlightenment" movements,[2] I take that our *most important problem* (our most important *goal*), here and now, should be the following: promotion of *the rule of reason*, promotion of *the dominance of rationality*, over positive law and legal thinking.

Obviously, promotion of *the rule of reason*, promotion of *the dominance of rationality*, over positive law and legal thinking, is a too broad and vague a goal to pursue. It must, therefore, be broken down into narrower and more manageable goals. Five conspiring (more) *specific goals* come to the mind, which correspond to as many dimensions of rationality, to wit:

1. Promotion of the rule of *epistemic* rationality;
2. Promotion of the rule of *methodological* rationality;
3. Promotion of the rule of *conceptual* rationality;
4. Promotion of the rule of *instrumental* rationality; and, finally,
5. Promotion of the rule of *substantive* rationality.

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1 Bentham ([1776] 1988, 3).

2 For a clear instance of the "neo-enlightenment" outlook see, e.g., Bobbio (1998).

The *first specific goal*, promotion of *the rule of epistemic rationality*, requires jurisprudents to further true and reliable knowledge about positive law and the doctrinal study thereof. Two different tasks are to be carried out in view of this goal.

On the one hand, jurisprudents should work out *realistic theories* of positive law, of the doctrinal study thereof, and of (assumedly) scientific investigations about it. They should provide, in sum, true and dispassionate descriptions of the law world. This task, it must be noted, has both a *constructive* and a *deconstructive* side. Providing realistic theories requires engaging in a relentless critical assessment of extant ones. In particular, it asks jurisprudents to *detect* (conscious or unconscious) *mystifications*, whenever they are afoot, and do away with them by means of *demystification*.

On the other hand, jurisprudents should also assume the role of *legal epistemologists*. They should enquire about the better conceivable ways of making positive law a matter of truly scientific investigation, putting the outcomes of this line of investigation into the form of prescriptive legal epistemologies.

The *second specific goal*, promoting *the rule of methodological rationality*, requires jurisprudents to further the accuracy and correctness of legal reasoning, as performed by jurists, judges, officials of the legislative and executive branches, attorneys at law, etc. Accuracy and correctness are to be measured from the standpoint of logic, rhetoric, and sound theories about legal interpretation and legal argumentation, both as to matters of law and as to matters of fact. The rule of methodological rationality over legal reasoning presupposes, accordingly, the working out of realistic theories of adjudication and "legal science" (as doctrinal study of law) in their argumentative dimensions. Its pursuit turns jurisprudents into the controllers and reformers of how jurists, judges, and lawyers at large (should) reason.

The *third specific goal*, promoting *the rule of conceptual rationality*, requires jurisprudents to further the conceptual and terminological precision and articulation of legal thinking.

Any sort of knowledge lawyers may have about the law, as well as their everyday practice as jurists, judges, attorneys, etc., inside of a legal experience whatsoever, necessarily depend on (is fatally mediated by) some terminological/conceptual apparatus: a scheme, framework, or set of terms and corresponding meanings.

Conceptual rationality invites jurisprudents to be distrustful about the extant terminological–conceptual apparatus their legal culture happens to (have inherited from previous generations and) make use of at any station in its temporal progression. It suggests that there is always room for moving

from (fatally) less fine (poorer, obscurer, obsolete) terminological/conceptual apparatuses to (ever) finer (richer, clearer, updated) ones, containing a larger set of more precise concepts tied to a more articulated set of terms.

Jurisprudents should achieve this goal, it must be emphasized, by the constant, relentless, carrying out of a variety of "conceptual", "philosophical" or "linguistic" "analyses", which I shall call *reconstructive conceptual investigation*. This should be proceeded by enquiries articulated in three related stages of *conceptual detection*, *conceptual reconstruction*, and *conceptual therapy*.

At the stage of *conceptual detection*, or conceptual investigation in a narrow sense – what J. L. Austin proposes to call "linguistic phenomenology"[3] – the extant terminological and conceptual apparatus that is the subject matter of the enquiry is identified, analysed, and its rational virtues and flaws dispassionately brought to the fore. Here, several tools for the analysis of legal discourses are put to work.[4] Conceptual detection paves the way for the two following operations.

At the stage of *conceptual reconstruction*, the extant terminological and conceptual apparatus is modified into a new one, that is capable of replacing it, but does, and should do, roughly the same job of the extant one, though in a better, more rational way – for instance, through its finer articulation in a larger, more comprehensive, set of terminologically distinct and semantically clearer and more exact concepts. Here, the several tools for conceptual and terminological refinement are to be put to work.[5]

Finally, at the stage of *conceptual therapy*, the use of the reconstructed and replacing conceptual and terminological apparatus set forth in the second stage is recommended and carried out, as a way out from the (supposed) rational flaws of the ongoing one.[6]

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[3] Austin (1956–57, 130).

[4] Such as those derived from the analytic theory of words (the distinctions between logical and descriptive terms, concrete and abstract terms, emotively neutral and emotively laden terms, etc.) and the analytic theory of sentences (the distinction between the grammatical and the logical form of a sentence, between ontic, deontic and imperative sentences, between descriptive, prescriptive and constitutive sentences, etc.).

[5] Such as the analytic theory of concepts, the analytic theory of definitions, and the twin tools of explanatory and reformatory imagination. For an overview of the tools considered in the present and preceding footnote, see Chiassoni (forthcoming 2021).

[6] The view of conceptual investigation adopted here may look like a piece of eclecticism, where suggestions from Bentham, Russell, Carnap, Quine and Strawson, among others, are put together in a sort of mental patchwork. It is so indeed. In

The *fourth specific goal*, promoting *the rule of instrumental rationality*, requires jurisprudents to contribute to making the law an instrumentally rational enterprise. In view of such a purpose, jurisprudents should instruct jurists: (a) to check whether extant sets of legal norms (at the national or international level) are instrumentally adequate for the goal(s) they are presumed to serve (if any); and (b) in the negative case, to devise norms that would be instrumentally (more) adequate for such goal(s).

Finally, the *fifth specific goal*, promoting *the rule of substantive rationality*, requires jurisprudents to promote positive law's adequacy regarding the values of *ethical rationalism*. In view of such a purpose, jurisprudents should perform two tasks. First, they should check whether the content of extant laws (at the national or international level) is *acceptable to rational agents*: namely, from the standpoint of individuals that are (assumed to be) conscious, both of their dignity as rational, free, and equal moral persons, and of their (not necessarily selfish) interests. Secondly, in the negative case, they should bring to the fore the unbearable character of extant laws and set forth reform proposals.[7]

3. PROMOTING THE RULE OF RATIONALITY AND THE JURISPRUDENCE JOB

After Bentham, we are used to distinguishing between expository (descriptive) and censorial (normative) jurisprudence. How do the several tasks above relate to the Benthamite distinction?

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fact, I do not care for strict philosophical allegiance. I care for (hopefully) smoothly working tools for (hopefully) fruitful jurisprudential investigations.

[7] In his account of the "critical" branch of jurisprudence, Hart presents the evaluation of law as a two-stage process. In the first stage, the only one that is relevant here, any positive legal system should be assessed from the standpoint of it being "acceptable to any rational person" individually considered. Acceptability depends, in turn, on meeting three conditions. To begin, the legal system must contain "certain rules concerning the basic conditions of social life": namely, "rules restricting the use of violence, protecting certain forms of property, and enforcing certain forms of contracts". Furthermore, these rules must satisfy the "procedural requirements" appropriate for "the rule of law": i.e., "the principles of legality" (the rules must be general, fairly determinate, publicly promulgated, easily accessible to knowledge, not *ex post facto*), and "the principles of natural justice" (the rules must be applied by impartial judges through fair trials). Finally, the person (the rational agent) who is evaluating the legal system must be among the beneficiaries of the protections and capabilities that its rules provide (Hart 1967, 109–116).

In very rough terms, promoting the rule of reason over law and legal thinking requires jurisprudents to play both games.

On the one hand, the goal of promoting *epistemic rationality*, insofar as it requires jurisprudents to provide true descriptions of the law world (and general theories of law), and the goal of promoting *conceptual rationality*, insofar as conceptual reconstruction serves a strictly explanatory or theoretical purpose, can be located within the field of "descriptive" jurisprudence.

On the other hand, the goal of promoting *epistemic rationality*, insofar as it requires jurisprudents to work out prescriptive legal epistemologies, together with the goals of promoting *methodological rationality*, *instrumental rationality*, and *substantive rationality*, can be regarded as identifying as many goals of a *censorial*, *prescriptive*, or *normative* variety of jurisprudence, though with different, rising degrees of ethical commitment on jurisprudents' part.

To conclude, I would like to say a few words about the style that should be deemed appropriate to jurisprudential investigations aimed at furthering the rule of rationality over positive law and legal thinking.

These – I submit – should abide by two basic principles of an analytic approach to legal philosophy: namely, the *principle of simplicity* and *principle of austerity*.

The *principle of simplicity* urges jurisprudents to avoid any magniloquent phrasing while pointing to the purpose of their investigations. It sees expressions like "enquiring about the nature", "the essence", or "the character" of law, as being laden with unnecessary (and possibly obnoxious) ontological suggestions. It requires, therefore, that they be put aside in favour of simpler, ontologically uncompromised ones, like "enquiring about the law in general", "about legal norms", "about adjudication", "about legal interpretation", etc. The principle, accordingly, stands up to any non-naturalistic, pre-analytic, conception of jurisprudence; to any view that still entertains, perhaps unconsciously, the idea of legal philosophy as vested with the role of the "first philosophy" (*philosophia prima*) about the law: as the only enterprise capable of disclosing those "necessary truths" about the law world, which empirical legal science, and its servant, analytic jurisprudence, cannot even imagine coming close to.

The *principle of austerity* sets a standard of non-exaggeration in the formulation of jurisprudential theses (e.g., those concerning the actual role legal rules, interpretation, adjudication, etc., play in the life of a legal system). It suggests to jurisprudents the proper way of putting into words the theses they stand for. Such a wording, it claims, should not indulge either in metaphors, or, even worse, in forms of expression where the descriptive

content is overwhelmed, disguised or altogether dissipated by the use of combinations of words meant to be shocking for the audience. The principle of austerity admits of no *succès de scandale*; it tolerates no "*pour épater les juristes*".

To sum up: jurisprudence should be no literary exercise. It should not be words-magic for the amusement of jaded intellectuals and other leisured people. If rationality is to rule over law and legal thinking, jurisprudential claims should be couched in the severe, tightly controlled, language of conceptual precision and empirical content.

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LEGAL PHILOSOPHY AND THE STUDY OF LEGAL REASONING

In this paper, I argue that legal philosophers ought to focus more on problems of legal reasoning. This is a field with many philosophically interesting questions to consider, but also, a field in which legal philosophers can contribute the most to the study and the practice of law. Neither legal practitioners nor legal scholars reason with the same care and precision as philosophers do. Against this background, I suggest that the following three types of questions regarding legal reasoning are especially worthy of serious consideration. The first is that of the relevance of the theory of reasons holism to legal reasoning. The second is the question of how to analyze (first-order) legal statements in a way that does not undermine the rationality of legal reasoning. And the third is the question of whether legal arguments are to be understood as deductive arguments, inductive arguments, or both, and if so how.

Key words: *Legal reasoning*. – *Nature of law*. – *Conceptual engineering*. – *Reasons holism*. – *Legal statements*.

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1. INTRODUCTION

The topic of this conference is the fundamental problem(s) of contemporary legal philosophy. This is a deep and difficult topic, however, so I shall be content to say something about how I understand legal philosophy and what I consider to be especially interesting questions in legal philosophy today. And my central claim is going to be that legal philosophers ought to focus more than they have done so far on problems of legal reasoning. Not only is this a field with many philosophically interesting questions to consider, but it is also, in my estimation, the field in which legal philosophers can contribute the most to both the practice and the study of law. The practice of law is, after all, an argumentative practice. Lawyers and judges aim to provide solutions to concrete legal problems but rarely try to say anything of general application. And although legal scholars take a more general view of things and typically discuss types of legal problems, they, too, tend to prefer a rather piecemeal approach to legal problem-solving, and usually abstain from defending general theories or otherwise speaking in general terms.

But even though reasoning and interpretation are at the center of what legal practitioners and legal scholars do, and even though there are many highly talented persons in the above-mentioned groups, neither legal practitioners nor legal scholars reason with the same care and precision as philosophers do. Perhaps the most important difference is that whereas legal practitioners and legal scholars typically approach reasoning and interpretation in an intuitive way, emphasizing rules of thumb, common sense, and the value of workable legal solutions to problematic cases, philosophers, although they may also reason intuitively and emphasize common sense, often take care to make the logical structure of the relevant argument explicit by formulating as precisely as possible both the conclusion and the premises, and by subjecting the argument thus formulated to close logical as well as substantive scrutiny, where such scrutiny typically involves paying close attention to the content, structure, and function of any relevant concepts.

The study of legal reasoning has not been high on the agenda of the most prominent legal philosophers, however. Hans Kelsen ([1945] 1999; 1960), Gustav Radbruch, Karl Olivecrona (1939; 1971), H. L. A. Hart ([1961] 2012, 1982), and John Finnis (1980), for example, have had little to say about legal reasoning. The obvious exception to the rule is, of course, Ronald Dworkin (1977; 1986), whose theory of law may be best described as a theory of adjudication, though it is worth noting that thinkers such as Alf Ross ([1953] 2019), Aleksander Peczenik (1980; 1990), Michael Moore (1985; 1989–1990), Frederick Schauer (1991), Robert Alexy (1992), Neil MacCormick

(1994; 2005), and Joseph Raz ([1979] 2009a; 2009b), too, have devoted books, book chapters, or articles to problems of legal reasoning or legal interpretation.[1] On the whole, however, legal philosophers, at least English-speaking legal philosophers, have mostly focused on the question of the nature of law, and to some extent on the analysis of fundamental legal concepts, or else have concerned themselves with normative/evaluative inquiries, such as the justification of punishment. The study of legal reasoning, at least as it appears in court opinions, has not received the attention it deserves.

2. PHILOSOPHY

I shall start out from a rather broad and inclusive conception of philosophy, including legal philosophy, which can accommodate not only conceptual investigations and the analysis of arguments, but also metaphysical, normative/evaluative, and, of course, epistemological inquiries. Here I find Wilfrid Sellars's characterization of the aim of philosophy appealing (1962, 35): "The aim of philosophy, abstractly formulated, is to understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term." While Sellars's characterization is indeed highly abstract and clearly lends itself to competing specifications, I shall be content to say that it opens up the field of philosophical investigations quite a bit, and that it is eminently compatible with the important idea that what philosophers are primarily interested in is not what this or that person said at one time or another, but in whether what he or she said is true, or at least justified. In my view, this is also the proper approach to take to the study of legal reasoning: What, exactly, is the argument? What is the conclusion, and what are the premises? Is the argument logically valid, or at least inductively strong? Are the premises true? Are there perhaps taken-for-granted premises that need to be made explicit?

Broad and inclusive though my conception of philosophy may be, I narrow it down a bit by adopting as a rule of thumb what we might call a weak naturalist constraint. For I aim to make my legal-philosophical inquiries compatible with a combination of ontological naturalism and methodological naturalism of the *results*-continuity type, that is, the view that philosophical inquiries should be in keeping with the results of the sciences. I am less keen to accept methodological (or epistemological) naturalism

[1] Here I would like to mention two excellent collections of essays on problems of legal reasoning, both edited by Neil MacCormick and Robert Summers, namely (MacCormick, Summers 1991; 1997).

of the *methods*-continuity type, however, that is, the view that philosophy should be "continuous with" the sciences, in the sense that philosophers should adopt the methods and techniques of reasoning or investigation used in the sciences (on types of naturalism, see Leiter 2007, 33–39).[2] The problem with this type of naturalism, as I see it, is that it appears to involve a rejection of the existence of a priori knowledge, such as knowledge of basic forms of inference, and knowledge of analytical statements, and, therefore, also a rejection of the possibility of conceptual analysis, classically conceived.[3] This would be a problem for me, because even though I prefer in most cases explication (or rational reconstruction) to conceptual analysis, classically conceived, I take such conceptual analysis to be an important part of philosophy, whether or not the relevant concepts are part of successful scientific theories.

The reason why I treat the above-mentioned naturalist constraint as a rule of thumb only is that I prefer to adopt a bottom-up instead of a top-down approach to the question of the adequacy or fruitfulness of philosophical inquiries, that is, I prefer to assess the adequacy or fruitfulness of fairly specific legal-philosophical proposals to starting out from first principles, so to speak, and deducing conclusions about the adequacy or fruitfulness of a proposal from them. For I do not wish to rule out beforehand the possibility that a philosophical investigation of a non-naturalist type can yield valuable insights.

Finally, I should say that even though I take a favorable view of conceptual analysis, as well as of explication, I am primarily interested in the world, not the language we use when speaking about the world. As I see it, a focus on the elucidation of concepts is typically a means to the end of understanding the world. In defending quasi-realism about values, Simon Blackburn (1984, 190) explains that the question for a quasi-realist about values is not what the world is like, but under what conditions it is semantically appropriate to *say* that an action or a state of affairs is good or bad. As much as I like Blackburn's philosophy, this is not how I see things.

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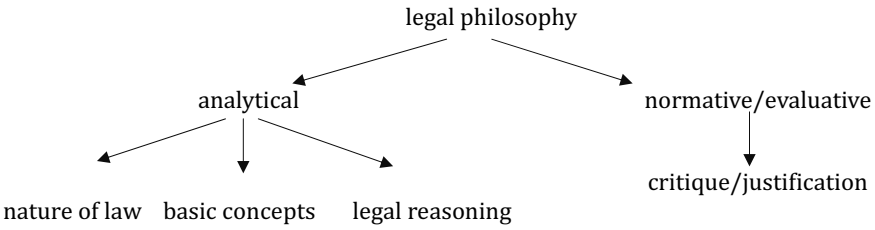
[2] It may be true that the main reason to accept ontological naturalism is that one also accepts methodological naturalism of the methods-continuity type. It seems to me, however, that another good reason to accept ontological naturalism is that one also accepts methodological naturalism of the results-continuity type.

[3] I am not, however, convinced that the invocation of a priori knowledge really is incompatible with the methods used by scientists. For scientists surely use logic, mathematics, as well as inductive reasoning, and it does seem difficult to account for the fundamental laws of logic or of mathematics, or for the principle of induction, without invoking the idea of a priori knowledge (on this, see Bonjour 1998).

3. LEGAL PHILOSOPHY

Following H. L. A. Hart (1983, 88–89), I offer the following schema of the field of legal philosophy:



Although Hart presented this schema already in the 1960s, I think it is still instructive to view the field of legal philosophy in this way. And here I shall concentrate on the analytical part. The question of the nature of law has been, and probably still is, considered by legal philosophers, especially in the English-speaking world, to be the central, perhaps the only, legal-philosophical question. I, too, find this question very interesting and think it is of central importance to legal philosophy, but I do not think it is the only legal-philosophical question, or even the only legal-philosophical question worth pursuing. Indeed, as I shall explain, I believe that for the moment there are more promising legal-philosophical questions to tackle. Nevertheless, I do believe there are some interesting nature-of-law questions that need to be dealt with. For one thing, there is the methodological question of the proper object of investigation. Should legal philosophers be focusing on the concept of law (Hart [1961] 2012; Raz 2009b; Alexy 2008) or rather on law itself (Moore 1992; Dworkin 1986), and what, exactly, is the difference? I myself prefer to focus on the *concept* of law, just as I prefer to focus on the *concept* of a legal right, or the *concept* of legal validity, since one can do this without presupposing that there is something that corresponds to the concept. Once one has arrived at an analysis of the relevant concept, one can proceed to investigate and see whether there really is something that corresponds to the concept thus analyzed. In addition, one may wonder whether one can even find the study object, if one does not have access to the relevant concept (Kelsen [1945] 1999, 178). Nevertheless, the question of the proper study object seems to me to be rather open.

Furthermore, for quite some time now, those who inquire into the nature of law have been inclined to focus on one particular aspect of the nature of law, namely, the (alleged) normativity of law, especially when seen against a naturalistic background (on this question, see, e.g., the essays in Bertea, Pavlakos 2011). I am not convinced, however, that a continued focus on this

particular problem is the best way for legal philosophers to spend their time. For it seems to me that the rewards we reap do not stand in proportion to the energy expended; it seems to be a matter of diminishing returns. If, however, one finds the question of the normativity of law, or, more broadly, the question of the nature of law, irresistible, I would suggest the following questions to focus on.

First, what is normativity? Whereas some, perhaps the majority of legal philosophers, operate with a strong conception of normativity, something like genuine, as distinguished from conventional, normativity, others appear to have something different and much weaker in mind when they speak of normativity. For example, Joseph Raz (2009a, 134–137) argues that whereas Kelsen operates with a conception of justified normativity, Hart defends a conception of social normativity, where the former type of normativity is much stronger than the latter. Secondly, many who focus on genuine normativity of law assume that such normativity is to be analyzed in terms of genuine, as distinguished from conventional (or institutional), reasons for action. But what, exactly, is a genuine reason, and are there any genuine reasons? The usual way to explain what a genuine reason is, is to say that it applies to, and has force for, the agent whether or not he has accepted any institution or perspective, such as the institution of law (Joyce 2001, 30–52). That is to say, the agent may have a reason to refrain from stealing, whatever his attitudes or preferences or commitments. Thirdly, there is the question of whether genuine normativity is to be understood as a species of moral normativity, or as some other type of normativity; and if it is thought to be a species of moral normativity, there is the question of how the contemporary debate about the normativity of law relates to the traditional debate between legal positivists and natural law theorists about the nature of law. If instead genuine normativity is not to be thus understood, the question arises how, exactly, it is to be understood. My own view is that genuine normativity is best conceived as moral normativity, and that this means that the question of the normativity of law is difficult to distinguish from the question of whether law is necessarily moral, as that question has been understood and debated by legal positivists and natural law thinkers.

The second subfield of the analytical part of legal philosophy concerns the study of legal concepts, especially fundamental legal concepts, such as the eight concepts discussed by Wesley Hohfeld ([1913; 1917] 2001) in the early twentieth century, or the concepts of a legal right, of a legal system, of legal validity, or of punishment. But there are, of course, many more concepts that deserve to be analyzed, or, if you prefer, explicated. Two such concepts might be the concepts of normativity and of reason for action, especially the concept of a genuine reason for action. What exactly is normativity, or

genuine normativity, and what is a genuine reason for action? Can we even grasp the concept of genuine normativity without first having grasped the concept of a genuine reason for action?

The enterprise of elucidating or clarifying a legal concept is an important enterprise, primarily because it is conducive to clarity of thought and, therefore, to economy of effort in legal thinking. But how are we to understand it? We may distinguish between *analyzing* a concept in the strict sense of attempting to establish an analytically true equivalence between the *analysandum* (that which is to be analyzed) and the *analysans* (that which does the analyzing), and *explicating* a concept in the sense of attempting to make sharper the contours of a somewhat unclear, or pre-theoretical, concept, in order to make the concept (more) suitable for a certain purpose (on explication, see Carnap 1950, 1–8; 1956, 7–8). Whereas an *analysis* will be true or false (or correct or incorrect), an *explication* will rather be more or less adequate in relation to its purpose; and the criteria of adequacy for such an explication are not moral, but theoretical, namely, that the explicated concept (the *explicatum*) should be (i) similar to the original concept (the *explicandum*), (ii) precise, (iii), fruitful, and (iv) simple. Note that the question of how to weigh these different criteria against one another is to be answered on pragmatic grounds, typically in light of the purpose of the explication.

When speaking of explication, one should also consider so-called conceptual engineering (on this, see Burgess *et al.* 2020). Conceptual engineering is said by one of its foremost proponents (Cappelen 2020, 132. Emphasis in the original.) to be "*the project of assessing and developing improvements of our representational devices*", where concepts are taken to be our core representational devices. The idea, which is not new, is that we should view our concepts (our representational devices) with suspicion and assume that they are not likely to be the best they can be. Hence we have reason to consider them closely and look for ways of improving them, so that they will be more useful for a given purpose. Carnaps's idea of explicating concepts is taken to be a prime example of conceptual engineering, but some conceptual engineers are willing to go further than what Carnap recommends. As they see it, we sometimes have reason to eliminate concepts, on the grounds that they are incoherent in some sense, or contribute to the oppression of minorities or other groups of people. Can one legitimately engage in conceptual engineering in the field of legal philosophy? I believe so, but I also believe one should distinguish carefully between different degrees of conceptual engineering and ask oneself what is a scholarly and what is a moral or political enterprise.

Finally, there is the third subfield, the study of legal reasoning. As I have said, the practice of law is argumentative. Judges, attorneys and legal scholars do not often put forward general normative or descriptive theories of law or legal phenomena, but argue individual cases, and, sometimes, in the case of legal scholars, argue cases of a given type. In addition, the use of information technology in law would seem to require a clear understanding of the logic of legal argumentation, at least on the part of programmers. So I believe it behooves us as legal philosophers to study legal reasoning in pretty much all its aspects, perhaps leaving empirical, quantitative studies to economists, political scientists, or sociologists of law.

I would, in keeping with this, like to say a few words about three types of questions regarding legal reasoning that I consider to be especially worthy of serious consideration. I acknowledge, however, that my choice of questions is very likely a reflection of my own taste and interests, which need not be shared by others, and the reader is therefore recommended to take what I will say in the following with a grain of salt. In any case, the first question is that of the relevance of the theory of reasons holism to legal reasoning in general. The second is the question of how to analyze (first-order) legal statements in a way that does not undermine the rationality of legal reasoning. And the third is the question of whether legal arguments or inferences are to be understood as deductive or as inductive inferences, or both, and if so how.

3.1. Reasons Holism

When discussing questions of legal reasoning, one should give consideration to a general theory of reasons called reasons holism (on reasons holism, see Dancy 1993; 2004). Whereas reasons atomists hold that a consideration that is a reason in one situation, with a certain force and polarity (direction), will be a reason with the same force and polarity in any other situation, reasons holists maintain instead that a reason in favor of, or against, an action, or a belief, need not have the same force or polarity in every situation in which it appears. Thus, whereas reasons atomists argue that the fact that one person promised another to do something is always a reason with a certain force to require that the promisor do what he promised to do, and to hold that he acted wrongly and, perhaps, that he ought to be sanctioned, if he does not do what he promised to do, reasons holists maintain that such a fact may be a reason to perform the relevant action in one situation, a reason not to perform the action in another situation, and no reason at all in a third situation. If, however, legal or moral reasons function in this way, there can

be no genuine (or true) general legal or moral norms, since the existence of such norms presupposes precisely that the reasons in terms of which they are formulated function in the same way in every situation; and this finding would in turn be relevant to, among other things, our understanding of the principle of uniform law-application, the idea of the *ratio decidendi* of a case, conceived as the general legal norm without which the precedent court could not rationally have decided the case the way it did, and what it means to follow a precedent. What I have in mind here, then, is that the most natural way of understanding the idea of treating like cases alike is to think of it as involving action in accordance with a general norm that covers the relevant cases. However, if there are no genuine general norms, one cannot reason in this way.

It is important to note that reasons holism is a theory of *genuine*, not conventional, reasons, where a conventional reason is a reason that applies to, and has force for, an agent if, and only if, the agent has accepted a certain institution, such as the institution of law, or of etiquette, and a genuine reason is a reason that applies to, and has force for, an agent, whether or not the agent has accepted such an institution (Joyce 2001, 30–52). For if legal reasons are genuine, reasons holism will apply to them, and if reasons holism is true, this raises the question of whether we have to modify, or even reject, our understanding of the idea of treating like cases alike; whereas if legal reasons are merely conventional, reasons holism will not apply to them, and as a result our understanding of this idea will not be threatened.

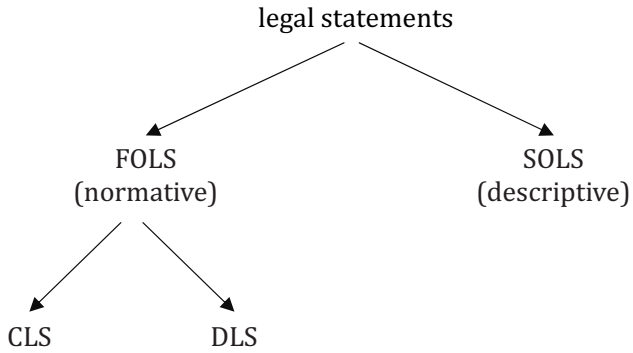
But are legal reasons genuine or merely conventional? The nature of legal reasons depends on the nature of law. Hence if legal positivism is true, legal reasons will be merely conventional reasons, since this follows from the separation thesis, which has it that there is no necessary connection between the content of law and true morality; if instead some version of non-positivism is true, legal reasons *might* be genuine reasons, since such theories reject the separation thesis.[4] However, if legal positivism is true, we also need to consider whether there might be some room for genuine reasons in the interpretation and application of the law, since one could argue that legal positivism does not apply to the interpretation and application of the law, and that therefore the possibility cannot be ruled out that such legal reasons are genuine (on the scope of legal positivism, see Spaak 2021). And if legal reasons are indeed genuine, reasons holism will apply to them.

[4] Whether legal reasons will be genuine reasons will depend on the details of the relevant theory. I believe Ronald Dworkin's and John Finnis's theories are cases in point. Dworkin (1977; 1986); Finnis (1980).

But even if legal positivism does not apply to the level of the interpretation and application of the law, one could perhaps avoid the conclusion that legal reasons that occur in the interpretation and application of the law are genuine reasons, by arguing that whatever the precise scope of legal positivism, the interpretive arguments and other legal meta-norms that are part of the lawyer's tool-box are best conceived as providing the judge with conventional reasons only. On this analysis, the textual interpretive argument, say, or the rule of lenity, would be a strictly legal meta-norm, that is, a legal analogue to the corresponding moral, or more generally, practical, meta-norm. The underlying idea would be that the very reason why judges (and others) make use of these meta-norms in the interpretation and application of the law is precisely that there is a tacit agreement (a convention) between judges that these are the meta-norms that should be used in legal reasoning. On this analysis, these meta-norms are used not because they are, or are considered to be, right, but because there is an agreement (a convention) to use them.

3.2. Legal Statements

When judges and others engage in legal reasoning, they make legal statements, that is, statements of, or about, the law. They might maintain that a person has a legal obligation, or a legal right, or legal power, or that a statute or a precedent should, or should not, be interpreted and applied in a certain way, etc. Not all legal statements are of the same type, however. As I see it, there are two main types of legal statements, namely, (i) first-order statements (FOLS), which are normative (or evaluative), and (ii) second-order statements (SOLS), which are descriptive, and two different types of first-order statements, namely, (ia) committed statements (CLS) and (ib) detached statements (DLS):



The distinction between first-order and second-order legal statements is clearly important to legal (and moral) thinking; and even though it may seem obvious in the abstract, it may be difficult to uphold the distinction consistently when analyzing legal or moral problems. As I said, I believe there are two different types of first-order legal statements, namely, committed statements and detached statements. One who makes a *committed* statement, such as "one ought to drive on the right-hand side of the road", or "I sentence you to 25 years in prison for aggravated murder", makes a genuine normative claim in the sense that he seriously means what he says. What, then, is a *detached* legal statement?[5] In an effort to understand Kelsen's theory of the basic norm, Joseph Raz (2009a, 140–143) introduces the concept of the legal man – the legal man accepts the law of the land as his personal morality – and explains that, on Kelsen's analysis, legal scholars adopt the point of view of the legal man, albeit in a *detached*, not a committed, way. The reason is that they wish to be able to conceive of the law as a system of valid (binding) norms for the purely intellectual purpose of discussing its correct interpretation and application. On this analysis, a person who maintains that Smith has a legal obligation to do *X*, is speaking from a point of view that he does not share, namely, that of someone who believes that the legal order has moral authority – if he had shared this point of view, he would have been making a committed statement, or so it seems to me.

Having introduced this typology of legal statements, we see that certain questions arise. First, do we encounter *all* of these types of legal statements in legal reasoning by judges, attorneys, prosecutors, legal scholars, and others? One may wonder, in particular, whether judges and attorneys make detached legal statements at all, or whether it is mostly legal scholars who make such statements. Interestingly, Hart appears to believe that all actors make detached legal statements. As he puts it (1982, 145), "[s]uch normative statements [that is, detached legal statements] are the most common ways of stating the content of the law, in relation to any subject matter, made by ordinary citizens, lawyers, judges, or other officials, and also by jurists and teachers of law in relation to their own or other systems of law." This claim strikes me as rather speculative, however. For one thing, I do not think it is clear just how one is to tell whether a person is making a detached (normative) legal statement or a second-order (descriptive) legal statement. Given that the explicit language used is no certain guide to the meaning of a statement, the natural conclusion

[5] The following paragraphs can be found, more or less verbatim, in Spaak (2018, 331–333).

is that one would have to inquire into the *intentions* of the person making the statement. Undertaking such an inquiry would not be easy, however, and it seems safe to assume that Hart never did so.

Secondly, first-order legal statements, in particular, require an analysis, and here several new questions arise. Since such statements are normative, in either a committed or a detached way, it seems natural to propose a meta-ethical analysis. The question, then, is whether they require a cognitivist or a non-cognitivist analysis; if they require a cognitivist analysis, the question arises whether this should be some version of realism or some version of anti-realism; and if they require an anti-realist analysis, we must ask ourselves whether this should be a constructivist, an error-theoretical, or a fictionalist analysis. Should we say, for example, that detached legal statements are best understood along the lines of pretense fictionalism – as distinguished from so-called tacit story operator fictionalism – that is, the view that the speaker is not asserting the relevant proposition, but is only pretending to do so (on fictionalism, see, e.g., Joyce 2001, chap. 7; 2005)? Alternatively, one could perhaps argue that legal statements require some sort of hybrid analysis, as Hart seems to have believed (on this, see Raz 1993).

When trying to come up with the correct metaethical analysis, one also needs to consider the application of the laws of logic to legal statements. If, for example, one wishes to defend a non-cognitivist analysis of committed legal statements, one will need to consider the so-called Frege-Geach problem. Simon Blackburn's quasi-realism (1984), for example, is an effort to do justice to our moral reasoning on an expressivist basis in a way that does not fall prey to the Frege-Geach problem.[6]

3.3. Deduction or Induction?

One may wonder whether legal arguments or inferences are deductive or inductive, a bit of both, or neither. To be sure, it does seem natural to think of many legal inferences as being deductive, though it remains to be seen if one can square this claim with one's metaethical analysis of legal statements. If, however, one believes that inductive reasoning plays an important role in legal reasoning – I have in mind here questions of law, not questions of fact – one needs to explain precisely how this can be the case. But what, exactly, is an inductive argument? I shall say that while a logically valid deductive argument is an argument in which the premises necessitate the

[6] I discuss Blackburn's quasi-realism in Spaak (2020).

conclusion, in the sense that it is necessarily the case that if the premises are true, then the conclusion is true, an inductive argument is an argument in which the premises do not necessitate the conclusion, but renders it more or less probable; and I shall also assume that there are three main types of inductive arguments, namely, (i) enumerative induction, (ii) analogical reasoning, and (iii) inference to the best explanation.

In his well-known treatise on legal theory and legal reasoning ([1978] 1994), Neil MacCormick points out that although deductive justification plays an important role in legal reasoning, there are limits to the use of such reasoning; and he offers as one example of non-deductive reasoning the interpretation of, say, a statutory provision (*ibid*., 65–72). His idea, I take it, is that in a conflict between, say, textual and teleological (or purposive) interpretive arguments, the judge might simply find that the former type of argument has stronger normative force (or carries more normative weight) than the latter and therefore trumps it, and that such a process of weighing does not in any way involve any deductive component.

If we now assume that all arguments (or inferences) are either deductive or inductive, so that if a given argument is not deductive, it must be inductive, the question arises precisely *how* we should think of non-deductive arguments, such as the weighing of interpretive arguments, conceived as inductive arguments. What type of inductive argument would this be? Would it be a matter of enumerative induction, or would it be an analogical argument, or an inference to the best explanation? I believe this will depend very much on the circumstances in the particular case, but whether we conceive of it as an argument from enumerative induction, as an analogical argument, or as an inference to the best explanation, the argument thus conceived will not be convincing. My own view is that the argument is better conceived as precisely a deductive argument, namely, (in this case) one that involves the application of a general legal meta-norm, according to which textual considerations trump teleological considerations unless there is a special reason to think otherwise. The problem with the (alleged) inductive argument, as I see it, is that once we take the above-mentioned general norm out of the equation, the argument seems to lack a proper foundation. What we seem to be left with is simply a brute assertion about the comparative normative force of two (or more) competing considerations, an assertion that may strike some, but not others, as convincing. Note here that this way of conceiving the argument is in keeping with the claim of reasons holists, that a reason in favor of, or against, an action, or a belief, need not have the same force or polarity in every situation in which it appears, and that therefore there can be no genuine general norms. In my view, however, this casts doubts on the plausibility of reasons holism.

As for deductive arguments in law, I shall be brief and simply state my view that I would like to see more legal-philosophical work that *applies* formal logic, especially quantificational deontic or modal logic, to legal or moral reasoning instead of discussing general features of various systems of logic, such as logical paradoxes or questions of soundness and completeness. I believe that formal logic could be used to clarify both legal and philosophical arguments, and that deontic logicians and others who know formal logic could be successful in selling their products to a legal-philosophical audience, if only they took care to emphasize application rather than abstract questions about the viability of competing systems of logic. Such an emphasis on the application of logic to legal reasoning would seem to be especially valuable in light of our increased use of information technology in law. Note that I am *not* suggesting that the abstract questions are pointless, or in any way misconceived, but only that they are much more difficult to appreciate for amateur logicians, not to mention all those with a visceral dislike of formalization, than are questions of application.

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DETERMINING THE CONTENT OF CORPORATE REPORTING ON HUMAN RIGHTS

Business enterprises have to report their activities to stakeholders in order to provide corporate transparency. Non-financial corporate reports provide a comprehensive coverage of environmental, socio-economic, labor, health, and human rights issues. In the paper the author argues that a uniform definition of a sector-specific human rights issue in reporting frameworks, rather than self-identification by enterprises of salient human rights issues, would help to achieve standardization and thus the possibility of sanctions in the event of false or misleading reporting. The author analyzes existing international and regional non-financial reporting instruments regarding the human rights included in it. The main content issues of non-financial reporting are derived and given requirements to improve them. The author further analyzes whether the two main frameworks for human rights reporting (the GRI Standards and the UNGPs Reporting Framework) currently meet the requirements for content defined in the paper and, if not, how they can be changed.

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1. INTRODUCTION

In addition to generating profit, business enterprises also have a social responsibility, which may assist a government in fulfilling welfare state goals (Buhmann 2006, 189). Their operations affect human rights of many stakeholders – from primary stakeholders including employees, shareholders, customers, suppliers, and creditors to secondary stakeholders including the local community, social activists, the media, business groups, etc. Human rights[1] are rights deemed to belong to an individual. It is emphasized that human rights are universal, indivisible, interdependent, and interrelated (World Conference on Human Rights 1993). The International Standard ISO 26000 (International Organization for Standardization 2010, para 6.3.2.1) additionally states that they are both inherent and inalienable.

When the international human rights regime was set up, states were designated as the sole duty-bearers, but now the subjects of international human rights law are also non-state actors, including business enterprises (Economic and Social Council 2006, para 9). It is accepted that business enterprises have an indirect obligation to respect human rights as international law requires states to adopt appropriate legislation ensuring that non-state actors do not violate recognized human rights (Bilchitz 2013; Ruggie 2013), but many authors (Muchlinski 2001; De la Vega, Mehra 2009; Letnar Černič 2011; Čertanec 2019) share the view that they also have a direct obligation to do so. The protection of human rights in business is mostly governed by non-binding policies, ranging from an individual business's internal code of conduct to recommendations issued by international organizations (e.g. the UN Global Compact Principles, the OECD Guidelines for Multinational Enterprises, the International Standard ISO 26000). Until now the most influential non-binding recommendations have been the UN Guiding Principles on Business and Human Rights (GPs),[2] adopted in 2011, which are structured as guidelines, but their language suggests obligation (Čertanec 2019).

[1] Throughout this article, the term "human rights" denotes human rights and fundamental freedoms.

[2] Human Rights Council (2011).

The UNGPs have assigned to states a duty to protect human rights from abuses by third parties and to business enterprises a responsibility to respect human rights. Both states and business enterprises are responsible for providing victims access to an effective remedy should an abuse occur. Part of the responsibility to respect human rights is conducting human rights due diligence. The process of due diligence includes also communicating how the actual and potential human rights impacts are addressed (GP 17). The most appropriate way to inform stakeholders about business enterprise's operations/activities is reporting.

Reporting can be formal or informal, depending on the addressed stakeholders. Reporting requirements often differ, according to the enterprise's size and sector. Small business enterprises are often exempt from the mandatory reporting, while reporting is especially important in large and public enterprises and enterprises in high-risk industries. It is of vital importance that transparency, credibility, and comparability are guaranteed and therefore there is a tendency to standardize reporting.

Current reporting instruments and frameworks mostly focus on disclosure just for the sake of doing it. The quality of reports is irrelevant, as they do not undergo an audit, since the content of the report is not clearly defined. In this way, a large quantity of reports with no real value is produced and they do not help create organizational change. Using a descriptive method, a method of analysis and comparison, the author argues that a uniform definition of sector-specific human rights issues in reporting frameworks, rather than self-identification by enterprises of material issues or salient human rights issues, would help to achieve standardization and thus create the possibility of sanctions in the event of false or misleading reporting. This would create an environment where all the information is internalized and actual changes are made.

In line with the outline of the paper, the author initially theoretically examines the characteristics of non-financial reporting, particularly corporate human rights reporting. Furthermore, the author addresses the content of corporate human rights reports and analyzes existing international and regional non-financial reporting instruments regarding the human rights included in them. Chapter 4 discusses the main content challenges of non-financial reporting – the unclear definition of human rights issues, a form-over-substance problem and the lack of sanctions for false or missing content. On this basis, the author derives requirements regarding the content – defining the exact human rights issues specific to each sector and the imposition of sanctions for non-reporting of defined issues or incorrect reporting. Finally, the author analyzes whether the two

main frameworks for human rights reporting (the GRI Standards and the UN Guiding Principles Reporting Framework) currently meet the requirements for content determined by the author and, if not, how they can be changed. Based on the preceding theoretical and empirical research, the author summarizes the findings, makes several suggestions as to how to address the challenges, and provides recommendations for subsequent regulations. The recommendations in this paper help to enable comparability of human rights reports and offer new solutions for imposing sanctions for false or misleading reporting.

2. NON-FINANCIAL REPORTING

Reporting can be done from financial and non-financial aspects of business activities. Initially, requirements for financial reporting were defined and subsequently requirements for non-financial reporting[3] followed. From predominantly environmental performance reports, they evolved in the direction of providing non-financial information on business's systemic issues such as labor, health and safety, human rights, business ethics, and other socio-economic impacts of business activities (Emeseh, Songi 2014, 139). Shabana, Buchholtz, Carroll (2017, 1117) defines a non-financial report as a "stand-alone document that a firm publishes with the express purpose of communicating its social responsibility activities to the general public and its stakeholders". The World Business Council for Sustainable Development (WBCSD 2002) defines it as a "public report by companies to provide internal and external stakeholders with a picture of the corporate position and activities on economic, environmental, and social dimensions". Reports are mainly drawn on the issues that business enterprises typically refer to as corporate social responsibility (CSR). According to Perrini (2006, 96), the most frequently covered issues in non-financial reports are: safety and quality of products and services, safety of working conditions, innovation and skill development, environmental protection, dialogue with stakeholders, and responsible citizenship.

[3] It is also known under the names social reporting, value report, corporate reporting, corporate social responsibility reporting (CSRR), sustainability reporting (SR), intellectual capital reporting (ICR), value reporting, economic, social and governance (ESG) reporting, and integrated reporting (IR). This article will consistently use the term "non-financial reporting".

Over the past decade, there has been an increase in the number of non-financial reports, there is also a tendency towards a more comprehensive coverage of issues and attempts to standardize reporting forms (Emeseh, Songi 2014, 138).[4] There were 10,242 non-financial reports in 2017 (Corporate Register n.d.). The majority of reports were from Europe, although trends are showing a notable increase of reports also in Asia Pacific and Latin America (UN Environment Programme *et al.* 2016). Non-financial reports can be found in annual reports as so-called integrated reports, which combine the enterprise's financial report with the non-financial report, with the aim of producing a single document or a stand-alone report. Since they have no prescribed format, they can be compiled by an external organization or the business enterprise itself. Reynolds, Yuthas (2008, 54) claims that every report should consider the principles of sincerity, appropriateness and understandability.

Non-financial reporting provides transparency of the enterprises' policies, risks, and responses to such risks, to enable stakeholders to take informed decisions (Martin-Ortega, Hoekstra 2019, 627). Non-financial reporting has become an integral part of business operations as it demonstrates that business enterprises recognize their obligation to stakeholders and their entitlement to information about issues that are of concern to them (Perrini 2006, 96; Emeseh, Songi 2014, 141). The motivation of business for reporting is derived from external pressures, internal pressures, and the opportunity to share the company's story (Searcy, Buslovich 2014, 154). The reasons for reporting are normally not purely ethical but lie in establishing corporate accountability, increasing stakeholder democracy, understanding the company's sustainability issues, performance, and gathering market information (Hess 2008, 447). At the same time this can be a marketing strategy adopted by business enterprises to enhance their public image with the possible implications for their profitability and ultimate survival (Emeseh, Songi 2014, 142). Reporting helps achieve the management's accountability for negative impacts, thus reducing the risk of reputational damage and improving its ability to attract and retain staff and customers (Buhmann 2018; Sarfaty 2013, 596). Non-financial reporting is an important source of information for potential investors and consumers in assessing social impacts and risks connected to business activities, which allows them to make informed decisions before forming business partnerships (Bratina, Primec 2017). Non-financial reporting is

[4] More on the non-financial report evolution in Hess (2008, 454–5) and Emeseh, Songi (2014, 139).

important for profitable business performance,[5] as operating in a socially responsible way enhances the company's reputation, secures greater employee commitment and productivity, makes it easier to access capital, and leads to better relationships with the government, competitors, the media, suppliers, and the local community, etc. (Commission of the European Communities 2001, §24; Moratis, Cochius 2011). Eventually, this all creates a competitive advantage over business enterprises that do not act in a socially responsible manner. Hess (2008) argues that for the achievement of meaningful reporting it is important that all the following requirements are fulfilled: disclosure of all relevant and material information related to the corporation's social and environmental policies and the actual performance, a dialogue with stakeholders to determine their expectations and their views on the corporate performance in meeting those expectations, and changing corporate behavior in furtherance of the goal of sustainable economic development.

Non-financial reporting can be done in three different ways: completely voluntary, as an enterprise's self-evaluation; corporate reporting can be a requirement for participation in multi-stakeholder initiatives, it can be done by civil society organizations, which offer external evaluative reporting, and finally it can be done as mandatory reporting, required by national governments or even supra-national organizations (Mehra, Blackwell 2016, 277). Opinions on the more effective system of reporting vary: some advocate voluntary, others require mandatory reporting. The most important pros of mandatory reporting are legal certainty, possibility of comparison, and standardization (UN Environment Programme *et al.* 2010, 8). The biggest cons are "one size does not fit all", inflexibility, complexity, and lack of incentive for innovation (UN Environment Programme *et al.* 2010, 8). Currently, non-financial reporting in the European Union (EU) is mostly voluntary, but some European countries (United Kingdom,[6] France,[7]

[5] Haller, Link, Groß (2017, 407) found that top executives of multinational business enterprises consider "non-financial information" as crucial for a company's long-term performance.

[6] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 No. 1970.

[7] Art 225 of the Grenelle Act II, 2010.

Sweden,[8] Norway,[9] Denmark,[10] Belgium,[11] the Netherlands,[12] Germany,[13] Spain,[14] Portugal,[15] Italy,[16] Finland[17]) have imposed mandatory non-financial reporting in various sectors, mostly for large and/or public business enterprises

Then EU's Non-Financial Reporting Directive 2014/95/EU[18] followed and introduced a mandatory non-financial statement in management reports for all European countries. The Non-Financial Reporting Directive requires a non-financial statement that contains information required for the understanding of the enterprise's development, performance, position, and impacts of its social, environmental and economic activities. Its stated overall objective is to increase the relevance, consistency, and comparability of information disclosed by business enterprises (Buhmann 2018). The Non-Financial Reporting Directive does not differentiate business enterprises by sector but rather by size. Under Article 19a and Article 29a of the Non-Financial Reporting Directive reporting is mandatory only for large public-interest business enterprises, whose balance sheets showed an average of more than 500 employees during the financial year, whereas it is still voluntary for others. This is justified by the possibility of the cost outweighing the benefits of obliging small and medium-sized enterprises to issue non-financial statements (European Commission 2017, 2). Therefore, many small and medium-sized enterprises are still not issuing non-financial reports and they enact their social responsibility within formal and informal networks, rather than through explicit policies (Matten, Moon 2008, 417). In

8 Annual Accounts Act, 1999 amended 2005; Sustainability goals for State-owned enterprises, 2012.

9 Act amending the Norwegian Accounting Act, 2013; The Norwegian Code of Practice for Corporate Governance, 2014.

10 Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses), 2009.

11 The Social Balance Sheet, 2003, updated in 2008.

12 Dutch Civil Code, 1838, updated in 2004.

13 Bilanzrechtsreformgesetz – Accounting Law Reform Act, 2005.

14 Sustainable Economy Law, 2011.

15 Social Balance Law 7/2009, 2009.

16 Legislative decree No. 32/2007, 2007.

17 Financial Statements Act 2008–2012 (from 2005, including 2008, 2013 and 2015 amendments).

18 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330.

2020, the European Commission prepared the Revision of the Non-Financial Reporting Directive, called Inception Impact Assessment, to address the problems that arise.

Reporting instruments that transcend national boundaries are suggested for an improved comparability and efficiency of reporting practice (UN Environment Programme *et al.* 2016, 23). The most important international non-financial reporting instruments and frameworks are the following: The Global Reporting Initiative (GRI) Standards, Social Accounting Standards Board (SASB) Standards, International Standard ISO 26000: Guidance on social responsibility and its Chapter 7 on guidance on integrating social responsibility throughout an organization, the OECD MNE Guidelines with its disclosure chapter, and the United Nations Guiding Principles (UNGPs) and its United Nations Guiding Principles Reporting Framework. These global standards are all of a voluntary nature so enterprises decide whether they will report according to them or not.

3. CORPORATE REPORTING ON HUMAN RIGHTS

Business enterprises have to communicate their human rights activities to their stakeholders in order to provide corporate transparency and accountability. One of the communication processes is reporting, which is intended to stimulate organizational changes to avoid future or current adverse impact on human rights (Buhmann 2018). Its purpose is to ensure internal accountability for achieving business objectives and external accountability to shareholders for their performance (UN OHCHR 2012, 57). As enterprises are often unwilling to offer this information or they offer just partial, often bias information, the necessity for regulating this issue emerged. The current foundation of corporate human rights reporting requirements is the UNGPs.

The UNGPs discuss communication as Pillar One and Pillar Two activities. According to Guiding Principle 3 (GP3), states should encourage business enterprises to communicate how they address their human rights impacts and, where appropriate (especially, where the nature of business operations or operating contexts poses a significant risk to human rights), even require it. Communication is an important part of fostering respect for human rights and its form is not prescribed (Human Rights Council 2011). In order to stimulate communication of adequate information, states could legalize self-reporting as a mitigating circumstance in the event of any judicial or administrative proceedings. The commentary to GP3 advises issuing state policies or laws that would clarify what and how business enterprises should

communicate and thus help them ensure both accessibility and accuracy of communications (Human Rights Council 2011). Such an adequate communication should take into account variations in business enterprise size and structures, safety and security risks, and legitimate requirements for commercial confidentiality (Human Rights Council 2011).

According to Guiding Principle 21 (GP 21) business enterprises should be prepared to communicate how they address their human rights impacts externally, particularly when concerns are raised by or on behalf of the affected stakeholders. Therefore, it is not necessary that they actually communicate all the information they have collected in a due diligence process, but they should be able to communicate business's human rights impacts when appropriate (UN OHCHR 2012, 57–8). As the form is not prescribed, business enterprises decide the how, the when and the who,[19] but the reports should cover topics and indicators concerning how business enterprises identify and address adverse human right impacts (Human Rights Council 2011, GP 21). The content and credibility can be improved by an independent verification of human rights, and sector-specific indicators can also be very helpful (Human Rights Council 2011, GP 21). Reported information must be accessible to its intended audiences and sufficient, but at the same time it should not pose any risks to the affected stakeholders, personnel, or to legitimate requirements for commercial confidentiality (Human Rights Council 2011, GP 21). Formal public reports are necessary if business operations or operating contexts pose risks of severe human rights impacts or if a business enterprise wants to embed within it the understanding of human rights issues and the importance that respecting human rights holds for the business itself, protects its reputation and builds a wider trust in its efforts to respect human rights (UN OHCHR 2012, 58). By integrating reporting on human rights into its financial reports, business enterprises demonstrate the importance of respecting human rights for business (UN OHCHR 2012, 57).

[19] Precisely the lack of a reporting structure or template is criticized by Wheeler (2015, 768), because it is very difficult to achieve comparability without a published methodology on how to report and inter-firm competition that is essential for the court of public opinion.

4. HUMAN RIGHTS CONTENT OF NON-FINANCIAL REPORTING INSTRUMENTS

Stand-alone human rights reports are not common; they are usually included in non-financial reports. The UN Environment Programme *et al.* (2016, 19) research identified in 2016 that over three fifths (61 percent) of non-financial reporting instruments cover reporting on specific environmental or social topics. The remaining two fifths require or encourage reporting of general sustainability information. The issues included in non-financial reporting instruments are similar. With the exception of the UN Guiding Principles Reporting Framework, which is for human rights issues only, others also include environmental issues, labor issues and anti-corruption. The OECD Guidelines for Multinational Enterprises, ISO 26000, the Non-Financial Reporting Directive and the GRI Sustainability Reporting Standards additionally cover economic and social issues such as organizational governance, fair operating practices, consumer issues and community involvement.

Despite the fact that human rights are included in non-financial reporting instruments, there is a significant difference in their scope. The disclosure chapter of the OECD Guidelines for Multinational Enterprises and the chapter on communication on social responsibility of ISO 26000 (7.5) do not mention explicitly human rights reporting, but both have their own chapters on human rights that are aligned with the UNGPs. Consequently, enterprises communicating under these two reporting instruments should conduct human rights reporting, but the enforceability of this requirement may be questionable. The UN Global Compact Guidelines for Communication on Progress mention human rights but do not clearly define their content. They state that Communication on Progress should include a description of the practical steps that a business enterprise has taken or intends to take to implement the Global Compact principles in the area of human rights. The vague wording again raises the issue of enforceability. On the other hand, the Non-Financial Reporting Directive, the GRI Sustainability Reporting Standards, and the UN Guiding Principles Reporting Framework provide specific guidance on human rights reporting.

The tasks for corporate human rights respect, under the Non-Financial Reporting Directive, are set out in the Guidelines on non-financial reporting. Enterprises are expected to disclose material information on the potential and actual impacts of their operations on right-holders (European Commission 2017, 25–6). The Guidelines on non-financial reporting give specific examples of possible disclosed information, such as how accessible their facilities, documents, and websites are to people with disabilities, or the list of operations and suppliers at significant risk of human rights

violations (European Commission 2017, 25–6). One of the tasks is also material disclosure on human rights due diligence, and on processes and arrangements implemented to prevent human rights abuses, for instance, how a business contract with supply chain partners deals with human rights issues (European Commission 2017, 25–6). A business enterprise may also describe the role and responsibility of the board or supervisory board regarding human rights policies (European Commission 2017, 17, 18).

The most comprehensive non-financial reporting instruments are the GRI Sustainability Reporting Standards, which have assigned a special standard to human rights, i.e. GRI 412 – Human Rights Assessment (GRI 2018). It is categorized under the social topics of the GRI Standards and provides general requirements for reporting on human rights. The GRI 412 standard includes a management approach to human rights assessment disclosure (explanation of the material topic and its boundary, description of policies, commitments, goals, grievance mechanisms, specific processes or programs, and an evaluation of the effectiveness of that management approach) and a topic-specific disclosure. Some other GRI standards specify corporate reporting requirements related to specific human rights, such as GRI 401: Employment, GRI 403: Occupational Health and Safety, GRI 406: Non-discrimination, GRI 407: Freedom of Association and Collective Bargaining, GRI 408: Child Labor, GRI 409: Forced or Compulsory Labor, GRI 411: Rights of Indigenous Peoples' or GRI 414: Supplier Social Assessment.

In order to provide more detailed guidance to enterprises on how to report on human rights issues in line with their responsibility to respect human rights, under the UNGPs, the UNGPs Reporting Framework, was adopted (Shift and Mazars n.d.). It provides a business enterprise a concise set of questions and a clear and straightforward guidance on how to answer these questions with relevant and meaningful information in order to know and show that it is meeting its responsibility to respect human rights in practice (Shift andMazars n.d.). The Reporting Framework offers implementation guidance to business enterprises that are reporting and assurance guidance for internal auditors and external assurance providers (Shift and Mazars n.d.). According to the UNGPs Reporting Framework (Shift and Mazars 2015, 4), business enterprise should, at a minimum:

- Provide a substantive response to the two overarching issues in Part A: Governance of Respect for Human Rights;
- Meet the four informational requirements under Part B: Defining the Focus of Reporting;
- Provide a substantive response to the six overarching issues in Part C: Management of Salient Human Rights Issues.

5. THE CHALLENGES REGARDING THE CONTENT OF CORPORATE REPORTING ON HUMAN RIGHTS

Human rights reports must provide credible and relevant information. There are three major challenges to the content of corporate human rights reporting: unclear definition of human rights issues, "form-over-substance" issues, and the lack of sanctions for incorrect or missing content.

5.1. Unclear Definition of Human Rights Issues

A problem already arises in the definition of non-financial information. Non-financial reporting instruments do not consistently define the term non-financial information and only provide general guidance on its interpretation. As confirmed by the research findings of Haller, Link, Groß (2017, 407–8), the term "non-financial information" lacks a common meaning and understanding, which leads to the problems that affect the efficiency and effectiveness of corporate communication. The meaning of the term "non-financial information" may be contextually or geographically dependent and used within different reporting approaches and domains, so that different business enterprises may disclose different types of information as "non-financial information" or disclose the same type of information in different ways (Haller, Link, Groß 2017, 411). A new generally accepted definition of non-financial information should therefore be created (Haller, Link, Groß 2017, 407).

Furthermore, it is also not clearly defined what specific human rights must be included in human rights reports. Most reporting instruments do mention human rights but only in broad terms, with a reference to international human rights instruments. With the exception of the GRI Standards, other instruments do not define individual human rights and consequently the reports contain very general information and commitments on human rights issues.

The issue was also recognized by the European Commission in its Revision of the Non-Financial Reporting Directive. Non-detailed reporting requirements leave a great deal of discretion to the reporting enterprises and create unnecessary and avoidable costs, as enterprises consequently face uncertainty and complexity when deciding what non-financial information to report and how and where to report it (European Commission 2020).

As the wording is unclear, Reynolds and Yuthas (2008, 55) warn that it is possible for business enterprises to pick and choose which items to include in the report and which to leave out. It would therefore be possible to have a report that is factually accurate but paints an inaccurate picture of the performance (Reynolds, Yuthas 2008, 55). The European Commission

(2020) has already noted that enterprises often report information that users do not consider relevant and exclude that which is. In spite of the fact that flexibility in reporting requirements is necessary, as enterprises operating in different sectors face different issues and too rigid requirements could lead to enterprises reporting on issues of limited importance to that specific enterprise, at the same time comparability of reports is prevented, which means that the information is less relevant to investors and other stakeholders (Martin-Ortega, Hoekstra 2019). As Hess (2019, 35) points out, "comparable information is important for allowing stakeholders to determine the leaders and laggards in an industry, and then push the laggards to improve their performance."

For this reason, human rights benchmarks have been developed and their importance is increasing as they enable greater corporate transparency. One such benchmark is the Corporate Human Rights Benchmark (CHRB), which uses publicly available information to assess the human rights performance of 230 global companies in five sectors that have a high risk of negative human rights impacts (agricultural products, apparel, extractives, ICT manufacturing and automotive manufacturing) (World Benchmarking Alliance n.d.). Unified sector-specific indicators help achieve comparability and merit-based auditing, which builds stakeholder confidence. As Emeseh and Songi assert (2014, 139–40), standardizing performance indicators and issuing general guidelines for reporting will improve the consistency of reports. In this way, the reports would be easier for investors and decision-makers to analyze and understand (Tschopp, Nastanski 2014).

5.2. A Form-Over-Substance Issue

Currently, there is too much of the so-called "paper compliance", where enterprises demonstrate only formal compliance with procedures, rather than providing objective information on whether the business enterprise has been, or is at risk of being, involved in human rights abuses (Jägers 2013, 320). Enterprises are simply not motivated to make public their human rights impact because of the negative publicity that may follow. Consequently, they report the data that is easiest to collect (i.e. policies and procedures) as opposed to the most important ones (i.e. performance outcomes) (Hess 2019, 33). The reporting process does not lead to an organizational change as the focus is on disclosing what the enterprise has already done without focusing on how it will improve (Hess 2019, 38). Reports focus on managing the public's impression of the enterprise and reducing exposure to criticism and social or economic accountability, rather than providing meaningful

information and transparency (Buhmann 2018; Hess 2019). An enterprise may choose not to fully disclose its social performance because it may disclose favorable and hide unfavorable information, fail to put disclosed information in context, or simply provide false information (Hess 2008, 462). Even if the non-financial information is accurate, enterprises may fail to provide information about the actual implementation or effectiveness of that information (Hess 2008, 462).

Reporting instruments still place too much emphasis on ex-post compliance (i.e. disclosure) rather than ex-ante organizational change measures and proactive human rights due diligence (Buhmann 2018). The GRI Standards, which are the most widely used reporting framework, are intended only for corporate performance disclosure. Although the Non-Financial Reporting Directive requires due diligence, its focus is still on disclosure. Its audit requirements are only intended to check whether a non-financial statement has been made, not whether the information disclosed is accurate (Buhmann 2018). Only the UN Guiding Principles Reporting Framework places a stronger emphasis on proactively addressing human rights issues. In addition to using the information for disclosure, a due diligence approach also encourages its use to improve corporate social performance. Under the UNGPs, formal public reporting has an ex-post perspective on the action performed or the impact caused, but it is also part of the human rights due diligence process and has an ex-ante focus, which helps identify, prevent or, if necessary, mitigate an adverse impact before it occurs or grows (Buhmann 2018).

Jägers (2013, 320) sees a solution in mandatory reporting, which could address this problem if it provides clear standards on what to report and how, and ensures that the information is verifiable. Enterprises have to be required to make public their human rights impacts otherwise they will not do it. Contrarily, Martin-Ortega and Hoekstra (2019) argue that mandatory reporting laws are not sufficient and special due diligence laws should be adopted, requiring further action from the enterprise preventing and remedying critical human rights risks. The experience with modern slavery reporting laws (e.g. California Transparency in Supply Chains Act and Australia's Modern Slavery Act) confirms this, as mandatory reporting laws are often not enforced. As Buhmann (2018) argues, the information collected should be used internally to understand society's expectations and change one's practices accordingly. Reporting should be a learning process for an organizational change (Buhmann 2018), it should inform stakeholders and lead to a dialog. Reports should not be seen as an end result but only as a tool to start, improve, and own a healthy due diligence process that enables an organization to know the risks and change practices to prevent the

risks, establish a proper process, minimize, and remedy the consequences (Martin-Ortega 2019, 115). Hess (2019, 48) recommends two governmental measures, in addition to mandatory disclosures and due diligence: direct support for stakeholder initiatives that allow users of information to act as surrogate regulators; requiring and enforcing disclosures that help external stakeholders monitor outcomes but are not directly linked to an enterprise's performance. Hess (2019, 43) recommends that governments move away from general transparency programs (such as the GRI standards) and toward mandating more targeted social transparency, focusing on a specific stakeholder group, issue and/or sector.

An excellent example is the OECD Due Diligence Guidance for Responsible Business Conduct, which "provides practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by providing plain language explanations of its due diligence recommendations and associated provisions" (OECD n.d.). The OECD has developed sectoral guidelines to help enterprises identify and address risks to people, the environment and society associated with business operations, products or services in specific sectors (financial sector, extractive sector, apparel and footwear sector, agriculture sector, and minerals from conflict-affected and high-risk areas sector) (OECD n.d.).

5.3. The Lack of Sanctions for False or Missing Content

A (mandatory) reporting system can only be effective if a business enterprise is sanctioned for not reporting or for providing false and misleading information. Emeseh and Songi (2014, 138) argue that business enterprises should be held liable for inaccurate statements made knowingly or negligently in their non-financial reports. Currently, sanctions are only available in the form of a fine for non-compliance with the reporting requirement under national regulations. There is no sanction for false or misleading statements, as the auditor only verifies the formal accuracy of the report.

The voluntary nature of the majority of non-financial reporting instruments is the main reason why there are no sanctions for non-reporting or misreporting. There is no binding international reporting instrument to impose sanctions at the international level. Without such an instrument, sanctions are country or region dependent. Under the EU Non-Financial Reporting Directive, there are only a reporting requirement and sanctions that can be imposed by governments for non-compliance with the reporting requirement. A fine would be possible under the Non-Financial Reporting Directive if a business enterprise made a non-financial statement that did

not mention human rights issues. The extent and quality of the information disclosed are not relevant; an auditor or audit firm only verifies that the non-financial statement has been made (Art. 19a, para. 5, Art. 34, para. 3). The Member States may require that the information in the non-financial statement is verified by an independent provider of audit services (Art. 19a, point 6). The collective responsibility for ensuring that a non-financial statement is drawn up and published in accordance with the requirements of the Directive lies with the members of the administrative, management, and supervisory bodies of a business enterprise (Article 33(1)). However, for fear of affecting the business competitiveness, most Member States have chosen not to include it in their legislation.

The other reason is that measuring human rights is not an easy task, as indicators risk producing invalid results (misleading images of corporate performance) and non-emancipatory effects (i.e. disempowerment of human rights victims) (De Felice 2015). Business and human rights indicators should estimate past or projected human rights performance, with results conveyed by a verbal or numerical expression, such as a number, a percentage, or a verb (De Felice 2015). In order to measure business and human rights compliance, De Felice (2015) asserts that three categories of business and human rights indicators need to be established: policy, process, and impact indicators.

5.4. Recommendation

Based on these challenges, the author formulates the following recommendation for current reporting instruments, reporting frameworks and governments to enable meaningful and relevant corporate human rights reporting:

(a) precise definition of a sector-specific human rights issue and

(b) sanctions for non-reporting on defined issues or false reporting.

Only the clear definition of human rights issues, specific for each sector, would standardization of report content be possible. A system of credible and comparable reports would be made possible by the standardization of the report content and an independent external assurance of the report. Auditors would be able to verify not only the disclosure of information but also the credibility of information. On this basis sanctions for non-reporting on defined issues or misreporting can be adopted and used to address inadequacies. All of this would lead to a change in organizational behavior and the adoption of proactive measures aimed at preventing adverse human rights impacts.

5.4.1. Precise Definition of a Sector-Specific Human Rights Issue

- Reporting frameworks should clearly define human rights issues, specific for each sector and based on a thorough examination of which human rights are most frequently abused in the given sector. Reporting frameworks should include sufficient explanations and illustrative examples so that business enterprises can report on the basis of them, in a standardized manner. Other human rights that are not sector-specific, but are relevant to the reporting enterprise, must be reported separately as a result of mandatory corporate human rights due diligence.

The first part of the task is assigned to reporting frameworks, which should conduct appropriate analyses of the relevant human rights issues in each sector. The current initiatives have singled out sectors such as agricultural products, apparel, extractives, ICT manufacturing and automotive manufacturing, as they have a high risk of human rights impacts. According to the author, all sectors need to be included as the UNGPs do not exclude any sector. The author recommends using the sectors used by the ILO: Agriculture, plantations and other rural sectors; Basic metal production; Chemical industry; Commerce; Construction; Education; Financial and professional services; Food, beverages, tobacco; Forestry, wood, pulp and paper; Health services; Hotels, tourism and catering; Mining; Mechanical and electrical engineering; Media and culture; Oil and gas production; Postal and telecommunications services; Public service; Shipping, ports and fishing; Textiles, clothing and footwear; Transport; Transport equipment manufacturing; Utilities (water; gas; electricity) (ILO n.d.). If the need arises to look at a particular sector in more detail, new sections can be added.

When looking for relevant human rights issues, reporting frameworks can use an example from the Corporate Human Rights Benchmark methodology in which they have identified which human rights are most relevant for each sector. In the agricultural products sector, ten human rights were identified, including living wages, prohibition of child labor, freedom of association and collective bargaining, health and safety, etc. (CHRB 2020). Reporting frameworks need to include enough examples so that enterprises know exactly what to report on and are not confused. The UN Guiding Principles Reporting Framework and its implementation guidelines are a good example of this.

The second part of the task falls to the enterprise, which must find out through human rights due diligence whether there are any other human rights issues that are specific to the enterprise. Human rights due diligence should be required by law and the disclosure part of it should provide the public with the relevant information. Enterprise can use *The Corporate*

Responsibility to Respect: An Interpretive Guide (Office of the UN High Commissioner for Human Rights), the UN Guiding Principles Reporting Framework, or the OECD *Due Diligence Guidance for Responsible Business Conduct* to identify human, environmental and social risks associated with business operations, products or services in specific sectors.

5.4.2. Sanctions for Non-Reporting on Defined Issues or False Reporting

- Reporting instruments should require sanctions for failure to report or misreport on certain human rights issues. They should also require the designation of a person with knowledge of human rights due diligence to undertake corporate reporting on human rights issues.

The solution to improving the quality of human rights reporting lies in emulating the financial reporting model, where misreporting is sanctioned. Non-financial information has to be audited in the same way as financial information, using unified sector-specific indicators. Since countries are not willing to adopt this voluntarily, this has to be made mandatory. Reporting instruments (e.g. the Non-Financial Reporting Directive) should require governments to implement this requirement and have in place assurance guidance for internal auditors and external assurance providers. The ultimate goal is the adoption of a binding international reporting instrument that would impose sanctions.

To improve the quality of human rights reporting, human rights reporting should be entrusted to a person with knowledge of human rights due diligence. Human rights reporting cannot be outsourced to PR firms as they try to portray the enterprise in the best possible way instead of making an honest assessment of the situation. The system should be similar to that for the protection of personal data, where a person within the enterprise is designated as data protection officer.[20]

6. ANALYSIS OF THE CURRENT HUMAN RIGHTS REQUIREMENTS FOR CONTENT IN REPORTING FRAMEWORKS

The author analyzes whether the two most commonly used frameworks for voluntary non-financial reporting – the GRI Standards and the UN Guiding Principles Reporting Framework – currently meet the requirements

[20] See Articles 37, 38 and 39 of the General Data Protection Regulation.

for content determined by the author, and if either of these frameworks were incorporated into a mandatory corporate human rights reporting instrument and if not, how they could be changed.

6.1. GRI Standards[21]

Standard GRI 412 – Human Rights Assessment requires the enterprise to report on the number and percentage of operations that have undergone a human rights review or impact assessment (reporting requirement 412–1), the number and percentage of employee trainings on human rights policies or procedures (reporting requirement 412–2), and the number and percentage of significant investment agreements, and contracts that include human rights clauses or that have undergone a human rights review (reporting requirement 412–3). The GRI Standards on a specific human rights issue (i.e. GRI 406: Non– Discrimination) require an enterprise to report on various matters, most frequently on the number of incidents and their status, or the naming of operations and suppliers that pose a risk of incidents and measures taken.

The analysis shows that the GRI standards do not meet the requirements for content determined by the author. They define eight different human rights topics and have a common standard for human rights (GRI 412 Human Rights Assessment), but have no sector-specific standards. In this way, they exclude many important human rights issues (e.g. freedom of thought, conscience and religion; right to privacy; right of an adequate standard of living, etc.). The UNGPs clearly state that all human rights must be respected and therefore all have to be taken into consideration. Furthermore, the GRI standards provide guidance but not enough illustrative examples, so

[21] The paper was written before the GRI published the revised Universal Standards in 2021 (GRI 1: Foundation 2021, GRI 2: General Disclosures 2021 and GRI 3: Material Topics 2021) that will be in effect for reporting, starting 1 January 2023. The Universal Standards have been revised to incorporate reporting on human rights and environmental due diligence for organizations to manage their sustainability impacts, including on human rights, as set forth in intergovernmental instruments by the UN and OECD (GRI 2021a). In development are also new Sector Standards that will enable more consistent reporting on sector-specific impacts by helping to identify a sector's most significant impacts (GRI 2021a). GRI is also running Topic Standard Project for Human Rights that is focused on updating GRI human rights-specific Topic Standards and developing Standards for human rights issues not yet covered in the GRI Standards (GRI 2021b). With the revision and the new development of GRI Standards, many of the recommendation of the paper will be considered.

enterprises do not know exactly how to report on them, which leads to confusion. The guidelines need to be specific enough to allow standardization of reporting content.

To meet the content requirements determined by the author, the first option is to amend GRI Standard 412 to include an additional requirement, 412–4, that would identify different sectors of the economy (e.g. the apparel sector) and their relevant human rights issues (e.g. living wage, prohibition on child labor, rights to physical integrity, right to privacy, etc.). It should be mandatory to report a number of incidents of each relevant human rights abuse and its status or identify operations, the suppliers that pose a risk to the relevant human right, and the measures taken. The second option would be to accept new standards for each human right, reporting the number of incidents of each relevant human rights abuse and their status or naming operations, the suppliers that pose a risk to the relevant human right, and the measures taken. Reporting instruments would then have the task of defining human rights issues, specific to each sector. In both cases, illustrative examples should be given to show enterprises how to report on them. One of the best practices in this area is the UN Guiding Principles Reporting Framework.

This approach is better, as current because the UNGPs explicitly state that all human rights can be abused. Selecting only eight human rights gives the impression that other human rights are not as important. With clearly defined human rights issues, specific to each sector, and clear guidance, the uncertainty of enterprises as to what to report would be expelled.

6.2. The UN Guiding Principles Reporting Framework

The UN Guiding Principles Reporting Framework is based on demonstrating continuous improvement, focusing on respect for human rights as opposed to philanthropic activities, addressing the most severe human rights impacts, providing balanced examples from relevant areas and explaining any omission of important information (Shift and Mazars 2015, 4–5). Part A consists of a set of questions regarding the governance of respect for human rights – policy commitment and embedding respect for human rights. Part B defines the focus of reporting – explanation and identification of salient human rights issues associated with the enterprise's activities and business relationships, with possible focus on specific areas. Additional severe impacts need to be identified and an explanation provided as to how they have been addressed. Part C addresses the management of salient human rights issues, such as specific policies, stakeholder engagement, assessing impacts, integrating results, and taking action, tracking performance, and

remediation. The final decision on what to report is in the hands of the individual enterprise, but it should work towards answering the supporting questions and improving the quality of its responses to all questions over time (Shift and Mazars 2015, 4).

The analysis shows that the UN Guiding Principles Reporting Framework provides relevant indicators and enough practical examples so that enterprises know exactly how to report on them when they choose their human rights issues. However, the content requirements determined by the author are not met – because the guidelines are too broad. Only human rights in general are mentioned, but no specific human right is addressed. There are no sector-specific issues, as it is up to each enterprise to identify salient human rights issues. Furthermore, enterprises choose which questions to answer and therefore comparison is not possible. All this creates uncertainty for an enterprise and prevents standardization.

To meet the content requirements determined by the author, the UN Guiding Principles Reporting Framework should be amended to specify which are the salient human rights issues for each sector and enterprises should report on them according to the sector in which they operate. In the apparel sector, for example, the framework would specify relevant human rights issues (e.g. living wage, freedom of association and collective bargaining, prohibition on child labor, right to safe and healthy working conditions, rights to physical integrity, right to privacy, etc.) and not defer this to the enterprise itself. The enterprises would add to their reports the human rights issues that are relevant only to them. They would not be allowed to pick and choose questions, but all should be included unless they provide a valid explanation.

This approach is better than the existing one, as it allows comparability of reports and facilitates the identification of human rights issues from an enterprise's perspective.

7. A WAY FORWARD

The European Commission (2020) identified three possible ways of addressing issues with the content of non-financial reporting in its Inception Impact Assessment: revising the general non-binding guidelines and/or issuing additional guidelines on specific topics; exploring the use of existing or possible future standards on non-financial reporting, and; revising and strengthening the provisions of the Non-financial Reporting Directive. Such a revision could include, inter alia, specifying in more detail what non-financial information enterprises should report, and requiring enterprises to use a standard for non-financial reporting (European Commission 2020).

In the author's view, Non-Financial Reporting Directive should also require sanctions for not reporting or misreporting certain human rights issues. It should also require the designation of a person with knowledge of human rights due diligence to undertake corporate reporting on human rights issues.

Tschopp, Nastanski (2014, 147–8) found that the GRI standards have the full potential to be a globally agreed upon standard[22] and serve as a benchmark for improving performance.[23] Freyman (2011, 55) opposes this as she believes that the GRI standards do not offer enough to effectively compare the performance among the participating business enterprises. Cragg (2010, 772) recommends a solution in the form where the GRI standards are only suggested, rather than the necessary standards, in order to ease the tension created by a one-size-fits-all approach.

The analysis has shown that both examined reporting frameworks have their weaknesses and strengths regarding human rights reporting. There are multiple possible ways of going forward:

- both frameworks are preserved and amended by sector-specific human rights issues and linked by defining exactly what content each framework covers.
- both frameworks are preserved and amended by sector-specific human rights issues; the choice of the framework is left to each sector.
- both frameworks are preserved and amended by sector-specific human rights issues; the choice of the framework is left to each country.
- both frameworks are preserved and amended by sector-specific human rights issues; the choice of framework depends on the size of the enterprise: a more complex human right reporting system (UN Guiding Principles Reporting Framework) is prescribed to large enterprises, a less complex one (GRI Standards) to SMEs.

The most promising idea is that both frameworks be preserved and amended by sector-specific human rights issues; the choice of framework would be left to each country. Governments should introduce mandatory reporting requirements under the chosen framework, at least for the largest

[22] Alan Knight from AccountAbility (AA1000 Series) objects to a unified global standard as he believes there is no need for one single international CSR reporting standard but for a system that brings legitimacy and mutual recognition to a number of standards (Tschopp, Nastanski 2014, 155).

[23] Cragg (2010, 769–71) agrees with Tschopp, Nastanski as she believes that a streamlined set of requirements would allow greater stability and predictability.

enterprises. For SMEs, it can be voluntary[24] but with a system of incentives – if they adopt reporting requirements. In due course, the same regime is recommended, as the aim is to achieve comparability of reports.

Human rights respect is in "the best interest of society as a whole" (Čertanec 2020) so no government should be afraid to extend the mandatory reporting requirements above the minimum standards of the reporting instruments (e.g. Non-Financial Reporting Directive). Governments should:

- adopt mandatory reporting requirements for the content of the report under the chosen framework so that concerned enterprises know what to report on and how to report,
- require the designation of a person with knowledge of human rights due diligence to undertake human rights reporting,
- require mandatory auditing of human rights reporting so that the information collected can be properly assessed, and
- impose legislation that would sanction not only non-reporting but also misreporting.

Since reporting requirements involve substantial costs,[25] it would be necessary for governments to provide appropriate incentives for proactive measures in order to change business behavior in accordance with the non-financial information collected and to measure the progress of the enterprise. In addition, governments should organize workshops for enterprises to raise awareness that the information collected is also used to achieve organizational change and that disclosure is not the ultimate goal.

8. CONCLUSION

Human rights reporting represents an important form of communicating human rights impacts to stakeholders. As Buhmann (2018) states non-financial reporting has the potential to drive the change of business conduct if undertaken as an explicit organizational learning strategy.

[24] Positive discrimination of small and medium-sized enterprises is acceptable (Korže, 2019).

[25] The European Commission (2013) expects the financial burden on the concerned enterprises under the Non-Financial Reporting Directive to be between €600 and €4,300 per year. If more extensive reporting is implemented, it can be even between €155,000 and €604,000.

Business enterprises have to perceive reporting as a helpful tool and not as an unnecessary evil, as they perceive it at the moment. The procedure of reporting should be facilitated and not seen as an additional burden.

The solution lies in copying the model of financial reporting, where false statements are sanctioned. The standardization of report content would be made possible through the clear definition of human rights issues, specific for each sector. Standardization of report content and independent external assurance of the report would provide a system of credible and comparable reports. Auditors would be able to verify not only the disclosure of information, but also its credibility. Sanctions for non-reporting of the defined issues or misreporting can be adopted on this basis and used to address inadequacies. All this would lead to a change in organizational behavior and the adoption of proactive measures to prevent adverse human rights impacts.

To achieve this goal, the following requirements for content should be adopted:

- Reporting frameworks should clearly define human rights issues, specific for each sector and based on a thorough examination of which human rights are most frequently abused in the given sector. Reporting frameworks should include sufficient explanations and illustrative examples so that business enterprises can report on the basis of them in a standardized manner. Other human rights that are not sector-specific but are relevant to the reporting enterprise must be reported separately, as a result of mandatory corporate human rights due diligence.
- Reporting instruments should require sanctions for failure to report or misreport on certain human rights issues. They should also require the designation of a person with knowledge of human rights due diligence to undertake corporate reporting on human rights issues.

The analysis of the GRI standards and the UN Guiding Principles Reporting Framework shows that they do not meet the content requirements determined by author. Human rights issues are too broad, and there is no differentiation between the enterprise sectors. The advantage of the UN Guiding Principles Reporting Framework is that it provides relevant indicators and enough practical examples so that enterprises know exactly how to report on them when they choose their human rights issue, whereas the GRI standards do not.

To meet the content requirements determined by the author, the GRI 412 standard and the UN Guiding Principles Reporting Framework should be amended so that the frameworks specify which human rights issues to report on for each sector. The enterprises would add to their report the human rights issues that are relevant only to them. They would not be allowed to select issues, but all should be included unless they provide a valid explanation.

The most promising idea is for both reporting frameworks to be preserved and amended by sector-specific human rights issues; the choice of the framework would be left to each country. Governments should introduce mandatory reporting requirements under the chosen framework – at least for the largest enterprises. For SMEs, it can be voluntary, but with a system of incentives – if they adopt reporting requirements. If the reporting requirements were crystal clear, then auditors could also review the content of the information collected, and the governments could enact laws that sanction not only non-reporting but also misreporting. Governments should additionally organize workshops for enterprises, to give them instructions on how to collect and report on the necessary information and stipulate an organizational change. Over time, the same regime is recommended for all countries, in order to provide comparability of human rights reports at the international level. The ultimate goal is the adoption of a binding international reporting instrument that would impose sanctions for failure to report or misreport on certain human rights issues.

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WHEN LAW ENTERS HISTORY: PROHIBITION OF CRIME NEGATIONISM AND ITS LIMITS IN INTERNATIONAL LAW

The topic of this article is the interaction between the freedom of expression and the memorial laws concerning historical crimes. The author offers an analysis of the phenomenon of negationism through the prism of international law. The article is based on two interrelated hypotheses. The first is that the prohibition of negationism has a legal foundation in international law only if accompanied by the ability to incite hatred or violence. For this purpose, international and regional European standards on negationism are analyzed. The second hypothesis is that in the practice of implementation of memorial laws, the border between hate speech and legitimate historical denialism becomes blurred. This fact might lead to excessive encroachment upon the freedom of expression. The author offers an analysis of the practice of the European Court of Human Rights as a referential framework for the application of memorial laws in practice aimed at evading these excesses.

Key words: *Freedom of expression. – Memorial laws. – Hate speech. – Genocide. – Human rights*.

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1. INTRODUCTION

I was prompted to write this article by recent events in the region of the Western Balkans that received much public attention. A Minister in the Government of the Republic of Montenegro had to resign his post due to a public speech in which he questioned the official interpretation of the events surrounding the crimes committed in the region of Srebrenica (Kajosevic 2021). A few months later, the adoption of the amendments to the Criminal Code of Bosnia and Herzegovina (BH),[1] which criminalized the negation of judicially proven cases of atrocities that occurred during the civil war in this country if they are capable of inciting to hatred or violence, provoked reactions not only in BH but also in other neighboring countries that were directly or indirectly involved in the civil war.

The first described case is one of political responsibility – the other of criminal. Despite the difference, the underlying logic behind both events was the need of the state in question to react to expressions that contradict official versions of history. A social need was recognized to suppress one's freedom to express its own beliefs. Both states in question are nominally democratic, guaranteeing their citizens' freedom of expression, among other numerous human rights and freedoms. Both cases involve several inter-related concepts which deserve a short explanation before I delve into the main arguments of the article, such as memorial law, negationism, historical denialism, hate speech, and freedom of expression.

1.1. Memorial Laws – Keepers of Official History

The states from the examples above are just two among many that have instituted some form of laws limiting the freedom of expression to preserve the version of historical truth that is found to best suit the values of democracy and protection of human rights (see parts 1.2. and 2.3. for a brief comparative overview of state practice). This practice is in doctrine associated with the term *Memorial Law*. Memorial law refers to an intervention of a legislator in the domain of historical memory, either through declaring a certain interpretation of events as official history (Frazer 2011, 29), or through prohibiting certain negationist actions towards official history. This second form of memorial law often prohibits negationism of certain crimes from the past, especially so-called core international crimes, such as genocide,

[1] High Representative Decision Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina* 46/21.

war crimes, and crimes against humanity. The term "*official history*" will be used in this article to refer to three types of historical interpretation: 1) That which is declared as truthful by a law, parliamentary resolution, or other act of political power; 2) The predominant interpretation shared by scholars and other influential members of a society in a particular historical moment; 3) The interpretation of events reached during criminal trials or other similar proceedings (e.g. reconciliation or fact-finding commissions). The term "negationism", on the other hand, will be used to describe expressions (words, actions, symbols, gests, etc) that deny the official version of events, offer alternative versions, or in another manner conflict with the official interpretation of facts concerning crimes of genocide. This term was coined by French historian Henry Rousso to describe politically-motivated denial of the Holocaust (Rousso 1987). The same author made a clear difference between negationism and historical revisionism. The second term, in his view, describes the legitimate practice of new historical interpretations made in the light of newly accessible information acquired by adequate research methods (Rousso 1987, 35). However, as will be seen later in the article, it is not easy to differentiate between the two once a memorial law establishes the official version of history.

1.2. Negationism – Between Hate Speech and Freedom of Expression

The freedom of expression is intrinsically linked to the democratic character of society since democracy presupposes the ability of an individual citizen to express their own beliefs and arguments in the "marketplace of ideas" (Mill 1863)[2], otherwise, democracy would be unable to function properly. On the other hand, none of the guaranteed individual rights and liberties in a democracy are absolute. Limitations to individual rights are believed to be legitimate since they are imposed to protect the foundations of the democratic order itself and at the same time to enable the enjoyment of rights for other members of society.

One of the well-known examples of limitations to the freedom of expression is the ban on "hate speech", or "pejorative or discriminatory language with reference to a person or a group on the basis of who they are" (UN 2019; Krstić 2008, 7–20; Krstić 2020a, 7–10; Krstić 2020b, 318; Munivrana-Vajda, Šurina-Marton 2016, 435–467). Hate speech is regarded as contrary to the

[2] See also the practice of the US Supreme Court, *Abrams v. United States*, 250 U.S. 616 (1919).

rules of democratic debate and a threat to the rights of others since it can lead to atrocities against the targeted group (Rosenberg 2012). Stereotyping, insensitive remarks, non-inclusive language, are just some examples of hate speech that might present a risk to people targeted by it. As history has shown, prolonged and massive usage of such expressive techniques has indeed led to atrocities committed, preparing the atmosphere conducive to acts of violence (UN 2014). Once the atrocities are committed, however, can denial of these atrocities also lead to another round of atrocities? Authors originating from the regions affected by historical atrocities often believe this might be the case. In this context they usually cite Stanton (Muftić 2018, 2), for whom the denial of atrocities such as genocide is just a last stage of the process. However, Stanton explicitly states that this denial is a part of the effort of the perpetrators themselves to cover up the evidence and evade prosecution (Genocide Watch 2021). If the denier is just an ordinary person who individually had nothing to do with the atrocities (except perhaps being just a part of the same social group as the perpetrator), their freedom of expression would surely have to be guaranteed?

The answer to this question currently depends on the state in which the supposed denier lives. Fronza (2018, 180) notes that 21 out of 27 EU member states recognize in their legislation the crime of denial in certain circumstances, either as a separate criminal offense, or an aggravating circumstance. Out of these 21 states, four of them criminalize only Holocaust denialism, while the other 17 include various other core international crimes – genocide, war crimes, crimes against humanity (for a detailed analysis see Fronza 2018, 180–188). There are also examples other than in Europe, the most prominent being Rwanda.

Due to its historical experience with the genocide against the Tutsi, committed as part of the inter-ethnic civil war, which was prosecuted before an *ad hoc* international tribunal that categorized the massacres against the Tutsi as genocide, Rwanda has inserted in its Constitution the provision on the suppression of genocidal ideologies and adopted laws that criminalize genocide condonation, minimization or denial (Jansen 2014, 191–213). A person who states that the genocide never happened, or that the other side committed genocide as well, or otherwise disputes the established facts can be sentenced to up to seven years in prison.[3] On the other hand, the Rwandan experience shows how the ban on genocide denial might be abused by the government to suppress political opposition. According to some

[3] Rwanda, Law No. 59/2018 of 22/8/2018 on the crime of genocide ideology and related crimes § 2, Art. 5.

critics, the president of Rwanda, a member of the Tutsi people, used this law as a convenient vehicle to suppress the voices of dissent from the Hutu opposition, whose members were convicted of genocide by the International Criminal Tribunal for Rwanda (Tsesis, 2020, 117).

Bearing in mind the examples from the beginning, it can be argued that the historical experience of Bosnia and Herzegovina, or the Balkan societies at large, makes it more urgent to constrain the freedom of expression through memorial laws, as some Bosniak authors claim. (Smailagić 2020; Muftić 2018; Memišević 2015; Omerović, Hrustić 2020). I would not like to open a debate of whether the three constitutive ethnic communities in BH have reached a common historical interpretation of their recent past, and whether this interpretation corresponds to the historical facts established by the International Criminal Tribunal for Yugoslavia (ICTY). For the present purpose, it would suffice to say that a comparative glance at the laws in force in the former Yugoslav member states and territories does not prove that they share the need to protect the ICTY's judicial truth: Kosovo and Macedonia do not criminalize negationism at all, Serbia does not criminalize negationism related to the ICTY judgments,[4] and Croatia[5] and Slovenia[6] do not specifically mention the ICTY judgments. Only BH and Montenegro,[7] had the need to protect the ICTY legacy from negation through criminalization.

1.3. Article Structure

As one of the leading authorities in the field of studies of memorial laws states: "Curiously, most analyses of memory laws have been written by political scientists, sociologists, and historians rather than lawyers" (Belavusau, Gliszczyńska-Grabias 2017, 3). This article aims to provide a purely legal analysis of the phenomenon, and more precisely – an international legal one. The purpose of the article is to prove two inter-related hypotheses. The first one is that the prohibition of negationism does not have a clear legal foundation in international law, unless it is accompanied by the intention

[4] Criminal Code of Serbia, *Službeni glasnik Republike Srbije* 85/2005, as amended, Art. 387.

[5] Criminal Code of Croatia, *Narodne novine* 125/11, as amended, Art. 325 (4).

[6] Criminal Code of Slovenia, *Uradni list RS* 55/2008, as amended, Art. 297.

[7] Criminal Code of Montenegro, *Službeni list RCG* 070/03, as amended, Art. 370 (2–4).

to incite hatred or violence, i.e. unless it is a form of hate speech. For this purpose, international and regional European standards on negationism are analyzed in the second part of the article. The second hypothesis is that in the complicated practice of the implementation of this provision the border between hate speech and legitimate historical denialism becomes blurred. As indicated in the comparative study, memorial laws are generally insufficiently clear about their scope – "whether the punishment should only be for undermining the fact that certain persons have committed the crime or for contesting the legal qualification of the crime, the number of victims or the participation of other persons" (Grzebyk 2020, 14).

This fact might lead to excessive encroachment upon the freedom of expression, as an internationally guaranteed human right, in the implementation of memorial laws before domestic authorities. Therefore, the third part of the article gives an analysis of the practice of the European Court of Human Rights in cases involving negationism of core international crimes. This practice must serve as a referential framework for the application of memorial laws in practice, and for general public debate, to prevent the improper breaches of a person's right to freely express their vision of the crimes haunting our pasts, even if this vision involves some form of negation of those crimes.

2. PROHIBITION OF NEGATIONISM IN INTERNATIONAL LAW

International law contains no norms that expressly ban negationism in any form. Limitations of the freedom of expression are at the same time limitations of the ability to contest official interpretations of historical crimes. These limitations are enumerated in various international legal sources that contain freedom of expression as a basic human right (Gordon 2017, 62). In essence, they require a legally established, legitimate, and proportionate limit to a particular expression, which inevitably requires a highly contextual-based analysis of the conditions prevalent in the society that might expose its vulnerability to negationist acts.

2.1. General International Law

Thus, for example, Article 19 of the Universal Declaration of Human Rights states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless

of frontiers."[8] According to this definition, the right to freedom of expression contains an active and a passive component. Any legal constraint of this right prevents someone not only from expressing himself but also enjoying the right to receive the expressions of other persons. The Declaration creates the legal framework for a free flow of information in both directions, as a precondition for a functioning democracy. Thus, any legal ban on denialist statements limits the right of a person not only to emit a statement but also to receive such statements from other denialists. The Declaration contains the general limits to the freedom of expression which are inspired by the idea that every right comes with a duty attached to it: "Everyone has duties to the community in which alone the free and full development of his personality is possible" (Art. 29 [1]). These limits must be determined by law and are motivated by the need to protect the foundations of a functioning democratic society: the rights and freedoms of others, the just requirements of morality, public order, and general welfare (Art. 29 [2]). Finally, as the essential United Nations document, the Declaration states that the freedom of expression "may in no case be exercised contrary to the purposes and principles of the United Nations" (Art. 29 [3]). A denialist statement that may contribute to the destabilization of international peace and security is therefore outside the limits of protection of the Declaration.

The definition of the International Covenant on Civil and Political Rights[9] is in a similar vein, with an important addition. The denial that is formulated in a way that constitutes an incitement to its recipients to discriminate against the victims of a crime, or to be hostile or violent against them, is outside the Covenant's protection, and the Covenant requires its signatories to prohibit such an expression by law (Art. 20 [2]). The UN Human Rights Committee, which is responsible for individual communications on the alleged breaches of the ICCPR, dealt with the issue of the freedom of expression and criminal repression of historical denialism in the case of *Faurisson v. France*.[10] Faurisson and his historian colleague claimed that gas chambers in concentration camps under Nazi control during World War II were not used for the extermination of numerous victims, but rather that the gas chamber story is pure fiction. Their published works started to gain in popularity during the 1980s in France to such an extent that the state

[8] Universal Declaration of Human Rights, 1948, *https://www.un.org/en/about-us/universal-declaration-of-human-rights* (last visited 31 October, 2021).

[9] International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. *United Nations Treaty Series 1976*, Art. 19.

[10] UN Human Rights Committee, 2 January 1993, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

decided to react and suppress the wave of historical revisionism that the two have started. Under the pressure of a society of former camp prisoners, in 1990 the National Assembly adopted amendments to the Law on the Freedom of Press in France (the so-called *Gayssot* law, named of the member of parliament that submitted the motion),[11] which criminalized denial of the holocaust perpetrated against the Jews during World War II by Nazi Germany and its collaborators, as well as other mass atrocities defined by the Article 6 of the Statute of the International Military Tribunal in Nuremberg, or any other international or French court. Nevertheless, Faurisson proceeded to express his views and in an interview for a monthly magazine, shortly after the adoption of the law, he claimed again that concentration camps did not have gas chambers. He was tried and convicted on appeal before the French courts, and he promptly forwarded to the HRC a communication claiming his right of expression under the ICCPR was violated in this conviction.[12] HRC denied the protection for Faurisson, with the explanation that his statements were given with the aim of inciting antisemitism, however, it concluded *obiter dictum* that the ICCPR does not contain a general ban on the denial of international crimes, nor the facts upon which they were based, except if this denial is expressed with the intention to provoke hatred or violence.[13]

The International Convention on the Elimination of all Forms of Racial Discrimination gives more detailed instructions to its signatories on how to ban such expressions by suggesting that the state should criminalize denial of genocide and other crimes if such denial aims to incite the recipients to violence or discrimination against the members of a victimized group.[14] The Convention, notwithstanding its titular protected group, is not limited to victimized groups based on race only, as is visible from the definition of Article 4(a), which also mentions color and ethnic origin as the basis of incitement to discrimination or violence. In the case of the *Jewish community of Oslo et al. v. Norway,* the Committee found a violation of Article 4 in an antisemitic speech given during a march in commemoration of the Nazi leader Rudolf Hess, since the speaker's comments contained ideas of racial

[11] Loi n° 90–615 du 13 juillet 1990 tendant à réprimer tout acteraciste, antisémiteou xenophobe, JORF No. 0162 of 14 July 1990, p. 8333.

[12] UN Human Rights Committee, 2 January 1993, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

[13] *Ibid*.

[14] International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by UN General Assembly resolution 2106 (XX) of 21 December 1965, Art. 4(a), *https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx* (last visited 31 October, 2021).

superiority and hatred, making the speech "exceptionally offensive" and not protected by the right to freedom of expression.[15] There have been so far no cases dealing with atrocities other than the Holocaust.

The UN General Assembly and the Special Rapporteur for contemporary forms of racism, racial discrimination, xenophobia, and similar modes of intolerance have condemned in the first place the denial of the Holocaust, but also other types of historical denialism, omitting to clarify if criminal law is the adequate tool to deal with these issues (Parisi 2020, 44–45).

Thus, this brief overview of relevant general international legal sources shows that simple denial of historical facts, or unqualified negationism, does not represent a breach of international law, nor does the international law require states to criminalize this act in their legal systems. The only requirement under international law for states to criminalize a certain form of qualified negationism, which is committed with the special intention to provoke hatred or discrimination towards a certain part of the population.

2.2. A Special Historical Responsibility of European Legal Systems?

Regardless of the situation in general international law, there might be some support to the argument that European history requires special attention to negationist speech and that regional European standards should be stricter in this regard, in particular because of the Holocaust heritage. However, in Africa, another world region that has experienced terrible crimes in its history, which might be easily interpreted as genocide (and indeed one such event in Rwanda *was* declared genocide by an international criminal tribunal), the African Charter on Humans and People's Rights[16] has a simple provision that everyone has the right to express an opinion, without any limitations (Kurtsikidze 2017, 18).

Nevertheless, in 2019 the European Parliament adopted a resolution on the importance of European remembrance for the future of Europe, calling the distortion of historical facts and the concealment of crimes an integral part of the "information war" (EP 2019). The resolution recognized that the falsification of history is a threat to European unity and democratic values and stressed the importance of preserving the memory of "horrific totalitarian

[15] CERD, *The Jewish community of Oslo et al. v. Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005).

[16] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

crimes against humanity and systemic gross human rights violations" as a condition for reconciliation (EP 2019). Thus, the EU Parliament called on the Member States to "condemn and counteract all forms of Holocaust denial, including the trivialization and minimization of the crimes perpetrated by the Nazis and their collaborators, and to prevent trivialization in political and media discourse" (EP 2019; see also Grzebyk 2020, 13).

However, if we look at this issue from a purely legal stance, it seems there is not much difference between the general international legal framework and European standards. The only regional legal instrument that provides for the punishment of unqualified negationism is the Council of Europe's 2003 Additional Protocol to the Convention on Cybercrime,[17] which obliges state parties to prohibit, as criminal offenses under domestic law, acts that deny, grossly minimize, approve or justify "acts constituting genocide or crimes against humanity, as defined by international law and recognized as such by final and binding decisions" of the Nuremberg Tribunal or "any other international court established by relevant international instruments and whose jurisdiction is recognized by that party" (Art. 6). However, this Protocol is restricted to acts performed online or, as stated in Article 6, acts of distributing the punishable material or otherwise making it available to the public *through a computer system*. Furthermore, under the provisions of the Protocol, states are allowed to either not implement the said provision or part thereof or limit its application to cases where the conduct is carried out with the intention to incite hatred, discrimination, or violence for reasons of race, color, origin, nationality, ethnicity or religion (Art. 6, para. 2).

2.3. European Union Law – A Tale of Many Interpretations

On the European Union level, the need to regulate the topic of negationism of certain international crimes was addressed through its secondary law. In 2008 the EU Council adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[18] The Decision requires member states to ensure that their legislations recognize as an offense punishable by law the act of "publicly condoning,

[17] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28. 1. 2003, *European Treaty Series – No. 189*.

[18] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6. 12. 2008, p. 55–58.

denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes," as defined in the Statute of the International Criminal Court or the Charter of the International Military Tribunal in Nuremberg, if this act is "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" (Art. 1, para. 1 (c and d)). Member states are left with options to choose whether they want to additionally qualify the offense so as to be punishable only if it is "carried out in a manner likely to disturb public order," or "is threatening, abusive or insulting" (Art. 1 para. 2), or whether it is "established by a final decision of a national court of the Member State and/or an international court, or by a final decision of an international court only" (Art. 1, para. 4). This final qualifying element of the Decision serves as an official endorsement of judicially established facts as the supreme interpretation of historical events. Some authors have noted that there is a certain degree of hypocrisy in this provision, having in mind that such "Eurocentric" courts have never dealt with many devastating atrocities committed by the armed forces of member states in their former colonies, for example by the French military against the Algerians during the Algerian War of Independence or British concentration camps for the residents of the Boer Republics at the beginning of the 20th century. Such history is necessarily subjective and incomplete for any meaningful culture of remembrance in European society. In its essence, it is neocolonial (Parisi 2020, 48).

The first proposal of the Framework Decision published by the EU Commission back in 2001 criminalized only Holocaust denial.[19] Seven years of difficult negotiations on the Decision contents ensued, finally ending in a triumph of those member states that already had in their legislation the crime of negationism in various forms, as they were able to pressure other member states to accept their vision of the scope of the punishable act (see more in Parisi 2020, 48).

The Framework Decision requires member states to punish the negation of those core international crimes likely to cause a *consequence* – specifically hatred or violence. The denial by itself is not punishable, therefore, the same as in general international law. However, the Decision fails to closely define the terms "denial" or "gross trivialization". Thus, member states enjoy a wide margin of discretion to decide whether to punish, for example, a

[19] Council of the European Union, 26 March 2002, Proposal for a Council Framework Decision on combating racism and xenophobia, in *Official Journal of the European Communities*, COM (2001)/664, C 75 E/269.

statement that denies that a certain crime occurred at all, a statement that accepts that a crime occurred but offers a diminished number of victims than the official version, a statement that places the responsibility for a crime on a perpetrator other than the one established by a court decision, or a statement that offers a different legal qualification of the crime than the one established by a court decision. Another complicating factor for the delimitation of criminalized and free speech is the provision that states that the "Framework Decision shall not have the effect of requiring the Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular, freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability" (Art. 7, para. 2). One might wonder if this provision serves in essence as the legal loophole for a state to completely disregard the obligation to prohibit negationist speech, which might in part explain why some member states have failed to implement it so far.

As per the Commission's report from 2014, member states differ on various aspects of the implementation of the Decision. They either fail to implement all three acts of negation, all the core crimes that might be negated, or claim that the already existing Holocaust denial provisions can be interpreted to cover these crimes as well (EU 2014). Just five member states do not require incitement to hatred or violence as the element of the crime, but four member states require additional qualified elements not provided in the Decision (EU 2014). Some member states introduce the role of "judicial truth", requiring the act to negate crimes established by international or domestic courts to be punishable, the others do not give such importance to courts (EU 2014; for a detailed analysis see also Memišević 2015, 157–158).

The conclusion can be reached that the overwhelming majority of all these various legislative solutions require incitement to hatred or violence as a necessary constitutive element of the crime of negationism. This is a necessary precondition for the state reaction in all legal systems of the EU candidate states from the Balkans region that have implemented the Decision. As also a necessary element of general international legal prohibition of negationism, it deserves special attention, given to it in the next section.

2.4. Incitement to Hatred or Violence – A Necessary Ingredient

Whether the act of negation was capable of inciting hatred or violence would be most easily established through the intention and motives of the negator. The doctrine has identified several types of motives behind one's negationist act. In the first place are pure cases of hate speech, when the denier acts consciously and with the intention to provoke hatred against the targeted group. The second group of cases is those when a denier is a person seeking public attention, attempting to gain personal promotion through sensationalist alternative visions of official history. The third is the case of a fanatic, a person blindsided by ideology, who resists the reality through persistent belief in its alternative versions. Finally, there are simply people who believe in a version of the event that they have learned in school, people who did not have a chance to gain insight into versions of history accepted by law (Hochmann 2011, 281). The authors who support this point of view analyze negationism only as the "management of guilt" (Bieńczyk-Missala 2020, 20), i.e. more or less conscious and malicious activity that falsifies historical facts.

If the intention is not easily discernible, the analysis would have to take into account the objective circumstances surrounding the act. In the next section, I will delve into this issue more closely. However, for the moment, I would like to point out that the doctrine identifying motives behind the negationist act presupposes that the official version of history is correct. If there is no clear intention to mislead and spread fake news capable of incitement to hatred or violence, it is doubtful that a national law preventing people from receiving this information would be in accord with international human rights obligations. Article 10 of the ECHR contains a positive obligation on the part of the state to enable every citizen to receive information from other persons that would like to impart that information.[20] Thus, it is necessary to offer particularly strong reasons for any measure that restricts the access to information that a citizen needs to know.[21] On the other hand, a state has the positive obligation to enable conditions of public debate in which every person can without fear of reprisal express his ideas and opinions, without fear of reprisal, no matter if that opinion contradicts

[20] ECtHR, *Leander v. Sweden*, Appl. No. 9248/81, Judgment of 26 March 1987 at § 74. Similarly in: ECtHR, *Gaskin v. The United Kingdom*, Appl. No. 10454/83, Judgment of 07 July 1989, para. 52.

[21] ECtHR, *Węgrzynowski and Smolczewski v. Poland*, Appl. No. 33846/07, Judgment of 16 July 2013, para. 57.

the official state policy or influential social opinions.[22] Especially in cases where the debate concerns the history of a society, anyone's opinion should be tolerated and the debate must be conducted freely and rationally.[23]

It seems that both the limits of the intent to incite hatred or violence and the relationship between the "right to know" and the "right to negate" can be established only by a highly contextual analysis of every specific act of negation. At least for the states belonging to the Council of Europe, more precise guidelines for domestic authorities in their implementation of memorial laws can be inferred from the practice of the European Court of Human Rights (ECtHR). Even the EU Framework Decision indicates that its provisions will not interfere with the obligations of the Member States to respect the Council of Europe's Convention on Human Rights (ECHR) (Art. 7). This would mean that in practice the member states would not be allowed to restrict the freedom of expression through the margin of discretion offered by the Decision more than is allowed under the ECHR's legal framework, including its authoritative interpretation by the ECtHR's judgments.

3. EUROPEAN COURT OF HUMAN RIGHTS AS A REFERENTIAL FRAMEWORK

Convention for the Protection of Human Rights and Fundamental Freedoms provides for the freedom of expression, defined as the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers" (Art. 10, para. 1).[24] The exercise of this freedom is conditioned by the observance of certain legally prescribed limits that are necessary for the functioning of a democratic society. These limits are enumerated in the following paragraph of the same article: "national security, territorial integrity or public safety, for prevention of disorder or crime, for protection of health or morals, for protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining of the authority and impartiality of the judiciary" (Art. 10, para. 2). As summarized by Kaminski (2020, 69), this definition contains three basic elements that the state parties need to fulfill

[22] ECtHR, *Dink v. Turkey*, Appl. Nos 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, Judgment of 14 September 2010, para. 137.

[23] ECtHR, *Monnat v. Switzerland*, Appl. No. 73604/01, Judgment of October 2006.

[24] Convention for the Protection of Human Rights and Fundamental Freedoms, *https://www.echr.coe.int/documents/convention_eng.pdf* (last visited 31 October, 2021).

in order to legitimately restrict the freedom of expression: a legal base of the restriction in the form of law or judicial decision, available to citizens and precisely defined;[25] a legitimate aim of protection of any value enumerated in the Convention provision; and necessity of restriction for the purpose of preservation of the democratic character of a society. Kaminski also notes that in the majority of cases before the ECtHR the act of state parties that restricted the freedom of expression failed to fulfill the third element – the necessity of the preservation of the democratic society (Kaminski 2020, 69).

3.1. What is Historical Truth?

A general overview on the practice of the ECtHR and its predecessor, the Commission for Human Rights, leads to the conclusion that the freedom of expression has always been a highly valued commodity by the judges, although the level of protection awarded to a particular expression varied based on its character (Mężykowska 2020, 102–103). The Court expressly concluded that the purposeful spreading of lies and misinformation does not fall under the guarantee of the freedom of expression.[26] Only misinformation expressed in good faith can enjoy the protection of Article 10 ECHR.[27] On the other hand, The Court generally considers historical research as something which should not be prohibited by law, even if it denies the existence of historical crimes that form a part of the identity of the victimized group.[28]

The concept of "public interest" plays a very important role in connecting these dots, since the Court believes that the discussion on matters political or generally in the public interest is a necessary precondition for the welfare of a democratic society.[29] In the case of *Handyside v. United Kingdom*, the Court concluded that such discussion does not exclude expressions that might shock, insult or disturb state organs or certain social groups.[30] Yet,

[25] ECtHR, *Sunday Times v. United Kingdom* (No. 1), Appl. No. 6538/74, Judgment of 26 April 1979, para. 49.

[26] ECtHR, *Nilsen and Johnsen v. Norway*, Appl No. 23118/93, Judgment of 25 November 1999, para. 49.

[27] ECtHR, *Niskasaari and Otavamedia Oy v. Finland*, Appl No. 32297/10, Judgment of 23 June 2015, para. 58.

[28] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015, paras. 64–65

[29] ECtHR, *Otto-Preminger-Institut v. Austria*, Appl. No. 13470/87, Judgment of 20 September 1994, para. 49.

[30] ECtHR, *Handyside v. United Kingdom*, Appl. No. 5493/72, Judgment of 7 December 1976, para. 49.

this would depend on the specific historical context of the society, its social and cultural reality, and the manner in which the public opinion perceives a given topic.[31]

The Court regards certain historical events that influenced the destiny of a number of peoples, as well as historical persons who took part in them and bear responsibility for the way the events played out, as a special object of public interest which must be subjected to objective historical critique.[32] Therefore, the Court prohibits states from interfering in historical discussions, even if they involve topics such as war crimes, crimes against humanity, and genocide, and especially prohibits any state repression against participants in those discussions.[33] The Court finds the state's intervention necessary only in cases when the discussion could lead to justification of committed crimes, as it judged in a case concerning the Katyn massacre.[34] However, if the negation of the crime is expressed through a work of art, such as a novel, there is no need for state repression because it is a work of fiction and not of historical fact.[35]

But what does the ECtHR consider historical fact or historical truth? The Court expressly stated that there is no "sole historical truth."[36] The Court makes a difference between historical truth and historical interpretation, with only the former being protected by the Convention,[37] but memorial laws tend to represent official historical interpretation as the only possible truth, so this difference is not very helpful. In a way, the judicially ascertained historical truth has a higher value for the court than historically researched truth, which is apparent from the comparison between the Holocaust and the genocide against Armenians, where the Court made a difference between the two since the first was established by an international criminal tribunal

31 ECtHR, *Petkevičiūtė v. Lithuania*, Appl. No. 57676/11, Judgment of 27 February 2018, para. 21.

32 ECtHR, *Dzugashvili v. Russia*, Appl. No. 41123/10, Judgment of 9 December 2014, para. 32.

33 ECtHR, *Dink v. Turkey*, Appl. No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of 14 September 2010; compare with ECtHR, *Fatullayev v. Azerbeijan*, Appl. No. 40984/07, Judgment of 22 April 2010.

34 ECtHR, *Janowiec v. Russia*, Appl. Nos. 55508/07 and 29520/09, Judgment of 23 October 2013, para. 187.

35 ECtHR, *Orban and others v. France*, Appl. No. 20985/05, Judgment of 15 January 2009, para. 46 and 47.

36 ECtHR, *Monnat v. Switzerland*, Appl. no. 73604/01, Judgment of 21 September 2006, para. 68.

37 ECtHR, *Lehideux and Isorni v. France*, Appl. No. 55/1997/839/1045, Judgment of 23 September 1998, para. 47.

while the other was not.[38] In the absence of judicial truth, however, the Court would regard as truth only those historical facts that are unanimously accepted in historical doctrine. Some other important conclusions can be deduced from this paragraph. However, in some specific cases, such as the Holocaust, the Court believes that the combination of abundant historical research and judgments of international courts is enough proof to make a negationist's intent visibly malicious when they try to deny the facts of the killing of Jews, or the legal qualification that these killings were given in the Nuremberg trials.

The Holocaust is the only historical truth that the Court finds to be sufficiently proven to prevent historical or legal research from disputing it. As for other historical crimes, some authors who researched the attitudes of the Court towards particular historical events conclude that if there are disagreements between the Council of Europe members over the interpretation of some historical, event from their common pasts, the Court will most probably refrain from accepting as legitimate the state-imposed restrictions over the denial of such events (Lobba 2017, 126). At the same time, the Court raises the bar of expectation from the states to distance themselves from the Nazi regimes that were active on their territories in the past, and therefore encourages the restrictions of the freedom of speech for those persons that negate, justify or minimize Nazi crimes (Lobba 2017, 126).

3.2. The Special Case of the Holocaust and the "Abuse of Rights Clause"

To conclude the previous section, there can be no doubt that the public discussion of major historical events is in the public interest and should be awarded a high level of protection guaranteed by the ECHR. However, if during the course of historical discussions, individuals start to celebrate historical personalities and regimes, or their acts, which by their nature were undemocratic, discriminatory towards certain social groups, or in the worst case, constituted worst international crimes, such as genocide, the Court tends to approve some form of state repression against them. To decide whether the limitations of the freedom of expression were needed in every single case, the Court puts these expressions through a special normative test that will be discussed in this section.

[38] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015.

This normative has test evolved through time, but one constant element of the test was the use of Article 17 ECHR as the interpretative supporting tool. Article 17 states:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

In essence, Article 17 is the "abuse of rights" clause. The origins of the ECHR, deeply embedded in the anti-fascist sentiments after the end of the Second World War, influenced the way of thinking about the dangers to democracy posed by the abuse of its tenets. One must not forget that the Nazi party came to power in Germany through a democratically won election, continuing afterward with the accommodation of democratic institutions and procedures to its ideological needs that were inherently undemocratic, even anti-democratic (Haldemann 2005, 166).

Article 17, thus, in the practice of the ECtHR, firstly served as an indicator of the presence of the need for the democratic state to restrict the freedom of speech. In the first such cases before the Commission for Human Rights, only expressions containing serious racial discrimination were considered the abuse of rights from Article 17.[39] Later on, the abuse of rights clause enveloped anti-semitic denialism as well.[40] The Court accepted the jurisdiction and admissibility of such complaints, proceeded on to the proceedings *in meritum*, and used Article 17 as the interpretative clause of the contents of the freedom of expression from Article 10.[41]

In the cases of *Witzsch v. Germany*[42] and *Schimanek v. Austria*,[43] it is visible that the Court carefully analyses the content of the expressions prohibited by the democratic state to conclude whether there really was a need for its protection from the abuse, especially concerning their capability to incite hatred or violence. Thus, the acts of denial, minimization, and even approval of the Holocaust, committed by the citizens of these states by sending letters

[39] EcommHR, *Glimmerveen and Hagenbeek v. the Netherlands,* Appl. No. 8348/78 & 8406/78, Decision of 11 October 1979.

[40] EcommHR, *Lowes v. UK*, Appl. No. 13214/87, Decision of 9 December 1988.

[41] ECtHR, *Lehideux and Isorni v. France*, Appl. No. 24662/94, Judgment of 23 September 1998, para. 47.

[42] ECtHR, *Witzsch v. Germany,* Appl. No. 41448/98, Judgment of 20 April 1999.

[43] ECtHR, *Schimanek v. Austria,* Appl. No. 32307/96, Judgment of 1 February 2000.

to influential political figures claiming that the gas chambers are just a product of propaganda intended to smear the German nation's honor, are placed outside of the scope of the ECHR's protection.

The next phase in the Court's use of the abuse of rights clause became visible in the *Garaudy v. France* case,[44] where the Court changed the way it looks at Article 17, now no longer as a simple interpretative clause, but as a procedural tool. From then on, the Court started denying the admissibility of complaints claiming the breach of Article 10 rights if the case at hand involves negation of the Holocaust. Garaudy, as a citizen of France, thus is found to be outside the Convention's protection when he publicly asserted that the whole state of Israel is based on the "Holocaust myth", or the "Nuremberg myth". The Court did not perform any kind of material analysis of the content of Garaudy's claims, regarding the mere act of the Holocaust denial as the act capable of "destructing rights and freedoms" contained in the ECHR. The doctrine labels this approach of the Court as the "procedural guillotine" (Cohen-Jonatan 2001, 680), and it is true that the Holocaust thus becomes a taboo topic of the democratic society, the holy cow that is out of reach of any discussion, and any negationist expression concerning aspects of the Holocaust renders its author a threat to democracy. The Council of Europe definitively endorsed such an approach of the Court when it claimed that any speech that sheds doubt on definitive historical facts, such as the Holocaust, automatically represents an abuse of rights from Article 17 ECHR (Wojcik 2019, 34).

The Court justifies the special status of the Holocaust because its social consequences are not identical to those of other crimes.[45] The Court concludes from its practice that cases of Holocaust negationism are always inspired by the Nazi ideology, antisemitism, or xenophobia, which makes them inseparable from an attack on the Jewish community. In addition, the Court believes that the Holocaust is "the common European experience", meaning that in the past the majority of European states experienced regimes that collaborated with the Nazis on their territories in the pursuit of the Holocaust aims. Kahn (2011, 85–86) offers an especially powerful argument concerning this when he claims that the Holocaust has a genealogical connection with hate speech.

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[44] ECtHR, *Garaudy v. France*, Appl. No. 65831/01, Judgment of 24 June 2003.

[45] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015, para. 243.

Put into the context of the Western Balkans history, thus, the negation of some Holocaust-related crimes, such as the deportation of Jews by collaborators of Nazi Germany from the territory of the Kingdom of Yugoslavia to the concentration camp in Auschwitz, or their mass executions in gas vans (Byford 2010, 5–47), or stationary gas chambers and labor camps such as Topovske Šupe and Staro Sajmište in Belgrade, no matter how well-researched and no matter the lack of intention on the part of the author to incite hatred or violence against the Jews, would represent an abuse of rights expression by ECtHR standards and the negator would not enjoy its protection.

3.3. Negation of "Ordinary" Atrocities

The situation is rather more complicated when it comes to historical crimes other than the Holocaust, even those closely related to it. It seems only some general directions can be deduced from the Court's practice when it comes to material limitations of expressions negating "ordinary atrocities", however, any analysis is highly contextual.

Firstly, the form of expression plays a relevant role. In the *Lehideux and Isorni v. France* case,[46] the applicants were two editors that published a proclamation on behalf of some civil societies in France demanding the rehabilitation of Marshall Phillipe Pétain, a convicted French war criminal, and a Nazi collaborator during the occupation. The ECtHR found a breach of Article 10 since it claimed that the evaluation of the historical role of Marshall Pétain was still an object of discussion, regardless of his judicial conviction and the work of the majority of historians both in France and abroad. The reason for their conviction was based on the part about Pétain's true historical role that they failed to mention – his complicity in the process that led to the Holocaust. However, the Court interpreted the meaning of Article 10 to protect not only the contents of the expression but also its form, which means that if one intentionally overlooks a fact, it does not automatically mean one is abusing one's freedom of expression. Such an approach is immoral but not illegal.

[46] ECtHR, *Lehideux and Isorni v. France*, Appl. No. 24662/94, Judgement of 23 September 1998.

If compared to a prominent collaborationist politician from the period of Nazi occupation of Serbia, Milan Nedić, this would mean that public expressions of praise for his historical role, even if they would intentionally overlook his contribution to the previously mentioned deportations and executions of Jews, would not constitute an abuse of the Convention rights.

Secondly, the deeper an event is situated in the past, the less inclined the Court is to find negationist discussion about it abusive. In *Lehideux and Isorni v. France,* a mitigating circumstance for the applicant's behavior was found in the fact that they were discussing events that happened over 40 years ago. This fact meant there was no "pressing social need" for the state to repress the denial of Pétain's crimes, however atrocious they happened to be.[47] The same conclusion was reached in the *Monnat v. Switzerland* case.[48] This, "passage of time" argument might be used in connection with the legitimacy of the so-called "Incko's law" in Bosnia and Herzegovina, which was discussed in the introduction. The fact that it was adopted 25 years after the end of hostilities in this country, while the negationism of certain crimes committed during the civil war started immediately after they were disclosed, and never really stopped afterward, and despite that negationism never really inciting any social conflicts, makes it dubious if there really is a "pressing social need" for its adoption.

Thirdly, the Court is more likely to find the abuse of rights if the historical actors in question are still alive. This is clearly visible from the *Chauvy and Others v. France* case.[49] Furthermore, cases have started appearing before the Court where survivors of historical atrocities claim the breach of their right to private life (Article 8 ECHR) by the negationist acts.[50] Although this is a new and different problem in the legal treatment of negationism, it might play a role in future Court decisions regarding its limitations when it is targeting historical actors that are still alive and can enjoy their Convention guaranteed rights.

Fourthly, the negator's research method is relevant for the delimitation of legitimate historical revisionism and punishable negationism. As noted by Kaminski (2020, 82), when the discussion is of a historical nature and

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47 *Ibid*, paras. 57 and 67.

48 ECtHR, *Monnat v. Switzerland*, Appl. No. 73604/01, Judgment of 21 September 2006, para. 64

49 ECtHR, *Chauvy and Others v. France*, Appl. No. 64915/01, Judgment of 29 June 2004, para. 69.

50 ECtHR, *Aba Lewit v. Austria*, Appl. No. 4782/18, Judgment of 10 October 2019.

it fails to adequately use legitimate historical sources, this would certainly be an indicator of bad faith on the part of the historian negating a given crime. Some objective ties between negator' beliefs and political activities might serve as an indication of racist or other discriminatory intent. The justification of the criminalization of negationism does not lie so much in the existence of the undisputable historical fact, but in the fact that negationism, although presented as impartial historical research, obviously represents an undemocratic ideology or anti-semitism.[51]

Fifthly, the number and frequency of expressions is relevant for the evaluation of the gravity of the case. The Court in *Perinçek* concluded that there were just three instances where the applicant publicly related his arguments.[52] Wojcik (2020, 108) is right when criticizing this approach as out of tune with a modern informational society, where one digital expression in the form of a post on a social network can reach millions of people easily and quickly through reposting. However, this conclusion is also highly contextual and it seems it depends on the audience that was primarily intended to receive the expression. In *Witzsch v. Germany* the negationist act consisted of a single private letter, sent to an influential politician and a researcher.[53] The social influence of the audience strengthens the capability of the expression to cause negative consequences for a targeted individual or a group.

Sixthly, the past of a certain society influences the limits of the freedom of expression allowed, which touches upon controversial events from that past. For example, The Court did not find any tensions in Swiss society between the Turks and Armenians, although sizable minorities of both nations lived in Switzerland at the time of the writings by a Swiss citizen that negated the genocide against Armenians.[54] In the Court's opinion, Switzerland did not have any connection to the events that occurred on the territory of contemporary Turkey during the First World War.

[51] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015, para. 243.

[52] *Ibid*, para. 244.

[53] ECtHR, *Witzsch v. Germany* Appl. No. 41448/98, Judgment of 20 April 1999.

[54] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015, para. 255.

3.4. The *Perinçek* Case Controversy

The seminal case for the purpose of delineating freedom of expression from the abuse of rights, regarding the negation of international crimes other than the Holocaust, is *Perinçek v. Switzerland*.[55] The first time the ECtHR tackled the issue of negation of a genocide that is not the Holocaust (Krstić 2020c, 114–116). The applicant was a journalist and a lawyer of Turkish ethnic origin, who publicly denied that the massacre committed by the Ottoman authorities during the First World War against Armenians was genocide.

The massacre against Armenians is rather well documented in historical sources. There is not much disagreement on the fact that during 1915 and 1916 the Ottoman government forcefully deported several hundred thousand ethnic Armenians, allegedly because of the needs of the war effort and their collaboration with the Russian Empire (Bilali 2013, 16–19). Traversing the country in harsh weather conditions, with inadequate access to food, water, and shelter, exposed to constant harassment, indiscriminate killings, rape, and looting by the Turkish troops, the number of displaced Armenians dwindled from approximately 2.5 million to 1.5 million people after the war ended. No judicial proceedings were ever instituted on the international plane for these events, however, around 30 countries qualify these events in their political declarations as genocide. In his published writings, Perinçek disputed precisely this qualification, claiming that the story about genocide was a product of international conspiration of imperialistic powers against the Turkish people, the same powers that were primarily responsible for the conflict between the Turks and the Armenians. He was tried and convicted under the Swiss Criminal Code, since Swiss courts concluded that the genocide against Armenians is a well-known fact, citing in support of this argument works of historians from various countries, in addition these political declarations.[56]

The Court, once it received Perinçek's complaint under Article 10, pointedly proceeded to the meritum, without using its Article 17 "guillotine", although the subject matter was alleged genocide. This prompted some authors to conclude that the Court created an unjustified "hierarchy of memories", with the Holocaust at the top of the pyramid (Wojcik 2020, 98) and other crimes of genocidal nature becoming less privileged (Lobba 2014, 65). I might

[55] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015.

[56] Tribunal fédéral (Switzerland), ATF 6B_398/2007, 12 December 2007, para. 4.2.

remark, on this matter, that it is in the nature of any legal act that creates official memory, be it a law or a court's judgment, to approach the history selectively, since its endorsement of a particular event, or the interpretation of such event, puts this event or its particular interpretation in a more privileged position in comparison with other events or other interpretations of the same event that have been left out of legal protection. Nevertheless, the Court firmly confirmed in the most recent case that "states that have experienced the Nazi horrors [...] [have] a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis."[57]

Anyway, the ECtHR now had to decide whether Perinçek's genocide denial conformed with its test on the limitations of the freedom of expression, or to put it another way, whether the Swiss court rightly concluded that its conviction of Perinçek was based on the law, had a legitimate aim and was necessary to protect Swiss democracy. The Court argued that the protection of the dignity of the Armenian victims, and the contemporary identity of Armenian people, for which the memory of the genocide is a constitutive element, would be a legitimate aim. However, the Court opined that Perinçek did not insult the dignity of the Armenian people since he had not negated the crimes that occurred against them, but merely gave another legal qualification of these crimes. His expression could not incite hatred against Armenians in such away. Additionally, the focus of his denialism was directed towards the foreign imperial powers, which in his view construed the genocide dogma, and not against the Armenian people. Paragraph 117 of the judgment deserves to be cited in full:

"In any event, it is even doubtful that there can be a "general consensus", particularly among academics, about events such as those in issue in the present case, given that historical research is by definition subject to controversy and dispute and does not really lend itself to definitive conclusions or the assertion of objective and absolute truths (see, to similar effect, the Spanish Constitutional Court's judgment No. 235/2007, referred to in paragraphs 38–40 above). In this connection, a clear distinction can be made between the present case and cases concerning denial of crimes relating to the Holocaust (see, for example, the case of Robert Faurisson v. France, determined by the UN Human Rights Committee on 8 November 1996, Communication No. 550/1993, doc. CCPR/C/58/D/550/1993 (1996)). Firstly, the applicants in those cases had not disputed the mere legal characterisation of a crime but had denied historical facts, sometimes very concrete ones, such as the existence of gas chambers. Secondly, their

[57] ECtHR, *Pastörs v. Germany*, Appl. No.: 55225/14, Judgment of 3 October 2019.

denial concerned crimes perpetrated by the Nazi regime that had resulted in convictions with a clear legal basis, namely Article 6, sub-paragraph (c), of the Charter of the (Nuremberg) International Military Tribunal, annexed to the London Agreement of 8 August 1945 (see paragraph 19 above). Thirdly, the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established."

Finally, the Court concluded that no existing international treaties obligated Switzerland to criminalize genocide denialism, and more generally, that such an obligation does not exist on the level of general customary international law (para. 266), which is a confirmation of our survey of general international law from part 2.

The importance of the decision in *Perinçek* cannot be overstated. If the Court stays true to its interpretation of the Convention in this case in future instances as well, this would imply that it would be very difficult to defend any law criminalizing negation of genocide other than the Holocaust as being in accordance with the ECHR.

4. CONCLUSIONS

Crime negationism is regulated indirectly at the international level, through legal instruments dealing with the freedom of expression. Of all the analyzed general international legal instruments, none prohibits any form of negationism *per se*, the only prohibited act is the negation capable of incitement to hatred or violence against an individual or a social group targeted by a negationist act. On the European level, it is obvious that the tragic historical experience of the Holocaust has prompted the European Union and its member states to directly address this matter. The differences in the regulation between various European states testify that every society has to come up with its own adequate legal solution. Some commonalities consist in specifying the requirement that the prohibited negationist act has the capacity to incite hatred or violence. The EU attempted to address these differences through its Framework Decision, however, some member states evaded implementing it fully, and those that opted to do so, inserted qualifications of incitement to hatred or violence, or even the existence of a court decision, international or national, as proof of the commission of the crime, with the idea to prevent mere denialism from becoming a criminal act. This analysis has proven the first hypothesis of this article – that negationism is prohibited in international law only as a form of hate speech.

This article's overview of cases involving negationism before the ECtHR shows that in practice it is very difficult to ascertain the hateful intent behind the negationist act, which might make the interference of memorial laws with the freedom of expression wider than intended. Therefore, the practice of the EctHR might serve as a general referential framework for their application. However, this jurisprudence is constantly evolving and depends on the context of the cases being adjudicated. Therefore, only partial conclusions about this referential framework can be reached so far.

The Holocaust, as a form of genocide that is inherently against democratic values, that is confirmed through abundant historical literature and decisions of an international court that enjoyed the wide support of the international community, deserves special protection, and any form of its denial is not protected by the freedom of expression, regardless of its potential to incite hatred or violence.

Negation of other historical genocides and atrocities generally cannot *per se* be considered as against the law, and various contextual elements have to be taken into consideration. Firstly, if the intention to incite hatred or violence towards a targeted individual or a group is found to exist it definitely makes a negationist act illegal. In case the intention is lacking or is difficult to ascertain subjectively, the string of objective contextual elements defines the limit of the freedom of expression in any particular case, as shown in section 3.3. of the article.

All these factors must be carefully taken into consideration to delimit freedom of expression from its abuse. As noted by Górski (2020, 57), the path that threads these limits is "slippery and narrow". However, international law has still not come up with better solutions to fill in the gaping void between the two opposite notions of total freedom of expression and total ban on any kind of atrocities negationism.

The *Perinçek* case confirms the restrictive approach of the Court when accepting limitations to the freedom of expression for crimes other than the Holocaust. It seems that the Court would not be willing to accept any historically disputable crime as a taboo topic, regardless of the existence of numerous material evidence, historical research, and political declarations that create its official history. It is yet to be seen, if and when one of the cases dealing with the negation of the crimes established by an international criminal court comes before the ECtHR, say for example a complaint by a citizen of Bosnia and Herzegovina against the application of newly amended criminal provisions of this state, if the judicial quality of truth would prove to be a more decisive factor for the ECtHR's analysis.

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LEGAL MEASURES ON VACCINATION AGAINST SMALLPOX IN THE PRINCIPALITY OF SERBIA IN THE 1830s–1840s

The paper addresses the legal measures regarding vaccination against smallpox in the Principality of Serbia in the 1830s–1840s. The main focus is on two normative acts – Rules for the inoculation of pox of 1839 and a Supplement to these Rules of 1842. Relying on archive material, the paper strives to show both the normative content of these acts (including a comparison with the Austrian regulations of 1836), as well as the circumstances in which they were passed and their application in practice. Particular attention is paid to the main obstacles to effective vaccination – distrust and fear of the procedure among the general population and insufficient available medical staff – and steps that were taken to overcome these difficulties.

Key words: *Vaccination against smallpox. – Principality of Serbia. – Mandatory vaccination. – Law and medicine.*

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1. INTRODUCTION

Smallpox was a serious medical threat in early 19th century Serbia, taking a large number of lives almost every year. The main form of prevention had long been classical inoculation with the smallpox virus, which was dangerous in its own right. Vaccination was slowly introduced in the 1820s and 1830s, but it was initially met with a lot of distrust by the majority of the population (Dimitrijević 2011, 127–128). In order to overcome that, the government issued a set of binding *Rules for the inoculation of pox* on 8 July 1839,[1] that was later supplemented on 7 May 1842,[2] prescribing a wide range of measures aimed at advancing the vaccination effort and – eventually – eradicating smallpox in the country. This paper will analyse the circumstances in which these regulations were passed, their normative contents and the effectiveness of their application in practice in the first years of their existence.

2. A VERY BRIEF OVERVIEW OF THE FIGHT AGAINST SMALLPOX

Smallpox (*variola vera*) was likely known, under different names, since Antiquity, but in its early stages it was likely milder than in the Modern era, and medieval medicine mostly considered it a childhood disease, albeit a nasty one. The first great smallpox epidemics that took large numbers of lives happened in Central and South America in the 16th century, when the virus brought by the conquistadors ravaged a population that had not developed any immunity. By the 18th century, the virus had become fully global, and catastrophic epidemics with high mortality rates occurred all around the world. Most inhabitants of Eurasia would contract it at some point in their lives. The case-fatality rate varied between 20 and 60 percent, but survivors, particularly in more severe cases, also risked permanent disfigurement and blindness. For a long time, the causes of smallpox were poorly understood, with a number of European physicians believing it to be

[1] Правила за каламлѣнѣ богиня, *Сборникъ законâ и уредбâ, и уредбены' указâ, изданы' у Княжеству Србскомъ, одъ времена обнародованогъ Устава земальскогъ (13. Фебр. 1839. до Апр. мес. 1840.)* I/1840, Београдъ: Кньигопечатня Княжества Србскогъ, 69–77. Dates are given according to the Julian calendar, which was in use in Serbia until 1919.

[2] Уредбеный додатакъ къ правилама за каламлѣнѣ богиня, *Сборникъ законâ и уредбâ, и уредбены' указâ, изданы' у Княжеству Србскомъ, одъ Априла 1840. год. до Конца Декембра 1844. г.* II/1845, Београдъ: Кньигопечатня Княжества Србскогъ, 184–186.

innate – a belief finally dispelled by the discovery of peoples in previously unknown areas of the world who had had no experience with it. As no cure existed, and preventing exposure and infection during an outbreak was often very difficult, particularly in urban settings, it was predominantly believed that it was better for infection to occur during childhood, since infection in adulthood usually led to more severe cases. For this reason, children were often exposed to mild cases of the pox, in hope that their own course of the disease would be equally mild and grant them immunity afterwards. Different special practices for this were developed primarily in Asia, such as insufflation (inhalation of smallpox dust) in China, or inoculation through insertion of smallpox matter into the skin, in a puncture or cut, in India and the Ottoman Empire, but also parts of Africa. These practices made their way to Europe and America in the early 18th century, stirring interest among an increasing number of scholars and leading to various experiments. Unfortunately, these forms of inoculation still led to a more or less regular course of the disease – usually milder than that spontaneously contracted, but still with the possibility of a lethal outcome – and sometimes other diseases were transmitted by the procedure itself. Due to these factors, both scholarly and political support for inoculation – and thus its spread – waxed and waned, occasionally bolstered by particularly violent outbreaks of the disease (Bennett 2020, 1–64; Riedel 2005, 21–23).

Inoculation of the smallpox virus was also practiced in Serbian lands under Ottoman rule; it is believed to have been taken over from the Turks and Greeks by self-taught folk physicians, frequently including women and priests (Lindenmayr 1876, 9–12; Jeremić 1935, 112–113; Stanojević 1953, 1027–1028; Mihailović 1951, 143–146).

A radically new method brought fame to Edward Jenner (1749–1823): inoculation against smallpox with cowpox (dubbed *variolae vaccinae* by Jenner), a disease that affected humans with far milder symptoms (usually a single efflorescence or just a few, fairly localised, without high fever, etc.), yet developing immunity to smallpox. Jenner was not the first to discover this (the fact was known to country folk in some areas, and a few doctors were aware of it), but he was the first to note the great potential, begin controlled trials, discover that a ripe cowpox pustule is necessary for immunisation to take place, and publish papers about it. While a few competitors managed to perform a larger quantity of trials and begin larger-scale inoculation sooner than Jenner did, and thus earned more money in the process, the fame of discovering the vaccine and saving countless lives rightfully belongs to him (Bennett 2020, 65–93). The downside that Jenner's vaccine shared with the

old form of inoculation was the possibility of transmission of other diseases, and so precautions against that had to be taken, as shall be seen in more detail below.[3]

3. A NOTE ON TERMINOLOGY

3.1. The Disease: Of Poxes Great and Small

The Latin name for smallpox, *variola*, dating back to 570 CE, was derived either from the Latin *varius* in the sense of "stained", or *varus*, meaning a mark, blemish on the skin. The English *pox* (or, originally, *pockes*) has a similar meaning, and *variola* was named smallpox to differentiate it from the great pox or syphilis (Riedel 2005, 21–22).

The Serbian term *богиња* (modern Serbian *богиње, boginje*) is an umbrella term encompassing several diseases that create visible markings on the skin. The pox that was "small" in English, was, on the contrary *velike* ("great") *boginje* in Serbian, but there were also *male* ("small") *boginje* (also *ситне богиња*, rarely *морбили*), which signified measles (morbilli), as well as *овчије* ("sheep's") *boginje* – chickenpox (varicella). The word *boginje* might seem to be derived from the root *bog*, meaning "god", and would thus literally mean "goddesses", but is most likely a misnomer derived from the German word *Pocken*, with *bog* accidentally mixed in along the way (Mihailović 1951, 143; Miklosich 1886, 416; Karadžić 1852, 473; Skok 1971, 182). While *boginje* is the dominant term in modern Serbian, during the period in question, the words *красте* (*kraste*, "scabs") and *осна* (*ospa*, "rash" – frequently in the diminutive plural *ospice*) were also widely used, with a number of more localised terms also employed.[4] As many sources use only the noun (*богиња*, *красте*), sometimes the exact disease cannot be distinguished with precision, but smallpox is more likely meant in most sources, as it was the most dangerous of these diseases.[5]

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[3] Subsequently, in the late 19th and early 20th century, Jenner's "arm-to-arm" type of vaccination will be replaced with vaccination by the lymph of calves infected with the vaccinia virus (Mihailović 1951, 143).

[4] Those are: *bonke, brke, brše, cvećke, kazamak, koze, kozice, kozjače, kraste, mrase, nepomenuše, osuci, patule, sipanice, šeše, štroka, stroka* (Jeremić 1935, 111; Mihailović 1951, 143).

[5] A circular letter from the Department of Public Health at the Ministry of Internal Affairs to all district administrations, mentioning a past epidemic of measles and ordering vaccination to prevent the onset of smallpox, claims specifically that otherwise even more lives could be lost, "all the more, as the great pox [*smallpox*]

The Serbian name for cowpox, *kravlje boginje* (*kraste*, etc.), means literally that (*krava* – "cow"), and its use as prevention led to the appearance of another name for smallpox – *prirodne boginje* ("natural pox"), obviously to signify the disease that humans naturally contracted, in order to differentiate it from the cowpox that was "unnaturally" caused, i.e. only artificially inserted for inoculation.

3.2. The Cure (or Rather, Prevention)

The Latin term *inoculatio* (or the less commonly used *insitio*) was originally used in horticulture, and meant grafting – the insertion of matter from one plant into a cut in the trunk of another. The similarity of this procedure to the insertion of pox matter under the skin justified the name. In English, both the domestic term *grafting* and the one of Latin origin, *inoculation*, were used. Another term for the procedure when patients were inoculated with smallpox was *variolation*, coming from the name of the disease itself (Bennett 2020, 27–28).

The new term for the new immunising procedure, inoculation with cowpox – *vaccination* – comes from Jenner's Latin name for cowpox, *variolae vaccinae* (*vacca* – "cow"); it was coined by the surgeon Richard Dunning in 1800, and while some criticised the term, Jenner himself started using it in the following year (Bennett 2020, 86–87).[6]

The Serbian terminology of the analysed period mostly uses two terms: *каламљењъ* (*kalamljenje*, modern Serbian *kalemljenje*), and *пелцованъ* (*pelcovanje*), both signifying grafting.[7] (In this article, we shall mostly translate them as "inoculation", as more frequently used in English today.) While sometimes the texts specify *which* form of pox was grafted, most frequently they contain no elaboration, or speak of grafting *against* smallpox, which does not help determine if smallpox or cowpox was used. Thus, in some cases when inoculation is mentioned prior to the Rules, we cannot

is in itself a more severe and worse disease than the small one [measles]". ("*тимъ више, што су велике богинъ и по себы тежа и гора болесть одъ оны ситны*") A similar phrasing can be found in a letter to the Army chief of staff (AS: MUD-S, III/144, 379, 399/1841).

6 Some authors, such as Riedel (2005, 24), incorrectly claim that Jenner himself coined the term *vaccination*.

7 Again, variations on the theme of grafting also existed: *cepljenje, navrtanje, ucepanje, urezivanje* (Mihailović 1951, 143).

be certain if variolation or vaccination is meant, though the former is more likely, as the old form of inoculation was widespread.[8] In the period after the passing of the Rules, as variolation was outlawed, its uses are explicitly mentioned as grafting of the "natural" or "human" pox, and those where nothing is specified can be reliably assumed to mean vaccination.

The word *vakcinacija/vakcinisanje*, which has since become the most common term in Serbian for the procedure (*pelcovanje* having become rare, and *kalemljenje* quite obsolete in this context), is only very rarely encountered in documents of the period. For example, a letter from the Ministry to the Government of the City of Belgrade (*Upraviteljstvo varoši Beogradske*) in 1841 does mention the word in three instances,[9] but the term *kalemljenje* is used in all other places in the document. Vuk Karadžić's famous Dictionary does not contain any words related to *vakcina*, but it does contain *kalam, kalamiti, kalamljenje* (Karadžić 1852, 52, 250). Thus, when "vaccination" is used in this text, it should only be understood as a translation (used to avoid indefinite repetition of "inoculation"), and not as an indicator that a word with the same root was used in the Serbian sources there mentioned.

4. SMALLPOX IN EARLY 19TH-CENTURY SERBIA

4.1. The Spread of the Disease and Variolation

Smallpox was fairly frequent in 18th and 19th century Serbia. It had an endemoepidemic pattern. Outbreaks occurred practically every year, causing many losses and leaving many survivors fully or partially blind, and many more disfigured by pox-marks. The occurrence seems to have been intensified in the 1830s, which correlates to similar developments in neighbouring countries (see Memmer 2016, 17). However, the forces meant to battle the disease were unfairly outnumbered during this period, as there were only a few formally educated physicians in the entire country, most of them foreigners (Mihailović 1951, 141; Stanojević 1953, 1039–1040; Katić 1967, 338–339; Đorđević 1983, 150–158; Matović, Spasić 2013).

[8] It is unfortunate, but worth noting that even some competent historians, such as Radoš Ljušić (2004, 441), talk in brief overviews of "kalemljenje" as if it were a single procedure, although mentioning examples that clearly relate to two completely different procedures – variolation and vaccination.

[9] "*изъ ланскогъ списка вакциниране дъце дознало*", "*средствомъ благотворнимъ вакцинираног одъ поморне болести велики краста или богиня сачуваю*", "*средствомъ вакцине*" AS: MUD-S, III-144, 387/1841.

Multiple outbreaks of the pox are documented in the surviving source material, mostly in winter, when the population was most susceptible. Many of these reports originate from the military, which can partially be attributed to the state of the archival material, but it should be noted that the army was in itself a suitable terrain for the transmission of infectious diseases; also, in the 1830s it still performed a number of functions that were later transferred to the jurisdiction of the police and local administration, and thus military reports included information about outbreaks of disease in civilian communities as well.[10] The known outbreaks varied in their strength and scope, and the reports in the level of detail, but mostly the officers informed their superiors of the location of the outbreak and the overall state of the affected, and the number of deceased, usually only classified by sex, or with a short designation if they were mostly children or adults, young or elderly people, though one unusual report informs of the deaths of 13 people of both sexes, of which six persons were taxpayers.[11]

It was a well-known fact that smallpox could leave even its survivors with tragic consequences. As an illustrative (albeit extreme) case, we could take that of one Stojana Vulićev from the village of Ćovdin in the Mlava County,[12] who was left blind as a result of smallpox in 1835, and was subsequently strangled by her husband Radovan in February of 1836, because of her blindness. Radovan confessed his crime to the county captain and awaited trial. The case is documented only in the report of Colonel Petar Tucaković, Commander of the Central Military Command (*Коммандант Средоточне Военне Команде*), to Prince Miloš on 20 February 1836 (AS: KK, XIV, 1710/1836), and its aftermath is not known.

How did the population and the state cope with smallpox prior to the introduction of vaccination? Amateur specialists in variolation, known as *beležari*, *bilježari* ("markers") or *pelcari* ("grafters") appear in the sources, and it seems they were called upon relatively frequently. They usually took lymph from patients who were suffering from a mild form of smallpox – nevertheless taking precautions, with minimal contact. For example, Mladen Žujović recounts in his memoirs how his aunt, who had been a grafter in

[10] See e.g. AS: KK, XIV, 663/1835; XV, 1652/1835; X, 212/1836; XIV, 1760, 2008/1837; X, 835, 838, 886/1838; XIV, 2069, 2077, 2091, 2191/1838; XXXVII, 1605, 1664/1837.

[11] "*и зато исто време умрло є одъ велики богиня 13. душа одъ обоєгъ пола, гди рачуни се 6. глава, коє су данакъ плаћале.*" Report by Colonel Stefan Stojanović to Prince Miloš of 9 December 1837 (AS: KK, XIX, 584/1837).

[12] The territory of Serbia was divided into three levels of administrative units: the *okrug, srez* and *opština*, which will be translated as district, county and municipality respectively.

the 1820s, did not let the patients enter her house, but merely pulled their hand through the window from the outside. The inoculation was performed with a silver needle, as silver was not prone to rust and possessed certain antiseptic properties, and thus could be easily kept in a hygienic condition (Žujović 1902, 5, fn. 1; Mihailović 1951, 143–146).

Still, the procedure was performed only in need, and not in any systematic way, as general prevention. A local community would summon a grafter (or make use of a local one, if available) to protect those who had not yet developed immunity (mostly children) from a nearby outbreak of the pox; if there was no threat in the vicinity, nobody went out of their way to secure inoculation.

For example, in a report of 7 January 1838, Major Pavle Binićanin informed General Jovan Obrenović that 11 people (six men and five women) had died of smallpox in the village of Vranići, after which the villagers had summoned a grafter (*нелцарь*), Bojo Knežević from the village of Goračići, also in the Čačak District, who began performing inoculations of the healthy villagers; Binićanin remarks that those inoculated bear the disease much more lightly (AS: KK, XIV, 2077/1838). Here, the villagers or local authorities seem to have arranged for a grafter on their own. In other cases, we see petitions to superiors: for example, in the letter of Captain Petronije Andrejević to General Jovan Obrenović of 16 March 1838, Andrejević reports an outbreak of smallpox in many villages of his (Crna Reka) county, and asks the General if he could send Đorđe the grafter from Karanovac, underlining that he would have a lot of work and make a tidy profit (*Ibid.*, 2191/1838).

Other reports, e.g. the letter from Lazar Tošić, dated 14 February 1838, describing his own inoculation in Karanovac (perhaps by the same Đorđe?), show the usual circumstances and consequences of such a procedure: it was usually undertaken only when an immediate risk of contagion existed (Tošić reports that three people in his house were dangerously ill), and the inoculated person also expected to go through the full (albeit usually lighter) course of the disease and had to remain in isolation to avoid infecting others (AS: KK, XIV, 2092/1838).

For those already affected by the pox, isolating them from those who were not immune was also a regular measure, particularly in organised environments such as the army. For example, in March 1835, 30 soldiers were reported to be ill with *boginje* at the barracks in Kragujevac (17 of the smallpox and 13 of measles). Measures were taken to prevent the spread of the disease: a hospital (*шпиталь*) was formed at the barracks, isolated from other soldiers: it consisted of 8 rooms, one of which was a *lazaret* (where newly admitted patients awaited diagnosis), and in the others the patients were sorted according to their illness. The commander supervised them on

a daily basis. Ten days later, the number of patients had already halved (15, though 12 of them suffering from smallpox, the more severe of the diseases), but Councillor Teodor Herbez, along with Military Minister Mileta Radojković and Councillor Arsa Andreić (Andrejević), suggested to the Prince that he order those district captains who have not yet sent their new recruits to postpone sending them until further notice, since most recruits who had arrived until that point had not been previously ill with the pox and thus had no immunity against it. In the next report, Herbez tells the Prince that the danger of the "epidemic disease of pox" (*епидимическе болести богинъ*) appeared to have passed, as 14 days had passed without any further recruits falling ill (AS: KK, X, 141, 144, 146/1835). Sometimes, on the other hand, it was the healthy who distanced themselves from the diseased community, leaving their houses in favour of forests or fields until the danger subsided (Đorđević 1983, 160).

Even a single case of the pox could be cause for some degree of alarm. On 28 July 1837, Herbez (now signed as the Temporary Chief of the Military-Police Chancery – *Привременный Шефъ Военно-полицайне Канцеларіе*) reported to Miloš that the Chief Military Commissioner, Major Jova Veljković, had reported to him that many soldiers in Kruševac were suffering from colds, but that one had come down with *богинъ* – thus either smallpox or measles, but the former is more likely – and asked for a doctor to be sent to tend to them. Herbez awaited Miloš decision on this matter (AS: KK X, 656/1837). Regardless of what decision the prince made, the inquiry itself illustrates the severity of the situation.

4.2. The Beginnings of Vaccination

The first known publication in Serbian regarding vaccination dates back to 1804. Naturally, it was published not in Serbia – where the First Uprising against the Ottoman occupation had only just broken out – but in the Metropolitanate of Sremski Karlovci, then under Habsburg rule.[13] It was published by Metropolitan Stefan Stratimirović himself, and entitled "An instruction regarding cowpox, for the purpose of eradication of the natural pox, which, in accordance with the allhighest order, the Archbishop of Karlovci, Metropolitan Stefan, recommends to Serbian parents and elders".[14]

[13] For an overview of the position of Serbs in Vojvodina, see Popović 1990.

[14] "*Наставленіе о кравіихъ оспахъ, ради истребленія природныхъ оспицъ, кое по всевысочайшему повелѣнію, Аріхепископъ Карловачкій, и Митрополітъ Стефанъ, сербскимъ родителемъ, и старешинамъ препоручаетъ.*"

It is a short pamphlet, 13 pages long, addressed to the general public. It describes first the dangers of smallpox, including the high death rates, and many partially successful attempts of treating or preventing the disease (with a focus on classical inoculation), turning to a description of Jenner's discovery and the benefits of inoculation with cowpox. It even exaggerates the spread of vaccination, claiming that there is no area in the world, "even with the most stupid Peoples" (! – "*и кодъ самы глупѣйши Народа*"), where the practice was not already known. It then proclaims that his Majesty the Monarch has ordained that vaccination be introduced for the good of his subjects; juxtaposing the dramatic examples of death or disfiguration caused by smallpox to the mild consequences and immunity to smallpox caused by vaccination, the text claims that parents who omit to vaccinate their children shall be seen as killers in God's judgement, underlining that the emperor had had his son and heir vaccinated.[15] The text ends with a passionate appeal to the readers to support vaccination, claiming that the eradication of smallpox depends on them (Митрополитъ Стефанъ 1804).

While this text technically could have reached the relatively few educated readers in Serbia during the First Uprising, it certainly did not initiate a vaccination endeavour in the country that was struggling with the war effort and institution-building. It was only well after the Second Uprising, in the politically and economically more stable conditions of the 1820s and 1830s, that information about vaccination begins appearing in the Serbian sources. By that time, several other publications in Serbian were available, all printed in Buda (Stanojević 1953, 1032–1034).

The oldest known cases were vaccinations in the Obrenović family – Jovan Obrenović's son Obren in 1822 and Prince Miloš's son Mihailo, on 27 January 1826 (Đorđević 1983, 169; Mihailović 1951, 147). In a letter to Miloš Obrenović not two months after Mihailo's vaccination, on 14 March 1826, Aleksa Simić informs the prince of a purchase of "the freshest cowpox" (*најсвежіи кравльи краста*) that was to be sent by stagecoach from Vienna (AS: KK VII, 331/1826). This shows at least an intention to continue the practice, and it seems to have been gradually spreading into the general population after the princely examples were provided (Đorđević 1983, 169). Still, these cases seem to have been relatively sporadic and the attempts to vaccinate met with a lot of resistance. Prince Miloš's personal physician,

[15] The Emperor and heir in question are Franz/Francis I (previously Franz II as the Holy Roman Emperor) and Prince Ferdinand (future Emperor Ferdinand I), though their names are not mentioned in the text – since they would, quite obviously, be well-known to the contemporary reader. The minister of war, Erzherzog Karl/Charles (Francis' brother) is the only official personage mentioned by name.

Bartolomeo Cuniberti,[16] remarked on this "There is no need to particularly underline that the introduction of the inoculation against pox had also met with great resistance. This all the more since it is known that it has not been accepted without resistance even in much more civilised countries in Europe; how could one expect it to be different in Serbia, where only the first steps on this path were being taken".[17] He also claimed that the general population began noticing that the vaccinated were truly consistently safe from smallpox only in 1835, when an epidemic broke out, and that the prince was praised for introducing vaccination (Kunibert 1901, 467). However, this should not be taken to mean that the opposition to vaccination was completely overcome: as we shall soon see, it would persist as a force to be reckoned with in the decades to come.

Writing of approximately the same period, Dr Emmerich Lindenmayer[18] remarked that the first vaccinations were performed rather undiligently, since the people had no faith in the vaccine's effectiveness, and most state officials shared the same views. In his opinion, an increase in the number of physicians, mandatory vaccinations of new recruits in the army since 1830, as well as an order by Prince Miloš that officials' children should be vaccinated first to give an example, helped increase the vaccination rates (Lindenmayr 1876, 44; Mihailović 1951, 151–152).[19] We have not succeeded in finding this order: it is possible that it existed, but, given the fact that

[16] Bartolomeo Silvestro Cuniberti (1800–1851), an Italian, worked first as a doctor in Constantinople, and then as the personal physician of the pasha of Belgrade. In 1828 he came to the personal service of Prince Miloš, with the right to keep a private practice as well. He left Serbia together with Prince Miloš, after the latter's abdication in 1839, later returning to Italy. His book on the Serbian revolution and Prince Miloš's first reign – half memoir, half historiography – is a valuable source for the period (Maksimović 2017, 13–14).

[17] "*Nije potrebno isticati naročito, da je uvođenje kalamljenja boginja takođe naišlo na veliki otpor. Ovo tim manje što se zna da ono bez protivljenja nije primljeno ni u mnogo uljuđenijim zemljama u Evropi; kako se moglo iščkeivati da će drugojačije biti u Srbiji gde su na ovom putu činjeni tek prvi koraci.*"

[18] Emmerich Lindenmayer (1806–1883), born in Tschakowa/Csákova in Banat, Austrian Empire, arrived in Serbia in 1835 and soon became the chief army physician, afterwards reaching the post of the Chief of the Department of Public Health in 1845, which he held until his retirement in 1859. His book *Serbien, dessen Entwicklung und Fortschritt im Sanitäts-Wesen, mit Andeutungen über die gesammten Sanitäts-Verhältnisse im Oriente*, published in 1876, is the first systematic history of Serbian medicine. See more about his life and work in Dimitrijević, Vacić 2013.

[19] "*sie impften zuerst die Beamtenkinder, indem die Beamten laut ausdrücklichen Befehles des Fürsten Milosch for Allen Andern ihre Kinder impfen lassen mussten, von diesen impften sie dann weiter mit dem eklatantesten Erfolge, weil das Volk glaubte durch die Kuhpocke im Orte auch schon ihre Kinder gefährdet zu sehen.*"

Lindenmayer wrote his memoirs many years after the events and that his chronology is sometimes unreliable (Mihailović 1951, 147), it is also possible that he wrongly attributed to Miloš the order that was, in fact, passed only in the Supplement to the Rules in 1842.

In April 1837, Dr Hermann Meinert, then the physician in Aleksinac, asked the District Administration to enable him to perform vaccinations by supplying him with vaccine matter, ordering for a list of all unvaccinated persons in the district to be created, having the municipality head be present at the vaccinations and forcing the parents to bring their children to be vaccinated, as well as providing him with a good riding horse and a fee for the procedure. The Administration, unsure if this was a good course of actions, forwarded the matter to the Council, which in turn consulted Prince Miloš. It claimed that it was certain that the intention was extremely useful for the preservation of lives, but uncertain whether the doctor would be able to implement his plans, and thus the prince's decision was required. It is possible that such administrative conundrums would have persisted longer, had an epidemic of smallpox in early 1839 not prompted the Department of Public Health (a specialised department of the Ministry of Internal Affairs) to decisive action (Mihailović 1951, 152–153).

The Ministry sent its initiative for passing the Rules to the State Council on 18 April 1839 – already in a period of political turmoil preceding Miloš's abdication. The accompanying act, signed by the Minister, Colonel Đorđe Protić, and the Temporary Chief of the Department of Public Health, Dr Karol Pacek[20] (who also drafted the text), explains how the pox spreads among the people of Serbia almost every year and that the Rules were meant to put a stop to that. However, they also warn that the number of district physicians is currently insufficient to commence full-scale inoculation, and they recommend beginning the procedure with the help of military and city physicians, so the disease could be prevented as soon as possible. As the Council did not adopt the Rules right away, likely as it was preoccupied with the political changes (including Prince Miloš's abdication on 1 June), a new letter was sent on 15 June, advising the commencing of inoculation with the aid of physicians in the Šabac and Podrinje districts, as well as Belgrade

[20] A Slovak born in Hungary, Dr Karol Pacek (1807–1876) worked in Serbia from 1833, first as an army physician in the rank of captain, and afterwards as the Chief of the Department of Public Health. He was the personal physician and close friend of both Prince Miloš and his son Mihailo, and left Serbia together with Mihailo Obrenović when he was banished in 1842, returning only in 1859, when Miloš Obrenović was restored to power, although no longer as a practicing physician, but merely as the monarch's advisor (Matović, Spasić 2013, 219; Maksimović 2017, 35–37).

itself, until the Regulation on the Naming of District Physicians could be passed, but reminding the Council that the process could not be initiated without the adoption of the previously proposed Rules. The Council then sent the draft to the Regency on 20 June, and it was finally signed on 5 July without any particular comments from the regents, and formally published on 8 July (AS: DS, 163/1839; see also AS: MUD-S, 321/1839).[21]

5. CONTENT OF THE RULES

5.1. A Preamble for the Masses

The Rules start with a lengthy introductory text (more than a page long) that we might call a preamble, given that it is not normative in character, but rather explains the reasons for the passing of the Rules. This is not uncommon for regulations of the period, but the length is extraordinary: such preambles were usually no more than a few lines in length, briefly describing the *ratio legis* or occasion for the passing of this or that act. Apparently, the controversy regarding vaccination was strong enough that a detailed explanation was deemed to be in order. Lindenmayer (1876, 58), for example, refers to the contents of this introduction as "conclusions meant for the people" ("*für das Volk berechnete Aufschlüsse*"). To help the reader gain better understanding of the spirit of this text, we shall quote the first passage in its entirety:

> Among all the wasting diseases that assault mankind, none has spread further or taken more victims than the pox. It has been more harmful to mankind than even the plague itself; given that it has not only destroyed so many men, but also countless people, even if they recover from this disease, cry for the remainder of their days blind, deaf, mute, maimed and disfigured. Over 400,000 men have been dying in Europe annually from the pox. Our Fatherland also rarely numbers a year in which one or another of its regions is not be assaulted by it. The pox assaults everyone once in their lifetime, if the life does not succumb sooner to some other disease. No age, no

[21] A draft text with some corrections and modifications was also preserved in the Council's archive, but the changes are mostly terminological and stylistic, aiming to describe the procedures, etc., more clearly; it seems that no major substantive change was made.

> sex, nor any bodily composition is safe from it. From the cradle to the deathly shroud, we can serve as its prey. Its treatment, when it manifests, is highly doubtful.[22]

The text goes on to explain that measures of strict quarantine for the diseased have been suggested by some (implicitly experts), but that this is not only very expensive, but also almost impossible to achieve in practice when the disease has significantly spread. Therefore, it is easier to avoid the pox "if the affinity towards it is shut down in the body" ("*ако се наклоностъ спрема нъи у тѣлу угаси*"), which can be done in two ways. The first is the inoculation of human pox on healthy people, which makes the course of the disease somewhat lighter. This procedure is claimed to have been in use in the whole of Europe until 40 years earlier, and still in use in some uneducated areas deprived of physicians, but it is stated that its consequences are very uncertain and it is full of danger, and thus it not only cannot be advised, but must be forbidden. On the other hand, there is the inoculation with cowpox, discovered by Dr Edward Jenner in 1798, which is qualified as safe, low-risk, easy to perform and thus had already spread throughout educated Europe 40 years earlier. Thus the Council and the Regency, after consulting the Department of Public Health (*Оддѣленіє Санитета*) of the Ministry of Internal Affairs, decided to introduce this method to support public welfare – and here the normative part of the Rules begins.

5.2. The Normative Text

The main text of the Rules can be divided into two parts. The first, Arts. 1–14, with no special subtitle, regulates the competence for and the organization of the inoculation, the price to be paid for it and the administrative procedure, while the second part, Arts. 15–20, entitled

[22] "Измеђъ свію опустошаємы болестій, коє родъ човеческій нападаю, ни єдна се ніє већма распространила, и выше жертвій одвукла, као богинѣ. Оне су човеческомъ роду шкодльивіє быле него и сама куга; будући су не само толико людий потрле, но осимъ тога безчисленни, ако болесть ову и преболу, слепи, глуви, неми, сакати и нагрђени заостале своє дане проплачу. Преко 400000 людій умирали су у Европи преко године одъ богиня. Наше Отечество такође редко кою годину числи, у коіой не бы єданъ или другій му предѣлъ ньима нападанъ быо. Богинѣ нападаю свакогъ у животу єданпутъ, ако животъ одъ друге какве болести пре не клоне. Никаква старость, никаквый полъ, нит' икаквый тѣлосоставъ може се одъ ньи сачувати. Одъ колевке до покрова смртногъ, можемо имъ као грабежъ служити. Ньіово є леченѣ, кадъ се укажу, весма сумнително." All translations in the article are by the author.

"Physicians' Instructions" (*Наставленія Лекара*) contains detailed medical instructions for the vaccination itself. While the first part has almost three times the number of paragraphs, its text is, in fact, shorter by a third: two and a half pages against slightly over four. There is, thus, more strictly medical than legal matter in the Rules, but the entire contents have been "juridified" by being placed in a legally binding form.

In the first part, the management and control of the inoculation process is placed under the jurisdiction of the Department of Public Health, which was to ensure that there is always enough high-quality matter for inoculation, and that it is distributed to the persons in charge of it (Arts. 1–2). The Department was to issue licences, but also orders, for performing inoculation to district physicians and surgeons (regardless whether they operated in cities or villages), to military physicians, but also to those whom the Department itself acknowledges as skilful (Art. 3).[23] Obviously, this was meant to allow for the recruitment of existing grafters, who did not possess formal medical education, but many of whom had enough practical experience and skill that their participation in the vaccination effort would be of use to the understaffed Department.

Returning somewhat to the didactic tone of the preamble, Article 4 proclaims that no one other than the aforementioned persons is allowed to perform the inoculation, and that the inoculation of natural human pox (as it had been previously performed in Serbia) is especially forbidden, as it is dangerous and its results uncertain. It is further specified that none but the persons listed in Article 3 may collect the matter from inoculated children, because unskilled inoculation can easily lead to other diseases, such as scabies, scrofula, syphilis, etc. It is proclaimed that anyone transgressing these rules is to be punished, but the punishment is not specified. This is not unusual for Serbian criminal law of the period, as the exact penalty was still often left to the judge's discretion. The principle of legality was introduced only by the Penal Code of 1860.[24]

Article 5 further prescribes that physicians are to be paid by the patients for every successful inoculation – one *cvancik*[25] by townspeople and half a cvancik by villagers; if the inoculation was not successful, the physician was

[23] "*кои се истымь Оддѣленіемъ за вѣште признаду*"

[24] See more on the development of Serbian criminal law and the Penal Code in particular in Mirković 2017, 156–170; Nikolić 2017.

[25] A corrupt form of the German word *Zwanziger*, this signified an Austrian silver coin of 20 Kreuzer, minted since the time of Maria Theresa, which was widely in use in Serbian-speaking territories at the time, since domestic silver minting had not yet begun (Stanojević 1925, 405).

to repeat it free of charge. If someone proved that they could not afford to pay the physician (again, the means of proof is not specified), their inoculation was to be paid from the state budget. Parents of vaccinated children were to allow physicians to extract the matter from their children free of charge (Art. 6).

A local official was always to be present during the inoculations and to control and co-sign the protocol (log) kept by the physician: it could be either the district chief, his deputy, the county chief, or the local priest (Art. 7). The protocol was to contain the first and last name of the inoculated person (if it was a child – the parents' names and marital status as well), date of inoculation, age, number of injections used for inoculation and the number that proved efficient, whether the person was able to pay or not, as well as from which child[26] the matter was taken (Art. 8). To verify the procedure's success, the physician was supposed to examine the inoculated person on the eighth day after the procedure, again in the presence of one of the local officials, and to write down the number of successful injections. On the same eighth day, the physician was to issue a certificate of inoculation with cowpox (Art. 9).

The time of inoculations and examinations was to be determined by the physician, and the place by the local elder (Art. 10) – a compromise obviously meant to insure some degree of convenience for both sides. Either way, the inoculation was to begin in April and to be performed until the end of September (Art. 11). After the end of October, the physicians had a duty to submit their protocols, containing all the necessary data and signatures, to the Department of Public Health (Art. 12).

An interesting role was assigned to priests in Article 13. In addition to potentially supervising the inoculation, priests were also required to submit (and thus implicitly to make) a list of people who were not inoculated to the chief,[27] who was then to report it to the physician. (This proved to be difficult in practice, as we shall later see.) It is not specified that the physician was supposed to do anything with the information provided (e.g.

[26] Although, as we shall see soon, it is nowhere stated that the matter is only to be taken from children, as adults were also inoculated, it seems that the legislator presumed here that most of the vaccinated population will be children. Also, even when adults were vaccinated, children were most commonly used for transmitting matter, as that reduced the risk of contracting other diseases through vaccination.

[27] It is not specified whether the district or county chief is meant. It is possible that either was valid (depending on the proximity of the parish to a district or county centre), since that seems to be prescribed immediately afterwards, in Art. 14.

to appeal to those persons to get inoculated), but it is prescribed that priests were supposed to remind their congregations at least once every three months not to omit to vaccinate their children, by presenting the dangers that come from such omissions, "and that for such negligence they shell be held accountable even to God himself" ("*и да ће за небреженіє то и самоме Богу одговарати*"). We can see here the same spirit present in Metropolitan Stefan's pamphlet, as well as in other similar literature of the time – the idea that, although the state did not directly punish vaccination avoidance, such people would be responsible before God for any unfortunate consequences that their children (as yet unable to decide for themselves) suffered as a result.

Finally, when the pox appeared somewhere, the local elder was required to inform the nearest (district or county) chief right away, and he was to report this immediately to the Ministry of Internal Affairs, so that inoculation could be initiated without delay (Art. 14).

The second part consists of practical medical information relevant for the process of inoculation. Article 15 contains a description of cowpox, claiming that it does not seem unnecessary, given that the matter for inoculating humans is taken from cows. This is followed by a description of the macules (pox marks) and their evolution during the course of the disease, as well as of the other symptoms that accompany them. In the end it is reiterated that such is the course of real cowpox, and only it is acceptable as a protective means against human pox.

Article 16 describes the course of properly transferred cowpox in humans, going into detail regarding the appearance of the pox-marks day after day for 14 days, and also describing other symptoms, such as swelling and fever, with remarks meant to help physicians differentiate the transferred cowpox from other diseases.[28] After the detailed description, the article lists once again the key points the physician needs to monitor in order to identify the cowpox, repeating briefly the evolution of the symptoms.

The physician was to take the matter for further inoculation only from a person with whom the course of disease matched the description in Article 16, on the seventh or eighth day after inoculation, and only if the person is (otherwise) completely healthy. He is specifically instructed never to use people who suffer from scrofula, venereal diseases, scurvy, scabies or any

[28] For example, it is stated that the glands in the patient's armpits sometimes swell and hurt slightly, but that this change lasts only for a few hours, and never the entire day and night.

other chronic disease,[29] as well as anyone in whom the cowpox did not take its regular course. Finally, the physician was always to use the "prettiest" (*најлепша*) and cleanest unharmed macule; if only one had appeared on the patient's body, it was not to be used (Art.17).

Article 18 contains environmental or personal counterindications against inoculation. Firstly, it is stated that although inoculation can be performed at any time (of the year) with the proper precautions, it is still better to avoid doing it during a harsh winter or high summer heat (obviously, due to an increased risk of complications), unless specific circumstances, such as an epidemic of smallpox or the distance of the patient's residence from the physician, demand so. The correlation of this norm with Article 11, which decreed that inoculation was to be performed from April to September, is not completely clear. On the one hand, this could serve as an explanation why Article 11 omits the colder months of the year – not just the winter months, but also late autumn and early spring. But, on the other hand, Article 18 mentions heat as equally problematic, yet all the summer months fall within the inoculation period. Presumably, this only meant that days or periods of unusually high temperatures were to be avoided. Finally, it seems that Article 18 allowed for inoculations to be performed outside the previously prescribed period of April to September, but we cannot tell for certain whether this was left to the physician's own discretional (medical) judgement, or if an approval of the Department of Public Health would be required.

Children under six weeks of age, children that were actively teething or "weak girls" (*слабе девојке*), during their menstruation, were not to be inoculated, if the date could be postponed. Finally, it is stated that persons suffering from glands, scabies, rickets, venereal diseases or *краставa глава* (lit. "scabbed head", possibly scalp ringworm, *Tinea capitis*) could be inoculated, but that matter for inoculation is never to be taken from them.

Article 19 contains detailed instructions for the inoculation procedure itself. The details and manner in which they are given show that the legislator – likely aware that even poorly educated persons would be performing the procedure – did not want to leave anything to chance. For example, the article begins with a description of the furrowed needle (lancet) to be used in inoculation: it is stated that it is a steel or silver

[29] While not every chronic disease is necessarily an infectious one, a great number of them are, and it was certainly more reliable to exclude any suspicious case outright.

needle with a furrow in the middle (bifurcated needle), that copper or bronze needles are unsuitable,[30] and that the needle must not be rusty or otherwise unclean, and that it must be properly cleaned after the procedure. One would expect the several latter instructions to be unnecessary for a trained medical professional, even in the mid-19th century: but as we have seen already, not only fully trained professionals were to be assigned the task, given the deficit of personnel.

It is also interesting that the description includes an alternative method. After describing how the physician should insert the needle with the inoculation matter into the skin without drawing blood, the Rules say that "some" (*нњки*) rather scratch the skin with the needle until liquid appears, and put the inoculation matter there. While the first method does seem to be the one recommended by the Rules, there is nothing to indicate that the second was considered less viable in any way: no comparison is given, in effectiveness or otherwise.

Some supplementary practical instructions are also given: how to wash and soften the inoculation spot when the patient's skin is dry and hard, but also how to wrap the spots in a soft linen cloth if someone's shirt is very thick and coarse, to prevent the coarse fabric from rupturing the macules.

The last, Article 20, talks of the preservation of inoculation matter. The recommended methods are: between two pieces of glass (one of which is slightly recessed), in a sealed glass tube, in an ivory lancet, in a dented feather shaft, or on a thread soaked in it and also sealed in a glass tube.[31] Basic instructions are provided for each method. It is then proclaimed that dry matter cannot be preserved for more than four months, while liquid matter in properly sealed glass tubes can preserve its potency for several years. (It is unclear from the same text whether the same applies to other previously described methods.) Finally, it is stated that the crust of cowpox does not provide good matter, and thus should not be used.

[30] The main reason for this is that these materials are softer and might break during the procedure. Steel needles were the strongest and most durable, while silver possesses antiseptic properties.

[31] All these methods were used for transportation of the vaccine across Europe, although it generally proved less durable than smallpox matter, and thus shipments were frequently unusable (Bennett 2020, 123–124).

5.3. Austrian Influences

Although no foreign model was mentioned in the correspondence preceding the adoption of the Rules, it is no surprise that the Serbian lawmaker consulted the legislation of the neighbouring Austrian Empire in drafting them – particularly given the fact that most Serbian physicians had been educated in either Austria or Hungary. The Austrian *Regulation on the Inoculation with Cowpox in the Imperial-Royal States*, passed on 9 July 1836,[32] was a significantly longer document, consisting of 56 paragraphs, and despite some differences, similarities can still be noticed even on a casual glance. Both documents are divided into two parts, the first, shorter one, concerning the administrative organization of vaccination, and the second, longer one, providing medical instructions to the personnel performing the procedure.

In the Austrian document, both sections (*Abschnitte*) have titles, as well as separate numbering of paragraphs. The first section, containing 16 paragraphs, is called "Regulation regarding the administration" (*Vorschrift in Bezug auf die Leitung*), and the second, with 40 paragraphs, "Regulation for physicians and surgeons who engage in inoculation with cowpox" (*Vorschrift für Aerzte und Wundärzte, welche der Kuhpocken-Impfung sich widmen*). Obviously, the Serbian Rules apply the same model in a somewhat simplified and shortened form. As the first section of the Austrian Regulation also contains some purely medical provisions (such as the rules for the preservation and transport of vaccine matter in §9–11), and the second some instructions to physicians on how to *organise* vaccinations in cities to maintain a steady supply of fresh lymph (§18–20) one might even say that the Serbian Rules contain a more precise division of subject matter.

The first part of both regulations contains more differences, for obvious reasons. Not only was the administrative division and structure of organs in the two countries different, but there were vast differences in the availability of educated medical professionals. Thus, for example, the Austrian provision that nobody other than licensed physicians and surgeons could perform inoculations, and if there were still physicians and surgeons who were not trained to vaccinate as part of their studies, they had to get special authorisation to vaccinate (§3). This was obviously a rule of a country which had a large number of formally educated doctors, and had only to provide for those older generations of them who had not learned to vaccinate during their studies. As such, it was obviously inapplicable in Serbia, which

[32] *Vorschrift über die Kuhpocken-Impfung in den kaiserl. königl. Staaten: vom 9. Julius 1836*. Wien: k.k. Hof– und Staats-Aerarial-Druckerey.

is why the Serbian Article 3 made a completely different exception – that for licensed skilful personnel *without* formal training. Other administrative complications, such as military physicians needing a special license from the civil authorities in order to vaccinate civilian children (§6), or the founding of a special vaccination institute (*Impfungsanstalt*) in the capital of each province (§8), were also quite unpractical in the situation in Serbia, and thus none of them were implemented.

The social and educational circumstances were also the cause for some adaptations. While the Austrian Regulation required parish priests and teachers (*Seelsorger, Volkslehrer und Schullehrer*) to advertise vaccination twice per year (§13-a), the insufficient spread of schooling in Serbia led to the latter being excluded.[33] The spreading of pro-vaccination pamphlets among the population (§13-c) was likewise not included due to the much higher degree of illiteracy, and the provision of §13-f on vaccination in orphanages due to the absence of such formally organised institutions in Serbia at the time.

It is interesting to note that the Rules did not initially include more drastic orders and restrictions meant to stimulate vaccination, but the Supplement of 1842 would introduce such or very similar measures (see more below). Such is the case with §13-b ordering landowners, people of upper social strata and state officials to set the example for others by allowing for their children to be vaccinated first, or §13-d banning the unvaccinated (or parents who would not vaccinate their children) from receiving government stipends, education in public schools or social assistance for the poor. It is possible that these measures were seen as too extreme (and thus potentially unpopular) at first, and that they were only resorted to when the initial iteration of the Rules failed to provide the desired results.

The technical medical provisions contain far more similarities, as has already been noted by Vojislav Mihailović, who has published the Serbian translation of some excerpts from the Regulation (Mihailović 1951, 149–151).[34] Without any pretensions to medical knowledge, we can note the following. The Serbian Rules mostly follow the layout of the matter of their

[33] Although we must underline that the obligation of the priests to remind people to vaccinate their children was made twice as frequent (at least once in three months) perhaps precisely because they were the only ones who bore the duty.

[34] However, his translated text contains a serious methodological flaw: although the fragment flows from §7 to §15 in apparent continuity, in fact, some paragraphs are taken from the first and some from the second section of the Regulation, and are not a single integral piece of the text. The name of the original act is also misspelled in fn. 5, with "*Fortschritt*" ("Progress") instead of "*Vorschrift*" ("Regulation"), likely a typographic error caused by the similar sounding of the words.

Austrian template in this regard, but compressing the essential information and omitting some of the details. Professional medical terminology is less frequent in the Serbian Rules, and that which is used is sometimes briefly explained – obviously for the benefit of the self-taught vaccinators – while the Austrian lawgiver saw no need for such clarifications, relying solely on formally trained physicians and surgeons. Some specific parts were skipped entirely, such as the long table comparing the course of the disease in unvaccinated and vaccinated patients through four periods, contained in §10. The lists of people who are not to be vaccinated, and of people from whom the matter is not to be used, are also partially different. The only piece of information that is present in the Serbian Rules and absent in the Austrian Regulation is the description of the course of cowpox *in cows*, probably deemed unnecessary in Austria, but of potential practical use in Serbia.

Mihailović's (1951, 160) expert assessment of the text of the Serbian Rules is that they are well-written for the time, and that their author was obviously an expert well-acquainted with contemporary medicine. He concludes "The Rules contain everything that such instructions should contain, nothing that is of relevance has been left out".[35] Even if he did not perform a detailed comparative analysis with the entire text of the Habsburg Regulation, his assessment that the text was of high quality in itself seems sufficient.

6. OBSTACLES IN PRACTICE

6.1. First Efforts and Initial Distrust

The course of vaccination can be followed through source material, primarily documentation from the Department of Public Health, kept in the State Archives of Serbia. Unfortunately, the Department's collection is far from ideally preserved: many documents have been lost, and the registers and protocols for some years are missing, making it much harder to search through the existing documentation. Thus, the picture laid out here will not be complete – but the available material is nevertheless sufficient for a clear general outline.

The Department sent the text of the Rules to every district and city in a fairly large number of printed copies (e.g. 50 for the city of Belgrade, 100 for each district), of which a few were to be kept by the administration, and

[35] "*U Pravilima je obuhvaćeno sve ono što takva uputstva treba da sadrže, ništa nije propušteno, što je od važnosti.*"

the majority to be distributed to local courts via county chiefs (in villages), or to the citizens in cities.[36] Administrative supplies – mostly forms for vaccination certificates (*feda*)[37] were also sent on a regular basis and in much greater numbers, and district physicians requested more when they ran out.[38] The district chiefs claimed to have instructed their subordinates to advertise vaccination as prescribed (see, e.g., AS: MUD-S, III-144, 540/1841); how honest and intense their efforts were, can only be speculated, but they were met with opposition nonetheless.

According to Lindenmayer's memoirs, the very first vaccination effort, from the summer of 1839 to the fall of 1840, was indeed a success, with all doctors and other authorised vaccinators working as quickly as they could, a large number of people being vaccinated and disaster averted. (As we shall see later, even this data varied drastically by region: his assessment might be unrealistically optimistic.) However, as the people started believing that the risk had passed, any zeal that existed among the masses waned, and the vaccination rate dropped again, increasing the risk of infection (Lindenmayr 1876, 58–59; Mihailović 1951, 160).

The distrust towards vaccination is visible in many preserved documents, and many common people showed preference towards the old method of inoculation, to which they were accustomed. The refusal of the masses to allow their children to be vaccinated is a common theme in the correspondence of the local authorities and physicians with the Department of Health; in many cases, a physician would visit a village in vain, since no family would volunteer their children for inoculation with cowpox. Threats and insults were not uncommon either. Instructions and urgings of the Department for officials and physicians to try educating and influencing the people (quite similar in tone to the Preamble of the Rules) are a common reply (e.g., AS: MUD-S, III-144, 765, 1013, 1969/1841).

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[36] AS: MUD-S, III-105, 224, 335, 545, 571, 761/1840. The number of copies for distribution to citizens was obviously far too small for widespread distribution, and the exact mode of dissemination is not fully clear.

[37] The word was derived from the German *die Fehde*, which among a plethora of other meanings, signified a certificate, letter of confirmation (Mihailović 1951, 179).

[38] The numbers varied – e.g. 100 reams with 1600 fedas for the Požarevac District, 20 reams with 640 pieces for the City of Belgrade and for the Krainski District, etc. The supplies were likely distributed. See AS: MUD-S, 1840, III-134, 336, 547, 572, 769, 1090, 1117, 1600, 1656.

Dr Anton Groder,[39] the physician of the Šabac District, left valuable notes, later published by Vojislav Mihailović, which provide a good illustration of the situation. Upon arriving in Šabac in July 1839, freshly appointed as the district physician, Groder encountered a large scale epidemic of smallpox. He obtained two tubes of vaccine matter from Belgrade and inoculated 10 children with it; the children were ordered to come to the city school on the eighth day, so that matter for further vaccination could be taken from them. As many unvaccinated children as possible were supposed to come to be inoculated in this way – but only eight turned up. Groder claims that parents were unwilling to bring their children to the school, wishing for the doctor to come to their houses, not understanding that the vaccination was done "arm-to-arm" and that all the children needed to be in the same place. Having vaccinated the few children who had been brought and having taken as much matter as he could from the previously vaccinated ones, he made and executed a plan with the help of the county chief: he went to the nearest village of Drenovac, vaccinated the children there with the fresh matter, and then, eight days later, selected 16 of them with good macules and brought them to Šabac, together with their parents. The local authorities had in the meantime spread the word that it would be the last vaccination in the city that year, and that it was mandatory for all unvaccinated city children to attend, or their parents would be punished.[40] The plan was a success: a large crowd gathered, Groder vaccinated 90 children on that occasion, with no complications afterwards, and the citizens even rewarded the villagers who had brought their children to supply the vaccine (Mihailović 1951, 163–164).

In some villages, Groder encountered not only vaccination boycotting, but direct opposition: crowds of armed peasants, angry and loud, claiming that they would not allow for their children to be vaccinated, distrustful towards the procedure's effectiveness or afraid that it might cause severe illness. In most cases, as he claims, reasoning of the local authorities and their explanations of the prophylactic value of cowpox, as well as threats of punishment, produced the desired results: the villagers calmed down and dispersed, sending their wives with the children. However, this was not always the case: sometimes the women and children even ran away into the woods to avoid vaccination! It was only after some time had passed, as Groder

[39] Anton Groder (1808–1885), born in Vienna, worked first in Vienna and Pest, and moved to Serbia in 1839, first as a temporary and soon permanent district physician, and member of several scientific societies in Serbia. He was very integrated in the local community and remains in fond memory of the citizens of Šabac (Mihailović 1951, 170–171; Maksimović 2017, 76–77).

[40] Presumably fined, but Groder does not specify – and it is possible that neither did the county chief.

claims, that people started noticing that while many unvaccinated children fell ill and died, the vaccinated ones remained healthy. He also provides the examples of a mother who let her children be inoculated, but was not vaccinated herself, and died of smallpox afterwards, and of a man who had almost all of his large family vaccinated – 11 people – everyone except himself and his favourite three-year-old son: both the man and the boy later died of the pox, while the rest of the family did not fall ill. Nevertheless, his overall impressions of the local authorities' and the population's cooperation, as well as the success of vaccination as a whole, are positive (*Ibid.*, 164–165).

Similar obstacles can be encountered in other sources. In his report of 23 June 1841, Đorđe Novaković, the physician of the Aleksinac District, once again asked the Ministry to forbid the practice of inoculation with the natural pox in the physician's absence, as he had learned that people in several villages had initiated such procedures on their own. He also suggests that all priests be forbidden to participate in such affairs, as some had done in cases that he was aware of, and had been instructed to discourage the people from engaging in the dangerous procedure and to accept vaccination (AS: MUD-S, III-144, 870/1841).

A report from the Smederevo District to the Ministry, dated 8 October 1841, shows that very few villagers were interested in vaccination despite both the physician' and the archpriest's appeals, and that in the end "some villages have replied 'when the pox appears nearby, we will call the doctor', and some 'the pox has come before, yet we survived nevertheless'".[41] (AS: MUD-S, III/144, 1454/1841).

On 5 January 1842,[42] the Court of the Peace in Rača wrote to the chief of the Lepenica County in the Kragujevac District to report that smallpox had appeared in the houses of Stefan Marković and Marinko Veljković, with one person falling ill in each. The Court had ordered for both houses to be placed under guard, as it had previously (time span not specified) done with the house of Živulo Nešić, when the pox had appeared there, in order to preserve the health of the municipality.[43] However, the local people

[41] "*нека села одговорила су кадъ се појве близу богинъ зваћемо доктора а нека и досадъ су богинъ долазиле пакъ ми опетъ остаяли живи.*"

[42] The document itself is dated January 5th, 1841; however, the note on the back indicates that it was received on January 5th, 1842, and it was filed under a number for 1842. We presume, thus, that the Court made a scribal error, particularly given the fact that it was the beginning of the year, and that one might have easily miswritten last year's number by force of habit.

[43] Although isolation was not prescribed by the Rules, there were other instances of it being used or recommended to prevent the spread of contagion. See also e.g. AS: MUD-S, III/144, 975/1841.

were asking for their children to be inoculated with smallpox from the two patients, as the community had previously done in 1833 with the help of a certain Old Man Marinko from Košarno – "or, that is, on their own" ("*или ређи сами*"), as the Court comments. As no one had died as a result of the inoculations in the 1833 case, the population hoped to achieve the same success now. The Court forwarded their plea to the chief, urging him to let the people inoculate themselves with the pox if at all possible, as they "could not by any means dare to inoculate with a doctor and matters" ("*єрь докторомъ се и матеріама никако усудити немогу пелцовати*"). The chief of the Kragujevac District forwarded the issue to the Ministry, claiming that he could not grant what the plea was asking, as it was against the Rules, particularly Articles 4 and 14, and hoping that the Ministry could solve the people's plight. However, he also remarked that the district physician was not currently in his home district, having been sent to the Čačak District to fight the disease that had appeared there (AS, MUD-S, I-39, 73/1842).

On the other hand, as the gravity of individual pox cases varied greatly, this also affected the popular attitude towards using smallpox for inoculation: the belief that lighter cases were better for inoculation was also prevalent in Serbia. In a report to the Administration of the Aleksinac District of 23 June 1841, the chief of the Aleksinac-Ražanj County notes that the pox had appeared in the village of Glogovice, and one person has already died, but that the villagers claimed that that pox (i.e. the particular manifestation of it) was dangerous, and he asks for the district physician to be sent to them and to bring a better pox for inoculation (AS: MUD-S, III/144, 1235/1841). At the very least, this shows a certain degree of confidence in the medical profession.

The distribution of vaccine matter was managed by the Ministry of Internal Affairs, which can be seen from the surviving documents. Thus, for example, on 3 March 1842, the Department of Health wrote to the Army chief of staff to request cowpox matter for inoculation, asking that 10 tubes be requested from the Army Doctor Lindenmayer and sent to the Ministry. On 6 March, it was reported that the tubes had been received. On the March 10, two were immediately forwarded to the Administration of the Belgrade District, to be given to the district physician. On 12 March, the Ministry sent two feathers with vaccine matter to the Government of the City of Belgrade, with the recommendation that it be handed to the city physician for his use (AS: MUD-S, I-39, 378, 400/1842).

As was frequently the case across Europe, at a time when transportation methods were still not fully reliable, sometimes the dispatched smallpox matter was no longer usable by the time it reached its destination.[44] In one case in the Podrinje District in 1841, the matter had arrived in a usable state, but had dried up by the time the local authorities managed to persuade the population (after previous failed attempts – by initiating judicial proceedings) to send any children to be vaccinated (AS: MUD-S, III-144, 773/1841). Generally speaking, in the more obvious cases, physicians noted that the matter was dry and stale and that it could not be used; however, in others vaccination was attempted, but it could be noted that the infection did not proceed as usual (see, e.g., AS: MUD-S, III/144, 358, 1005, 1095, 1490/1841). However, if the prescribed procedures – regarding not just inoculation, but subsequent examinations – were not implemented, this led to the most dangerous cases, as the inoculated people falsely believed themselves to be immunised against smallpox.

6.2. The Incident in Gurgusovac: A Case Study

A troubling case occurred in the town of Gurgusovac[45] in January 1842. The first piece of information about it can be found in a letter of the Ministry of Internal Affairs to the Administration of the Gurgusovac District on 19 January. The Ministry states that it had come to its attention that multiple children who had been inoculated with cowpox by the district physician of the Aleksinac District, Đorđe Novaković, had fallen ill and died. In order to decide how to act upon this matter, the Ministry demanded a detailed and unbiased report on the situation (AS: MUD-S, I-39, 116/1842).

A report by the Administration of the Aleksinac District, dated 22 January, says that another child had died since 19 January, referring also to a regular report of 15 January, where it was stated that children who had been inoculated by the district physician the previous summer had started to fall ill and die of smallpox. In a reply of 26 January, the Department of Health responds to a report that nine children (eight of them in the same village), who had been inoculated by the district physician the previous year, had died of smallpox. The Department inquires whether the (cow) pox had been

[44] Naturally, most cases proceeded without such complications; in some documents, the vaccine matter is expressly stated to be "fresh and good" ("*свъжа и добра*") (e.g. AS: MUD-S, III-144, 358, 773, 859/1841).

[45] The town was renamed to Knjaževac in 1859, after a visit by Prince (*Knjaz*) Miloš.

successfully grafted on the children, and whether they had been taken back to the physician for an examination after the prescribed time (AS: MUD-S, I-39, 145/1842).

In response to this, a vaccination report for the town of Gurgusovac was compiled (dated 31 January 1842), listing people who had been inoculated with cowpox by the district physician Đorđe Novaković, including those who were also inoculated with the natural pox "on top of that" ("*као и они лица коя су преко тога и природнимъ богиняма каламлъна*"). A total of 103 people had been inoculated, mostly children. The youngest patient was approximately six months old (the table lists "½" under "age"), and the oldest was 30 years old. Four pricks were made on all of them, and all four were successful with most patients (77), with none taking in only 12 cases. Naturally, all patients survived the procedure. However, 74 of them were inoculated again with natural pox, of which 4 died, and 18 persons decided on their own to take the natural pox "on top of" the doctor's ("*сама преко Докторови богиня природне примила*"), likely meaning that they had been infected with smallpox during the course of the received cowpox vaccine. Of those, 9 – a staggering nearly 50% – also died. Two remarks accompany the tabular report: 1) that 121 persons had also been spontaneously infected with the pox, with no grafting involved, of which 33 had died, and 2) that a further 363 people had infected each other with the pox (obviously also for prophylactic purposes), of which 15 had died (AS: MUD-S, I-39, 143, 235/1842).

From the accompanying letter we find out that Dr Novaković had arrived in Gurgusovac on 2 October 1841, and that the vaccinations had taken place from the 3 October through to the end of the month. The district and county chiefs did not assist him in the process, as the former had left to his home with the Ministry's approval, while the deputy in charge of executing the duties of the county chief was in the county centre, and thus they had left the local priest to assist the physician. The two had, however, not compiled a vaccination protocol, as the physician had supposedly told the priest that it was his own duty and that he would write the protocol and send it himself, but that he had not done so at all. The Administration had subsequently discovered that some people had infected themselves with smallpox, including some who had done so over the grafted cowpox, and had sent them all to the District Court to be investigated as transgressors, but they had all claimed that they were forced to do so, as they had seen some children who were inoculated with cowpox subsequently fall ill with smallpox, some of whom had even died. The Administration then decided to form a committee, also inviting Đoko Novaković to take part in it, to investigate the success of the inoculations. They wrote to the Administration of the Aleksinac

District, asking it to send the physician back to file his report, so it could be both sent to the Ministry and used in the District Court's investigations, but despite two urgings, neither the physician nor the report arrived. The report was finally made by the committee composed solely of administrative personnel and presided over by the priest. After Novaković was summoned to Gurgusovac for the third time, the reply came that he had caught a cold travelling from Aleksinac to Banja and that he was now bedridden, and thus he could not come, but could reply in writing if anything was needed. Finally, the Ministry was asked to advise the District Court whether to insist on the persecution of the persons who had infected their families with smallpox (*Ibid*, 235/1842).

On 5 February the Chief of the Aleksinac District, Petar Radoiković, reported to the Ministry that smallpox has appeared in the town of Banja (Banja County) and that three children had already died. Measures to contain it were ordered, however, the county chief reported that multiple denizens of Banja had had their children inoculated with natural pox "through old women" ("*прекo бабa*"), as they were afraid to let the district physician Novaković inoculate them with cowpox (AS: MUD-S, I-39, 238/1842).

On 11 February, replying to the Ministry's inquiry of 26 January regarding the deaths of the nine village children, the chief of the Aleksinac District reported that the previous summer Novaković had first inoculated eight children in the village of Katun, whom he had then examined eight days later, then inoculated a further 20 children with the matter taken from them. Again, eight days later he examined the second group of children and inoculated a further 80, but then he did not return to examine them, as he had left for Gurgusovac to perform inoculations there, and had instead sent an assistant of his, a local denizen and *terzija* (tailor), Andrija Mančić. Mančić arrived 10 or 15 days later, examined the children and reported the success of the vaccination to the villagers. However, some five weeks later smallpox reappeared, and six of the 80 most recently inoculated children and four from the batch of 20 died of it, while five of the initial eight also fell ill. Similarly, in Krajevo, the physician first inoculated six children, then examined them eight days later and inoculated a further 103 people, of which one child died, on one the physician found that the pox had not been successfully grafted, and one man's inoculation mark turned into a wound that caused some of his flesh to fall off and his arm to shrivel up; also, one of the houses where the initial six children were inoculated was affected with smallpox at the time when the report was written (AS: MUD-S, I-39, 280/1842).

Without any context, one might presume this to be a story of an incompetent physician performing his job poorly and then evading responsibility. However, Novaković was anything but incompetent: an immigrant from the

Habsburg lands,[46] he was the first professional surgeon in Serbia, spoke and wrote in six languages and was known as one of the few educated doctors who managed to win the trust of the broader masses (Maksimović 2017, 61). Naturally, these general favourable facts say nothing of the individual case: the problems in Gurgusovac and its surroundings still may have been the consequences of Novaković's mistakes. Nevertheless, in context, they seem to paint a slightly different picture: that of a man stretched too thin, attempting to do a job that would require several people for it to be done properly, and making mistakes in the process.

6.3. The Price of Being Too Few

Other cases also show that the number of available physicians was obviously insufficient. For example, on 12 March 1842, one Spiridon Perini submitted to the Ministry of Internal Affairs a certificate as proof of his inoculation skills, with a request that he be accepted into state service in some district, pledging his devout service and continued efforts in professional self-improvement. The certificate is private in nature, dated 8 March 1842 in Belgrade, where the signed individuals (nine male names, five of them Greek) confirmed that Spira Pirini ("*Г. Спира Пирини*") had inoculated their children and that they were very satisfied with his skill and effort. No formal medical education is mentioned in either document. In a letter of 16 March 1842, the MIA instructed the district physician of the Belgrade District, Dr Pavle Šteker, to instruct Pirini on how to diagnose the pox and inoculate with cowpox, and once he was satisfied with his student's competence, to issue him a certificate of competence and to inform the Ministry (AS: MUD-S, I-39, 425/1842).

While recruiting informally taught assistants was a necessity, not even all the available professionals were up to the task, as can be seen from the case of Dr Jovan Cotpo (or Cotpa – both spellings are used), who was first reassigned from the Čačak District to the Kruševac District due to drunkenness and neglect of his duties (which in turn led to a loss of trust of the local population); however, as he also continued with the same vices in Kruševac, coupling them with a confrontation with and insults of the district

[46] His origin remains a mystery: while it is known that he took the name Đorđe Novaković upon converting to Orthodox Christianity, two versions of his previous life exist. According to one, he was born Leopold Ehrlich in 1792 in Galicia; according to the other he was born in Lemberg (Lviv) as Eduard Has (Maksimović 2017, 61).

chief, on 22 August 1841 he was finally condemned by the Appellate Court to a permanent loss of rights to be employed as a physician. Prince Mihailo signed for the verdict to be executed on 24 September (AS: MUD-S, III-144, 2305/1841). Nevertheless, Cotpa's service in the vaccination effort was demanded until the very end: a letter from the Ministry to the Administration of the Kruševac District from 20 September 1841, instructs that Cotpo is to be sent to perform vaccination in his district, if the judicial inquest does not get in the way – even though he had previously not been allowed to vaccinate in June, precisely because of the investigation against him and the fact that the people had refused to let Cotpo vaccinate their children due to his drunken excesses (AS: MUD-S, III-144, 665, 854, 1342/1841).[47]

Employment of such a man until the last minute, dubious as it might be, illustrates the scarcity of medical personnel and the urgent need for more vaccinations. Groder also remarks that he could not inoculate more than a single county during one summer, since he had to come to every place three times with 8-day breaks – first for the initial vaccination, then for the second round from the previously vaccinated, and finally to examine everyone who had been vaccinated, issue certificates and take a fresh supply of vaccine matter (Mihailović 1951, 165).

Despite all the difficulties, the effort was genuine, and vaccination was performed both in urban and rural areas. A report from 1841 shows that even some children in a "Gypsy" camp had been vaccinated (AS: MUD-S, III-144, doc. No. missing /1841). While most of the vaccinated were children, efforts were made to convince adults who had not had the pox to be inoculated as well (*Ibid.*, 380/1841). As it had been even before the Rules, special attention was given to vaccination in the military, where there was a risk of recruits coming from various areas of the country infecting others in their units, but at least military discipline allowed for more efficient inoculations (e.g., AS: MUD-S, III-144, 786, 1629, 1941/1841).

A brief overview of the results of the entire first period of vaccination can be seen in the letter of the Minister of Internal Affairs, Colonel Cvetko Rajović, co-signed by the Head of the Department of Health, Dr Pacek, dated 11 March 1842, which proposed the passing of the Supplement to the Council. The letter declares that the protocols regarding the inoculation with

[47] Though other numerous cases of refusals of vaccination might tempt one to think that the distrust towards an individual doctor could have been just an excuse, the details of the case leave little doubt there. A letter from 28 May 1841, states that "every patient, even if lying in a perilous condition" ("*свакій ако и опасно лежећій болестникъ*") was unwilling to be treated by Cotpo, due to his reputation (*Ibid.*, 665/1841).

cowpox, created by the district physicians in the past two years and kept in the Ministry of Internal Affairs, show that the inoculation was not performed with the desired success even in districts where district physicians are in place, with the sole exception of the Požarevac District. The letter claims that this is "in the greatest extent because of a superstition, which deters the simple folk from this institution useful for them, and because the officials who dwell among them, poorly and almost in no way set an example".[48] It underlines again the use of inoculation with cowpox and the risks and dangers of inoculation with "natural pox" (*природне богинъ*), which make it necessary to forbid and terminate "this practice deadly for humankind" ("*ово за човечій родъ убитачно дѣло*"), and recommends and introduces the useful one. After the text of the draft itself, the letter reiterates that it is only in the described and no other way that the Ministry hopes to achieve the desired goal, since all other both milder and stricter public admonitions and recommendations of the Ministry have met with poor success (AS: DS, 139/1842).

Thus, during a period when some countries, which had started vaccination earlier and had better medical staff coverage, were already introducing revaccination – for example, Austria expanded its Regulation to include revaccination in 1840 (Memmer 2016, 18) – Serbia was still struggling to get a sufficient number of people vaccinated at all. Measures had to be taken to improve the situation – and the proposed Supplement was soon introduced.

7. SUPPLEMENT TO THE RULES

The Regulatory supplement to the Rules for the inoculation of pox was signed by Prince Mihailo Obrenović on 29 April 1842, and published on 7 May, a mere four months before he was forced to abdicate. Unlike the Rules themselves, the Supplement did not contain any strictly medical norms: it focused solely on measures for stimulating people to get vaccinated. The reason for this, stated in the preamble, is that the Ministry of Internal Affairs had shown the prince "that so far there has been little success in the welfare action of inoculation with cowpox".[49] Lindenmayer (1876 104–105, 429), on

[48] "*и то найвише због суевѣрія, кое прость народъ одъ овогъ за нѣга полезногъ заведенія одвраћа, и због тога, што имъ чиновници међу њима налазећи се, слабо и готово никако примѣръ у томе не даю*" In this context, it does not seem too unlikely that Miloš had previously ordered state officials to have their children vaccinated first.

[49] "*да се досадъ слабо успѣвало у добротворномъ дѣлу каламлѣња кравльи богиня*"

the other hand, attributes the need for this to the population's laxer attitude towards the pox due to the initial success of the vaccination – although, as stated before, his chronology might at times be faulty. Either way, the nature of the changes is summarised very efficiently in the table of contents of his book "The law on vaccination of the year 1839 is made stricter".[50]

All officials and state clerks, as well as priests and *kmets* (village elders), were obliged to inform the population of the Rules on every suitable occasion, and particularly in the spring and whenever human pox appeared. They were supposed to enthusiastically recommend the Rules as a welfare intention of the Government, which was only interested in the best way for preventing the suffering and deaths caused by the pox (Art. 1).[51] On the other hand, anyone who dared to spread the word that inoculation with cowpox was useless or harmful, or who tried to persuade anyone to oppose the Rules, would be harshly punished, as a transgressor "of any of the most important and most useful Regulations" (Art. 2)[52] – a broad formulation allowing the courts to pronounce heavy penalties in such cases.

Furthermore, all officials, especially those belonging to the police, priests and village elders, had the duty to let the physicians inoculate their children before others – obviously, in order to set a good example for the general population and to let the people see that the procedure was harmless. If any of these officials or elders tried delaying or opposing the measure, the physician was to immediately report it to the Ministry, which would order the official in question to be treated as a disobedient and non-diligent servant of the state (Art. 3). This was obviously to be interpreted in the context of the Regulation on State Officials of 17 March 1842,[53] which meant that the officials in question could be demoted or even discharged from service.

A range of restrictions was prescribed to stimulate the vaccination of young people. No young man would receive a government stipend starting from 1843, if he could not prove that he was either vaccinated or had had the natural smallpox; the same obligation would apply to those already receiving stipends, also from the start of 1843, or they would lose their allowance (Art. 4). Similarly, any young man who had not obtained immunity to smallpox in either of those ways would be refused admittance to the Gymnasium (high

50 "*Das Impfgesetz vom Jahre 1839 wird verschärft.*"

51 This article did not exist in the draft submitted to the Council on 11 March, but is present already in the first draft of the Council.

52 "*као съ преступникомъ буди кое одъ найважніи и найполезніи Уредба.*"

53 Уредба о чиновницыма, *Сборникъ законâ и уредбâ, и уредбены' указâ, изданы' у Княжеству Србскомъ, одъ Априла 1840. год. до Конца Декембра 1844. г.* II/1845, Београдъ: Кньигопечатня Княжества Србскогъ, 165–175.

school), the Lyceum (forerunner of the University of Belgrade)[54] and the Theological School, starting in 1843 (Art. 5). Finally, no such young man, from the same date onwards, could be taken as an apprentice in any craft or employed in a store; the master or merchant who violated this rule would be fined between one and five thalers (Art. 6).[55]

As a final and most restrictive measure, it was proclaimed that a person who had not obtained immunity to smallpox could not marry – in cities from 1843, in villages from 1844.[56] Any priest who married a couple without having asked for and received proof of their immunisation would be strictly accountable to the ecclesiastical authorities (Art. 7).

Finally, officials, priests, physicians and village elders who showed particular fervour in the action of inoculation would be given a commendation by the government, and possibly, "according to circumstances" (*по обстоятелствама*), also a "decent" (*пристойна*) reward (Art. 8). The mention of circumstances (absent in the original draft) might mean either that rewards would be given only to those individuals in whose cases the circumstances merit it (i.e. who distinguish themselves to the highest degree), or that they would be given if financial circumstances allow it – or both.

As mentioned before, a number of these measures originate in the Austrian Regulation of 1836: whatever had caused those measures to be omitted in 1839 was no longer a strong enough reason in face of the facts. It is worth noting that the draft submitted on 11 March contained another provision (positioned as Art. 7 there – i.e. before the mention of rewards) that was supposed to authorise the district chiefs to impose quarantine on houses where smallpox appeared, starting from 1843 – closing them and forbidding any outside contact for as long as the pox was in the house.[57] Since we have seen already that isolation was sometimes practiced even before the Rules were passed, one might speculate that this provision was

[54] On the structural and organizational changes in this main institution of higher education in modern Serbia, see Mirković 2008, Mirković 2014.

[55] The original draft suggested only judicial responsibility; the concrete height of the fine was added in the final version.

[56] The original draft contained a simple provision proposing "that no such person be permitted to get married" ("*ни едномъ оваквомъ лицу да се не дозволи венчати се*"). The delay of application of this norm and the penalty for priests were introduced later.

[57] "*Окружнимъ Началничествима да се даде власть, да оне куће, у коима бы се одъ почетка 1843. год. природне богинъ появиле, подъ затворъ стави и сваку мешавину съ ньоме за време докле годъ богинъ у ньой существовале буду, прекрати и забрани.*"

considered too restrictive considering that people often would introduce similar measures themselves, if practically possible, and that in cases where there were practical problems with imposing quarantine the provision would remain useless.

8. THE MEASURES IN PRACTICE

8.1. The Overall Progress

The period after the passing of the Supplement shows mixed results. On the one hand, some of the new measures managed to take hold, and the renewed effort to advertise and spread vaccination yielded some results. On the other hand, it was not easy to dispel the scepticism and fear of the vaccine in some circles, particularly among the uneducated rural population, and the Department of Public Health was still understaffed.

Already on 17 May 1842, the chief of the Smederevo District reported the following to the Ministry of Internal Affairs. Although in a previous report, of 3 October 1841, he had reported that the people of his district were not willing to let their children be vaccinated, now the district physician and the chief's assistant were sent to two villages (Cerovac and Bašin) where, using the matter from Kragujevac, they successfully vaccinated everyone who had not had the smallpox, and then did the same with a few children in two more villages. The chief expressed his firm belief that all the villages in the district would follow this example and that the task would thus be successfully accomplished (AS: MUD-S, I-39, 1031/1842).

Nevertheless, opposition still existed, showing that the popular attitude towards vaccination was slow to change. In a letter of 2 June 1842, to the Administration of the Belgrade District, the Ministry states that it had discovered that the vaccination effort was being undermined by some "ill-minded people" (*зломишљьника*), who destroyed the cowpox pustules on the seventh or eighth day after the inoculation, so matter for further vaccinations could not be taken from them. The Ministry instructed that such people be arrested and delivered to the local court of the peace as violators of Art. 6 of the Rules (AS: MUD-S, I-39, 1054/1842).[58]

Qualified medical personnel that could perform the vaccinations were still in short supply. On 11 June 1842, the Administration of the Crna Reka District reported an epidemic of smallpox both in the district centre (Zaječar) and in several villages, with multiple children having died. They

[58] The fact that the text of the article is quoted in the letter might be indicative of the Ministry's expectations regarding the local officials' knowledge of the law.

implored the Ministry to have Dimitrije Kaparis, the district physician of the Požarevac District, sent to their district to inoculate the population, as he was the physician of the neighbouring district, and had successfully performed inoculations in several districts. On 17 June the Ministry wrote back, recommending that Kaparis (here referred to as the surgeon of the Požarevac District) be sent to Zaječar to perform the inoculations. If he had not yet finished the job (of inoculation) in the Jagodina district, they were advised to tell him to finish it as soon as possible and then to take over the task in Crna Reka District without delay (AS: MUD-S, I-39, 1176/1842).[59]

However, the work must not have proceeded at the desired pace, as the district chief replied on 23 June that the doctor had not finished the vaccinations in his own district (*Ibid.*, 1281/1842). A letter from the Ministry to the Administration of the Jagodina District, dated 10 July, shows that Kaparis had not yet been sent to Zaječar to perform vaccinations. The Ministry urged that this be done immediately if he had finished his work in the Jagodina District, and that he should speed up his work if he had not (*Ibid.*, 1403/1842). Finally, on 22 July the district chief reported to the Department of Health that Dr Kaparis has finished the inoculations in the Jagodina District on 16 July but that he would stay there until the 26 July in order to examine the children after vaccination and to rest, after which he would head to the Crna Reka District (*Ibid.*, 1491/1842).

Another example of medical personnel being stretched thin can be seen in a letter from the Ministry to the Administration of the Smederevo District, dated 22 March 1843. The Ministry sent 6 glass tubes with vaccine matter, recommending that they be immediately given to the district physician so that he could begin with the inoculations. The overall progress of the vaccination effort, including the change of the popular attitude towards the procedure, is painted in colours that sound somewhat too bright, given the overall picture,[60] but the Administration was still reminded to advertise the Rules

[59] A stock of administrative supplies – 900 fedas and 20 reams of vaccination protocols were also sent to the district on this occasion, to be used by Kaparis in his work. Similar letters ordering the despatch both of administrative vaccination papers and protocols, as well as vaccine matter, were preserved in other instances as well; no major changes seem to have been made in this respect. See e.g. AS: MUD-S, I-39, 1504/1842; II-13, 512/1843, III-13, 1528/1846.

[60] "Inoculation has been underway for several months now almost everywhere in our Fatherland, which is greatly desirable, given the fact that the physicians are doing the said job well, and that people everywhere, even in the Rudnik and Čačak districts, where it has never been performed or known, eagerly ask for inoculation and gladly receive it, and even gives thanks for being thus protected from the misfortune and pestilence of the pox." ("*Калами се одъ више месѣци готово свуда по нашемъ Отечеству, и то одвећъ пожелателно, по томе, што*

and Supplement to the people in cooperation with the clergy, to strengthen support for the vaccination. However, it also instructed that, if smallpox had not yet appeared in the district and the vaccination could wait, the physician could commence with it in the Ćuprija District first, as the need was greater there, and only then return to Smederevo; the Administration was instructed to immediately notify the Ministry if that was possible, so it could order the procedure in the Ćuprija District (AS: MUD-S, II-13, 512/1843).

Mistakes during vaccination still happened in practice. On 3 July 1842, the Administration of the Belgrade District reported to the Ministry that two children in the village of Grocka, who had been inoculated with cowpox, had fallen ill with the natural pox 20 days later, and that one of them had lost its sight (AS: MUD-S, I-39, 1073/1842).[61] A later report, dated 11 June, specifies that the boy in question did not go blind, but merely could not open his eyes due to the pox on his face, and that he had recovered in the meantime. However, three more children who had been inoculated were reported to have fallen ill, one on the eighth and two on the fourteenth day after the procedure (*Ibid.*, 1196/1842). The details of the case do not provide information whether the cowpox had been fresh, whether the physician omitted to perform the necessary examination afterwards, etc., but either way this shows that the logistical problems still existed, undoubtedly at least partially caused by the insufficient number of personnel.

Although the preserved documentation is fragmentary, the vaccination reports do seem to be more routine in the subsequent years, and cases of people getting the pox despite being inoculated no longer appear (e.g. AS: MUD-S, III-35, 803/1843; III-13, 1625/1846).

Nevertheless, reminders for the application of the Rules were still frequently needed. For example, when the district physician of the Belgrade district, Dr Šteker, was about to commence inoculation in the Turin-Kolubara County, where this procedure had not been previously performed by any physician,[62] the Ministry of Internal Affairs sent a letter to the administration of the district (on 21 August 1842), recommending that they follow Article

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лъкарима исты посао добро за рукомъ иде, и што народъ свуда, па іоштъ и у Рудничкомъ и Чачанскомъ окружію, гдъ нигда то ніе рађено и познато было, тражи желно каламлъньтъ и радо га пріма, па и благодари, што се ньимъ одъ несреће и помора кравльи (sic) *богиня сачувава* ")

[61] The letter uses the word *обневидело*, which could imply both a permanent and a temporary loss of vision.

[62] "*гдъ до сад никако лъкаръ каламіо ніе*" This could imply either that no inoculations were performed at all, or merely that they were performed by self-taught individuals – though in the latter case, it is possible that only variolation was carried out.

8 of the Rules of 1839. Namely, that the district chief himself accompany the physician on the first visit in the county and try to persuade the people "in a nice way" (*лепимъ начиномъ*) to accept the new means of salvation from the pox, and only after the people develop the needed degree of respect for the procedure, would the district chief be allowed to leave the physician in the hands of the county chief, ordering him to be at hand to help the physician vaccinate as many people as possible (AS: MUD-S, I-39, 1661/1842).

On 16 January 1843, the Ministry wrote to the Government of the City of Belgrade, claiming that it had discovered that many children and even adults in the city were suffering from smallpox, and recommends that it call upon the people to vaccinate their children, especially through the city officials (*посредствомъ кметова и обштинара варошки*). It was further told to instruct the people that they could visit both the city physician and the garrison surgeon for this purpose, but also to remind them of the Rules and Supplement and the consequences for those who break them (AS: MUD-S, I-8/1843). Similar reminders exist in the correspondence with other local administrations.[63]

Groder wrote in his notes that the Supplement was of great help in securing the effectiveness of subsequent vaccinations, both directly and through orders by the minister of internal affairs and minister of education, that were repeated every year. He particularly underlines the provisions ordering officials and elders to provide an example by having their children vaccinated first. He concluded "And so it was. The inoculation proceeded entirely according to the law, as correctly and as successfully as it could be".[64] It was only a decade or two later that a lax attitude towards vaccination reappeared, as the absence of smallpox reduced the fear of it in the general population, while officials started thinking too highly of themselves to attend vaccinations in person and keep promoting the cause – which led to a resurgence of smallpox in the 1870s and early 1880s (Mihailović 1951, 166–167). While this period, beyond any doubt, merits further research as well, analysing it in depth falls outside the scope of this article.

8.2. Financial Concerns

The vaccination fee was also an issue of some relevance, as it was also a deterrent to the procedure, at least as far as the poorer families were concerned. Although the Rules did foresee exemption for those who could

[63] See e.g. AS: MUD-S, II-13, 512/1843.

[64] "*Tako i bi. Pelcovanje je išlo sa svim po zakonu, da nemože biti ispravnije ni uspešnije.*"

not afford the procedure, it was in all likelihood not so easy (and potentially shameful) to prove. Also, many poor families who were technically *able* to pay must not have considered a medical procedure of doubtful relevance and safety (from their point of view) to be the best way of spending their otherwise scarce means.

This issue was already noticeable in the first years of vaccination. For example, a letter from the chief of the Požarevac District to the Ministry on 12 April 1841, claims that the district physician was only then sending his vaccination protocols for 1840, as he could not complete them sooner, since not all the fees had been paid (AS: MUD-S, III-144, 1364/1841).

Even some officials considered the fees to be high: on 10 March 1843, the Administration of the Podrinje District petitioned the Ministry for citizens to pay only half a cvancik, as the villagers did. The Ministry took this appeal to heart and forwarded the initiative to the State Council, explaining how many city-dwellers were no richer than villagers, particularly as city life involved more expenditures than country life, and that even half a cvancik would be enough for the physicians, given the large amount of work. The Council and prince supported the initiative and the fee was unified on 23 September 1843 (Mihailović 1951, 172–173).

However, on 8 December 1843, the Council made an additional suggestion to the prince: to make the physicians inoculate the poorest for free, instead of those expenses being covered by the budget. The argumentation is slightly contradictory, claiming, on the one hand, that the existing provision could allow for abuse at the expense of the state, and on the other, that such a change would not cause much loss to the doctors, who had a steady regular salary. The prince asked for the opinion of the Ministry of Internal Affairs, which was opposed to this, pointing out that Serbian physicians were already paid less than their colleagues abroad, that there were means for preventing and persecuting abuse, and that the high numbers of fees charged would drop in a few years, when most adults will have been vaccinated and only newborn children would need inoculation, further reducing the physicians' income. The Council was again consulted and fought against this argumentation, claiming – again somewhat contradictorily – that it would not delve on the matter of comparative salary levels of physicians in Serbia and abroad, but that Serbia spent more from the budget on said physicians than any other European country, and that the better economic standing of the population and different civil relations in other countries allowed physicians to support themselves without any salary from the state. The Council then suggested a different change – that *all* persons be required to pay half a cvancik, without any exemptions for the poor. As they reasoned, persons so destitute that they could not pay such a small fee were certainly few – "and if someone

truly dwelled in such great poverty, that he is unable to pay this insignificant fee, then surely the doctors will have enough humanity to absolve him of it, as must be expected from educated people, who are, after all, sufficiently provided for in regard to their living"[65] (*Ibid.*, 173–177).

This letter cannot but be called presumptuous, but despite this (or possible *because* of this) the prince did not reply to it for a long time. The Council's opinion is dated on 4 April 1844; it was only more than a year later, on 22 August 1845, that he sent a brief reply, calling the Council's argumentation one-sided and weak. The matter was resolved only indirectly, but to the Council's liking: the budget for 1846 prescribed a raise for physicians, while allotting no funds for the vaccination of the poor (*Ibid.*, 177–178).[66]

8.3. How the Clergy Could (Not) Help

While we have already seen in several examples that the role of the priests in convincing the wider population to vaccinate their children was by no means negligible, their function as record-keepers, prescribed by the Rules, could not be readily realised in practice. This was brought to the attention of the authorities in the summer of 1842.

On 23 July the Administration of the Šabac District wrote to the Consistory of the Šabac Eparchy, asking for the clergy to compile a list of uninoculated people in the district (according to Art. 13 of the Rules), writing in very pompous and dramatic language about people who, to their own detriment, would not say which of their children had not been inoculated or had had the smallpox. It also asked that the priests frequently remind their congregations not to omit having their children inoculated and thus put them in grave danger, in accordance with the same article (AS: MUD-S, I-39, 1654/1842).

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[65] "*а баш ако се ко и налази у таковом великом убожеству, да ову незнатну таксу платити у стању није, то ће ваљда лекари имати доста човечности да му такову опросте, као што се то мора очекивати од људи изображени, и кои су у осталом довољно за њиово уживљење снабдевени.*"

[66] Only in 1859 – after the return of Miloš Obrenović to the throne – was this provision changed again, and every municipality was made to pay the fee for its poor residents. (Уредба коіом се прописую нека правила за каламленѣ богиня. *Сборникъ закона' и уредба', и уредбены' указа', изданы' у Княжеству Србіи. (Одъ почетка до конца 1859. године).* XII/1859. Бѣоградъ: Правителствена кньигопечатня, 39).

The Episcope Maksim Savić of Šabac, replied on 31 July 1842, reporting that all the priests in the eparchy had already been instructed to let their children be inoculated first, as well as to encourage their parishioners to inoculate their children. However, in response to the Administration's demand to provide a list of people who were not inoculated, he claimed that the Consistory is unable to comply, as it was seen that priests had no information of the fact other than from the protocols of the baptised, where more or less only newborn children were listed, and no distinction was made between the children who had had the natural pox and those who had been inoculated. (Obviously, this latter part of the argumentation was faulty, as those who had already had the pox did not need to be inoculated against it.) Thus, the Consistory believed that the *kmets* and courts of the peace could produce such lists more easily.[67] The letter also remarks in passing that the eparchy did not receive the Rules from the ecclesiastical authorities. Finally, if any priests were caught agitating against vaccination in any way, the district physician was encouraged to press charges through the lay authorities before the ecclesiastical courts (*Ibid*.)

The Administration then forwarded a copy of its own letter and the Consistory's reply to the Ministry, stating that it was now uncertain as to whether and how it was required to obtain a list of uninoculated people and asking for further instructions. It also requested that the Rules be sent to the Consistory, so it could distribute them to the priests and thus enabling them to play their role in the vaccination effort (*Ibid*.)

In response to this, on 21 August the Ministry of Internal Affairs wrote to the Ministry of Education (which was also in charge of ecclesiastical relations), relating the situation. A passage saying that the Ministry of Internal Affairs had sent 200 copies of the Rules to the Ministry of Education on 16 August 1839, has been struck out in the draft of the letter and replaced with one underlining that the Ministry of Internal Affairs has written confirmation from the Ministry of Education that it had received the said 200 copies and that it has not omitted to forward the necessary number to the Consistory to distribute to priests. Still, the Ministry continues, it suspects that the Rules could not be forwarded to the Šabac Consistory due to an insufficient

[67] In addition to that, it is stated that the eparchy could only send such a proclamation to the priests in all three districts that belonged to it (and not just the Šabac District), which it was not authorised to do without instructions from higher ecclesiastical authorities.

quantity of copies, and thus asked for an estimate of a further number of copies that would be necessary so the Rules could be distributed to the priests (AS: MUD-S, I-39, 1654/1842).[68]

On the same day, the Ministry replied to the Administration of the Šabac District, informing it that although Article 13 of the Rules did specify that it was the priests' duty to forward the lists of uninoculated people to the civil authorities, they were unable to do so at this moment, while the number of uninoculated adults was still higher than that of the inoculated ones, and thus this duty could not be demanded of them at that time. Only when the number of inoculations in Serbia had grown to the point that only recently born children had not yet been inoculated would the priests be able to perform this duty, by forwarding lists of recently baptised children. The Administration was also informed that the Ministry had written to the Ministry of Education regarding the copies of the Rules, and that it hoped that they would soon be sent to all priests in the Šabac District, if they had not received them previously (*Ibid.*)

The case as a whole is illustrative of administrative miscommunication fairly typical for the time. While the idea of priests notifying the civil authorities of newborn children who had not yet been vaccinated was a legitimate one in a state where the Church was the only institution that kept birth records, the execution was faulty. No one had been notified that the priests' duty was not to begin until a certain vaccination rate had been achieved – if that had, in fact, been the original plan, and not a *post factum* realisation that the provision had been unrealistic beforehand. Furthermore, even as a half-measure, the forwarding of lists of baptised unvaccinated children still could have been useful, but not even this possibility was utilised. In all likelihood, the number of vaccinators was still too low for them to be able to functionally make use of such information while large masses of the population still remained unimmunised. Even the priests' role in promoting vaccination, while enacted in many cases, could have been made more efficient had copies of the Rules and clear instructions been sent on time.

[68] It is worth noting that the Supplement was sent to the Ministry of Education on 23 May 1842 – before this correspondence – in 500 (and not 200) copies, to be sent to priests and courts (AS: MPS-P, IV-263, 832, 846, 1404/1842). There may have been earlier indications of the aforementioned problem, which led to the increase in the number of copies; perhaps the persons in charge simply made a better calculation this time, or more funds were allotted to the printing of the act.

8.4. Healthily Ever After?

Of all the restrictive measures introduced in the Supplement, the requirement of a vaccination certificate is probably the most extreme. After all, in the other cases (of students, apprentices, and the never explicitly prescribed, but tacitly present soldiers), an individual entered a collective of people who might not be interested in their particular company, but who might be endangered if they brought the contagion of pox into their midst. In the case of marriage, two persons made a conscious decision to create a family with one another. While the restriction could certainly be considered in the interest of their children (or in-laws, for that matter – also a relevant factor in a period when most families were large cognate groups), the intervention nevertheless reaches much further into the private sphere. The lawgiver was obviously aware of this, since an additional year of *vacatio legis* was left for the implementation of this norm in rural environments (where it would certainly be harder to enforce) – the only exception of this sort in the whole Supplement.

The church protocols of the married from the period do not reflect this obligation in any way: the same printed form was used as before, in which the details of the newlyweds were filled in by hand. The closest thing that the form does contain is a general formulation that no obstacles to contracting the marriage had been found (IAB: CMK). While originally meant solely for matrimonial impediments acknowledged by canon law, this could have been extended in interpretation to include the fedas that the groom and bride had to submit to the priest.

Although we have no factual knowledge of the "obstacles" being interpreted in such a way, there is no doubt that the provision was applied in practice, because the deputies of several areas (a total of eight petitions by deputy groups at different administrative levels) at the Saint Andrew Assembly of 1858 complained about it and asked for it to be abolished (Radenić 1964, 70, 91, 99, 133–134, 137, 145, 164). The level of detail in those petitions varies from a brief, unexplained demand for the certificates needed for marriage to be abolished, submitted by the Dragačevo County, to elaborate and slightly dramatic descriptions of the problem in several other petitions. However, the key cause for all of them seems to be that the future spouses frequently had to travel fairly far (i.e. from their home village to the physician in the district centre – a journey of 16–17 hours is mentioned in one petition), which not only involved expenses and a waste of time, but was also considered indecent for young unmarried (betrothed) girls, particularly if it involved spending a night in an inn, as they were notorious places of ill

repute. This could tarnish a girl's reputation and bring shame to her family.[69] The petition of the Rača County also mentions future spouses who did not have the certificates being "squeezed" (*isceđuju*) for extra fines, since the priests knew well that the peasants respected their rank so much that they would rather pay even five or ten times more than they owed than press charges – suggesting demands for bribes and extortion. It is worth noting that the vaccination as such was no longer questioned. In response to this, Art. 7 of the Supplement was abolished on 24 January 1859, replaced with an order to house elders and police authorities to ensure that children were inoculated on time.[70]

As Radenić (1964, 14) points out, many of these problems could have been resolved simply through better organisation. The logistics could have been resolved in a way simpler and less demanding for the average person, and obviously there were insufficient safeguards against abuse – which, again, could be generally considered a flaw of the administration during the period in question, and not specifically of the smallpox regulations. However, the very fact that this provision was (at least in principle) enforced in practice must have contributed to the overall vaccination rate.

We have not succeeded in obtaining information regarding the application of all the measures prescribed by the Supplement. For example, no information was readily available regarding the demands for fedas for students and scholarship beneficiaries. The documents from the Ministry of Education collection that deal with stipends and admission contain lists of students, sums and administrative trails of their payment for every month, etc., but no mention of whether the students had submitted their vaccination certificates.[71] However, this is no proof that certificates were not required, but merely that no explicit record of their existence was kept in these archives, focused as they were on the financial aspect of the

[69] A part of this issue was that vaccinators were obviously no longer travelling to every village. While the petition from the Smederevo District suggests that doctors should come to every village with a population of more than 100 to vaccinate children and simultaneously issue certificates (while people in smaller villages would travel to the nearest larger one), it appears that the increase in vaccination discipline in the meantime allowed for it to be moved to larger centres.

[70] Уредба, коіом се укида 7-ма точка уредбе одъ 7. Мая 1842. год. да момцы и девойке имаю при венчаню подносити свештеницыма феде да су богиняма пелцовани. *Сборникъ закона' и уредба', и уредбены' указа', изданы' у Княжеству Србіи. (Одъ почетка до конца 1859. године).* XII/1859. Бѣоградъ: Правителствена кньигопечатня, 19–20.

[71] The folders of documents we have managed to go through were the following: AS: MSP-P, IV-263/1842, II-81, II-82, VI-495/1843; I-5, I-40, I-42, IV-53/1844.

scholarships. It is equally unlikely that individual student files would contain anything of the sort, as the certificates would only have been submitted for inspection, and not given to the organs of the Ministry. Unfortunately, the scope of this research did not allow for a deeper investigation of these files or the archives of the educational institutions from this period; the same goes for the admission of apprentices. While further research in this area would provide a valuable piece of the puzzle, we are inclined to presume that the provisions were indeed enforced, since the much more problematic provision regarding marriage was.

9. CONCLUSION

The first decades of vaccination against smallpox in Serbia provided numerous obstacles. The population, mostly uneducated, was sceptical and fearful of the new procedure. The administration that was supposed to manage it had not yet been firmly built and was prone to omissions. Worst of all, there was a great shortage of educated medical staff needed to perform the vaccinations.

However, in this context, the legal response to the situation can be praised for its quality, efficiency and adaptability. Given the fact that Serbia had only achieved its autonomy within the Ottoman Empire in 1830 and that its overall development was stunted by four centuries of Ottoman rule, the introduction of a legal framework for vaccination in 1839 seems to be quite timely. The Austrian Regulation of 1836 was a reliable, high-quality template for the Serbian act, but it was also well adapted to the local circumstances – both in the sense that the text was shortened and simplified without the quality seriously suffering, and that material modifications were made to account for the more difficult circumstances, such as the decision to allow skilled practitioners without formal education to take part in the vaccination, upon approval by a formally educated doctor.

The restrictions for the unvaccinated persons in the Supplement might seem drastic to the modern reader – after all, are not similar restrictions the subject of heated debate now, almost two centuries later, in the midst of the COVID-19 pandemic? However, several factors must be noted here. Firstly, the measures were not invented by the Serbian government: they were inspired by the Austrian Regulation. Secondly, the government first tried to make do without them: none of the more extreme measures made it into the Rules – it was only after the first norms proved insufficiently effective that they were added. And thirdly, and perhaps most importantly, they proved efficient in practice, and the spread of smallpox was stopped.

But not forever: as we have briefly remarked in the final section, the lax attitudes towards vaccination in the subsequent decades led to a decrease in vaccination rates and the resurgence of the pox. That, too, could be taken as a valuable lesson for modern times. Nonetheless, it certainly is (and hopefully will be) a subject for further research.

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[8] Уредба коіом се прописую нека правила за каламленѣ богиня. *Сборникъ закона' и уредба', и уредбены' указа', изданы' у Княжеству Србіи. (Одъ почетка до конца 1859. године).* XII/1859. Бѣоградъ: Правителствена кньигопечатня, 39. (Uredba kojom se propisuju neka pravila za kalamljenje boginja. *Sbornika zakona i uredba i uredbeni ukaza, izdani u Knjažestvu Srbiji. [Od početka do konca 1859. Godine].* XII/1859. Beograd: Pravitelstvena knjigopečatnja, 39)

[9] Уредба, коіом се укида 7-ма точка уредбе одъ 7. Мая 1842. год. да момцы и девойке имаю при венчаню подносити свештеницыма феде да су богиняма пелцовани. *Сборникъ закона' и уредба', и уредбены' указа', изданы' у Княжеству Србіи. (Одъ почетка до конца 1859. године).* XII/1859. Бѣоградъ: Правителствена кньигопечатня, 19–20. (Uredba, kojom se ukida 7-ma točka uredbe od 7. Maja 1842. god. da momci i devojke imaju pri venčanju podnositi svešteničima fede da su boginjama pelcovani. *Sbornik zakona i uredba, i uredbeni ukaza, izdani u Knjažestvu Srbiji. [Od početka do konca 1859. Godine].* XII/1859. Beograd: Pravitelstvena knjigopečatnja, 19–20)

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/BOOK REVIEWS

Zoran MIRKOVIĆ, PhD*

Popović, Dragoljub. 2021. *Constitutional History of Serbia*. Balkan Studies Library, Volume 30. Paderborn: Brill Schöningh, XIII + 249.

At the beginning, a few words about the author of the book. Dragoljub Popović was a longtime professor at the Faculty of Law, University of Belgrade. He taught General Legal History (Comparative Legal Tradition, as it is called today), and was also habilitated for Constitutional Law. His brilliant university career was interrupted due to his disagreement with the repressive University Act of 1998. He continued his career first as a lawyer, then as the Ambassador of the Federal Republic of Yugoslavia to Switzerland (2001–2004). From 2005 to 2015 Popović was a judge of the European Court of Human Rights. The author of the book is a professor, diplomat and judge.

In the preface, the author explains why, apart from Jaša Prodanović's 1936 book *Ustavni razvitak i ustavne borbe u Srbiji* (Constitutional development and the constitutional struggle in Serbia), there is no book with the same title. First of all, there was the influence of Slobodan Jovanović on writing the constitutional history of Serbia, although he did not call it that. His voluminous books were not only dedicated to the constitutional history, but also to the political, economic and general social history of Serbia in the "long nineteenth century," i.e. from the First Serbian Uprising of 1804 to the outbreak of the First World War in 1914. The second reason, according to the author, is that constitutional history did not exist as a separate discipline at law schools in Serbia and Yugoslavia, but was taught as part of the national legal history and courses in constitutional law.

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The author singles out the rule of law and human rights and examines their significance for the development of Serbian constitutionalism. Which of these two elements was more important? The author says that it was not human rights and explains why: "Human rights have never become a pillar of the Serbian nation state. They were present as a concept with other ideas during the nation building, but were nevertheless unable to prevail. The reason for their weakness originated in the lack of social and political forces which could promote them and impose the respective narrative on the political agenda (...) Human rights were proclaimed in constitutional texts, but remained mostly ineffective." He emphasizes the importance of the rule of law: "The concept of the rule of law was much more widely discussed and was one of the levers of the developments. This was rather complex and showed specific traits of the Serbian society. That is why (...) an overarching principle as a source of the legitimacy of the ultimate power (...) would not be found in the protection of human rights, but rather in the rule of law."

The author reminds of Dositej Obradović's insightful words, that the local people in the Balkans, once they free themselves from foreign rule, can continue to rule by terrorizing the people – just as the foreigners had. Unfortunately, these words, have been confirmed in reality numerous times. The transfer of power from foreigners to local people has by no means guaranteed good and fair government.

The author shows the difficulties with the rule of law in practice on the example of the rule of Prince Mihailo: "The prince, stern, rigid and reserved in communication, different from his environment and unable to get support from the masses, was at the same time very much inclined to make use of his prerogative. He enjoyed his princely power to the full, and sometimes even overstepped the law." When he ascended the throne in 1860, the core stance of Mihailo's proclamation was legality: "Let each and everyone know that while Prince Mihailo is in power, the law is the supreme will in Serbia." Four years later, in 1864, Prince Mihailo sentenced five justices of the Supreme Court to imprisonment, on the basis of a subsequently passed law that enabled judges to be tried. The general impression was that the justices had been convicted illegally and without their guilt being proven, and that the principle of legality and judicial independence had been violated. There is nothing or almost nothing left of Prince Mihailo's promise that "the law is the supreme will in Serbia." The author concludes the description of Mihailo's rule with the words: "He was intolerant towards the opinions of others, which made his rule difficult to bear."

The 1888 Constitution deserved a high mark. The constitutional provisions on the organization of government on democratic foundations, the rule of law based on law, freedoms and the rights of citizens followed

in the steps of the high standards of European constitutionality of the time. The implementation of these constitutional provisions, which required much good will, patience and subtlety in acting, encountered almost insurmountable obstacles. The People's Radical Party, thanks to which most of the mentioned provisions were included in the 1888 Constitution, understood parliamentary government as the government of the majority in a literal way. Its goal was to win majority in parliament, which meant not only appointing its ministers but also filling positions in the administration, even in the judiciary, with its people. The parliamentary regime, literally and absolutely understood, quickly succumbed to the party regime or the regime of the party state. Due to his dissatisfaction with the party regime, King Aleksandar Obrenović suspended the 1888 Constitution in a coup d'etat in May 1894 and restored the 1869 Constitution. He replaced the party regime with his personal regime.

With the adoption of the provisions of the 1903 Constitution, Serbia became a constitutional parliamentary monarchy. The author leads the reader through this period, which some call the "golden age of Serbian parliamentarism", pointing out the obstacles that stood in front of it. He mentions that the middle class was very small and weak in number. Only six cities had populations over 10,000. The majority of the middle class consisted of craftsmen (46%), merchants (22%) and clerks (19%). A major obstacle to the functioning of the parliamentary system was the so-called conspiracy issue. The officers who had killed King Aleksandar Obrenović, to whom they had sworn an oath, over time became a factor in the political life of the Kingdom of Serbia, with all the negative consequences that such participation entails. In addition to these two, obstacles to the establishment of a parliamentary system were: poverty, illiteracy, and backwardness in educational and cultural terms, a low level of political culture, etc.

The author shows this development of parliamentary rule, from the two-party system to the system of the dominant party. He presents the story of probably the only "non-parliamentary action of King Peter," from May 1905. At that time, the king rejected the request of Prime Minister Nikola Pašić to dissolve the National Assembly and call new elections. Instead, the king entrusted the leader of the Independent Radical Party, Ljubo Stojanović, to form a new cabinet. The new prime minister immediately requested the dissolution of the National Assembly and new elections, which the king approved. With a special declaration, Stojanović promised free, fair and correct elections. That was done and probably the fairest elections were held at that time. The alleged "non-parliamentary actions of King Peter" resulted in free elections that expressed the true will of the people. However,

the two-party system did not last long: soon, from June 1906, a system of parliamentary government with a dominant party was established. It would remain so until 1914 and the beginning of the First World War.

The author begins the description of the post-war constitutionality with the fact that the general idea of the founder of communist Yugoslavia in 1943 was one ethnic federation. Serbs, Croats and Slovenes, as recognized peoples in the interwar Yugoslavia, were joined by Montenegrins and Macedonians. "Each of the constituent peoples had a republic, but the Republic of Bosnia and Herzegovina was differently conceptualized." Bosnia and Herzegovina was the homeland of the Serbs, Croats and Muslims who lived there (the Muslims were recognized as an ethnic group in the course of time). That is why the author believes that Yugoslavia was not an ethnic federation, at least not completely, and concludes: "The foundations of the federation, and its founding myth, were lacking a clear principle." Another weak point of the founding myth was that "the internal minorities in Yugoslavia, i.e. the Yugoslav ethnicities living in a large number outside of their main republic, did not enjoy minority rights."

To the major shortcomings in the original concept of the federation, the author adds the lack of legitimacy and democratic institutions, which in its entirety determined the fate of Yugoslavia. All these weak points were reflected in the constitutional texts, "whose number evidenced the instability of the whole state construction and basic constitutional settlement." In forty-six years, three constitutions, one constitutional act, and ninety (*sic*) constitutional amendments were passed. The first 1946 Constitution was a simple copy of the Soviet Union constitution of 1936. The 1946 Constitution established "one statist social and centralist state system, which excluded any form of pluralism – ideological, property, political, etc." (Ratko Marković).

Instead of a system of division of power, a system of unity of power was introduced, characteristic of the countries of the so-called people's democracy (i.e. countries from the socialist camp) for the entire duration of their existence. The system of unity of power meant that the holder of all power was the Assembly, which delegated executive and judicial power to the relevant bodies. In reality, the Assembly was not the bearer of all power, but rather the Central Committee of the Communist Party. This is another of the many contributions to the lack of legitimacy of the institutions that made crucial decisions. The author consistently and ubiquitously emphasizes this lack of legitimacy of these institutions, that there was no open debate on political issues, that there was no freedom of political organization, and that there were no free elections. This is to be commended and serves to nurture a critical spirit and scientific truth.

After the break with the Soviet Union in 1948, the Soviet model was abandoned and the search began for its own original constitutional and other solutions in building socialism. The 1953 Constitutional Act began a major Yugoslav constitutional experiment called "self-government". According to the 1953 Constitutional Act, the basis of the entire social and political system was: 1) social ownership of the means of production, and 2) self-management of producers and working people in all areas of social life.

The last two constitutions of the Yugoslav state, from 1963 and 1974, were not written as classical constitutions but as "charters of social self-government" (Ratko Marković). A total of forty-two amendments were made to the 1963 Constitution, in three steps. The 1974 Constitution was amended twice, with a total of forty-eight amendments. Three constitutions, one constitutional act and a total of ninety amendments in the forty-six years of the existence of socialist Yugoslavia show that something was wrong. "Were these the real constitutions that establish the state order, limit power and guarantee the inviolable sphere of freedom, or did we live under constitutions that were that only by name" (Kosta Čavoški).

The 1974 Constitution is designated in the book as the gravedigger of Yugoslavia. It was the longest constitution in the world, as it is pointed out in a pejorative manner. The language of the 1974 Constitution was very burdened with political and ideological phraseology, which led to the longest constitutional text in the world, of very low legal quality. With all these shortcomings, it should be added that the 1974 Constitution introduced concepts and institutions "that have no counterparts in comparative constitutional law, so that it was almost impossible for lawyers of classical education to understand" (Ratko Marković). The author sees in the following reasons for such a constitutional text: "This was due to the attempt by the text drafters to differentiate Yugoslavia from other communist regimes, but also to cover up and conceal the real political process of power struggle between communist elites in a form of government which was not based on free elections and therefore lacked legitimacy."

The author nicely observes on pages 214–216 that one of the key issues in the constitutional history of socialist Yugoslavia was Tito's position in the constitutional and political system. At the end of this passage, the author concludes: "The background of the 1974 Constitution lies in the failure of the political system introduced in 1963. The latter was based on the concept of appointing a successor to Tito. It was replaced by the idea that the strong man of the regime was irreplaceable. To provide a continuation of the socialist system of governance, the introduction of collective leadership seemed to be necessary. That is exactly what the 1974 Constitution provided for." In the 1974 Constitution some of the processes of political developments

reached their peak: "The strong man of the regime became President for life, and ruling party found its place in a constitutional provision on the organization of power." The outstanding features of the 1974 Constitution were, according to the author, "the parity of constituent units and consensus in the decision-making process." This mechanism at the level of Yugoslavia "was constructed in such a way that it could function only in the presence of an informal political arbiter." "It is indeed a miracle that the whole constitutional settlement survived for a decade after Tito passed away," concluded the author.

The author ends the book with an analysis of the Serbian constitutions of 1990 and 2006. The author first emphasizes the quality of the 1990 Constitution: a return to institutions and notions of classical constitutionality. The credit for this, the author will rightly say, belongs to the constitution's author, Ratko Marković. The language of the text of the 1990 Constitution is also highly praised. Then the author lists what is not in the Constitution: countersignature and constitutional complaint. After that, he talks about what is confusing in the constitutional text, such as provisions on social property.

Finally, the author cites examples where application has led to the distortion of the original constitutional solutions. The 1990 Constitution provided for the right of the President of the Republic to ask the National Assembly to vote once more on the act it had voted on, before he confirmed it. This is the so-called suspensive veto of the President of the Republic. On several occasions, the President requested a second vote, but the National Assembly never put that act to a second vote. "This was due to the fact that the majority in the National Assembly was controlled by the presidential political party." Thus, the suspensive veto of the President of the Republic turned into an absolute veto in practice, what evidenced, according to Popović, "the authoritarian character of the whole political settlement in Serbia under the 1990 Constitution." The author states that the 2006 Constitution is almost a repeated text of the 1990 Constitution, and that it repeated the shortcomings of its predecessor.

The concluding remarks were again dedicated to the ideas of the rule of law and freedom, on the long road to return to the community of European nations. In the appendix includes *A Word on Freedom* by Božidar Grujović (translated by the author).

Concluding a short review of the excellent book by Popović, the author of these lines is impressed by two basic ideas, in two periods of Serbian constitutional history.

In the 19th and first half of the 20th century, it was a struggle for freedom and an organized state in an environment that was often disrupted and insufficiently patient in building constitutional institutions. Serbian history was accelerating to the boiling point. Prince Mihailo was killed on 29 May 1868 after eight years of his second reign, at the age of forty-five. If he had lived to the age of eighty like his father Miloš, he would have lived and ruled until 1903. It was on 29 May 1903 that the last Obrenović, King Alexander, was killed at the age of twenty-seven, and he succeeded his father, King Milan, who had abdicated in February 1889 at the age of thirty-five. The almost unbearable acceleration of history could not favorably affect the stable and proper development of Serbian constitutional history and its institutions.

Post-war constitutionality is characterized by an unsuccessful search for original solutions. After forty-five years, the only way out was to return to classical constitutionalism.

Dragoljub Popović is an author with a shrewd spirit, a sharp and light pen. His book will enable foreign readers to acquire the necessary knowledge about the constitutional history of Serbia in English, which has not been the case so far. Given its qualities, the book should be translated into Serbian and enable native readers to get acquainted with its rich content.

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Connelly, John. 2020. *From Peoples into Nations: A History of Eastern Europe*. Princeton & Oxford: Princeton University Press, 956.

This book is about the modern history of Eastern Europe: it starts in earnest in 1800, thought basic information and considerations of the previous periods are also provided, and ends with Viktor Orbán, as a trademark of contemporary populism and illiberalism in the region. According to the author, Eastern Europe, sometimes in the book referred interchangeably as Central Eastern Europe, is geographically everything between contemporary Germany in the west, what was the Soviet Union in the east, the Baltic Sea in the north, and Albania and Greece in the south. East Germany, an entity under the Soviet rule during the Cold War is, for political reasons, considered in the book as a part of the region.

One of the main points of the book is about the strength, intensity, and resilience of ethnic nationalism in Eastern Europe. The main explanation and up to a point justification for its intensity provided by the author is that nations in this part of the world have been for centuries concerned about their very existence, threatened either by assimilation, meaning predominantly loss of the national language as the main trait of national identity, or by extermination. As the author points out "During the worst days of World War II, few worried that the Dutch, French or Russian peoples would become extinct. Yet this fear was very much alive among Serbs, Poles, Czechs, and East European Jews" (p. 24). For good reasons, the reader could add.

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Nationalism in Eastern Europe has been a fuel of the struggle of its peoples for survival. The nation state has been the answer, so it has been the aim of this struggle. The general attitude was that only after national liberation and after securing the existence of the ethnic nation, can other liberation be successfully pursued. For example, social injustices were considered to exist due to the oppression of the foreigners and their empires. In short, all development in domestic and international politics, economy and social sphere have been "overshadowed by the fear of becoming *foreign in their own land*, traitors to their heritage. East Europeans are accused of being obsessed with the past, but that is because they have wanted to break from it" (p. 26, italics in the original).

Accordingly, the author suggests that the history of Eastern Europe is dominated by the battle for its peoples' survival in the harsh environment of the much bigger, empire prone nations, whose empires dominated the region for so long. In 1800 there was only four states in the Eastern Europe, all of them multinational empires: Prussian, Russian, Habsburg, and Ottoman empires.[1] The author points out that the map of Eastern Europe in 1800 was like the map of Africa in 1900: borders arbitrarily drawn by the colonial empires irrespective of the ethnic, national, or tribal borders that had existed. Hence fragmentation of the empires in both Eastern Europe and Africa was inevitable with the advent and strengthening of national identity, though Eastern Europe has been more successful in that process than Africa. If the national identity was not strong enough, then the nation-building projects were doomed from the start, as the author points out that "Some of the nations imagined by intellectuals never took root; Czechoslovakia and Yugoslavia were just two cases" (p. 21).

The author specifies that "This book ascribes no stereotypes to Eastern Europe beyond saying that it is an anti-imperial space of small peoples. In the corners of its political nightmares dwells this indistinct fear of being absorbed into larger powers. The anti-imperial struggle kept ethnic cultures alive, but it also promoted ideologies of exclusion that can become racist" (p. 24–25). Though it is understandable that these are just two sides of the same coin, the reader is a bit sceptical about the author's claim that one of the empires, Austria-Hungary, protected human rights better than many nation-states the come later. It sems that the author confuses legal state (*Rechtsstaat*) with protection of human rights. Yes, the government in Austria-Hungary the was constrained by the law (after all, Gavrilo Princip was not sentenced to

[1] It was Prussia, Austria and Russa who wiped Poland off map a few years earlier (in 1795), and they agreed to "abolish everything which could revive the memory of the existence of the Kingdom of Poland" (p. 22).

death for the assassination of the Archduke Franz Ferdinant because he was legally underage), but these laws did not necessarily protect human rights, especially those of the Slavonic peoples in the Monarchy.[2]

The crucial country for the region, according to the author, proved to be Germany, especially the question how Germans would form a nation-state after the Holy Roman Empire become defunct in 1806. The answer to this question has shaped the region's fortunes and, especially, misfortunes. It was Otto von Bismarck's strategic decision to leave Austrian Germans out of the unification that proved to be crucial for the future. However prudent this decision was regarding the organisation of the united Germany, the Second Reich,[3] it produced a frustration and grievance among ethnic Germans who were not included in it, predominantly Austrian and Bohemian Germans. The border between Germany and Austria, between the same ethnic nation, was so frustrating for the lower customs clerk in the small Austrian border town of Braunau am Inn, a father of a young boy. The boy's name was Adolf Hitler.[4]

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[2] This nostalgic view of the Habsburg empire has gained a foothold in the recent years. For example, Judson (2016) provides a comprehensive, but rather rosy and unbalanced picture of the empire as an enlightening force that brought civilisation to its peoples. Basically, this contribution is a review of all the moral arguments of colonial expansion, in the which the metropolis is doing it for the benefit of the people in the colony whose civilisation is underdeveloped. This is not to say that in some specific cases, for example in the case of the occupation of the previously Ottoman Bosnia & Herzegovina, the advent of the Habsburg empire did not meant progress for the society. Evidence based chapters of Ivo Andrić's *Bridge on Drina* on the Austrian occupation of Višegrad, the city in which the bridge is located, provide vivid illustration of that progress.

[3] The author provides some rationale for this strategic decision. The religious and cultural heterogeneity of the united nation was not increased, the dominant position of Protestant Prussia was not endangered, and the Hapsburg dynasty was removed as the challenger to the throne of the Reich. Furthermore, German Austria was engaged in the task of expanding German cultural and not only cultural influence in Southeast Europe. As to the heterogeneity argument, some people in Serbia even today regret that King Alexander I was not as prudent as Bismarck.

[4] For years Germany's post-war political elite downplayed its own responsibility for the advent of National Socialism and the Nazi state, underlining that Hitler was Austrian. The anecdote is that during the first meeting between Germany's prime minister (Konrad Adenauer) and his Austrian counterpart (Julius Raab) after Austria regained its independence, following the signing of the Austrian State Treaty in 1955, Adenauer ostensibly remarked that, after all, Hitler had been Austrian. His Austrian guest ostensibly replied. "Yes, he was. But in Austria he had been a house painter, it was when he went to Germany that he became Chancellor". Of course, Hitler was never a house painter, that is propaganda driven myth; he was, prior to his political career, just an ungifted and failed artist (Hamann 1999).

It was Germany's decision to write a blank cheque to Austria-Hungary in 1914 and its decision to declare war on Russia and invade France, violating the neutrality of Belgium, which kicked off the Great War and the demise of the Habsburg Monarchy as a result of it, that made possible the advent of some new nation states in Eastern Europe and resurrection of others. It was Germany's decision to start World War II and, later, invade Soviet Union, that led to the gruesome death of so many people in Eastern Europe, virtual extermination of the Jews in the region, and eventually paved the way for the total regional control by the Soviet Union, emergence of the Soviet empire during the Cold War, and the thorough bolshevisation of the region.

Interesting is the idea suggested by the author about long 20th rather than long 19th century, at least for Eastern Europe. The idea, attributed to Hobsbaum (1995), is that there was a long 19th century that started in 1789 with the French Revolution and ended in 1914, with the beginning of the Great War. Subsequent is the short 20th century, which stared in 1914 and ended with the fall of the Berlin Wall and the end of the Cold War in 1991.[5] Hobsbaum's rationale for the notion of the short 20th century is that this is the time of extremism, with two world wars and two totalitarian movements (fascist and communist), and that with the demise of the latter the time of extremism disappeared. Contrary to this rather unconvincing point of view,[6] the author suggests that at least for Eastern Europe there is a long 20th century, which starts with the Berlin Congress in 1878, which produced first fully fledge independent nation states in Eastern Europe, carved out from the Ottoman Empire, triggering the process of political fragmentation in the region and that the long 20th century is still not concluded—obviously the author considers that the process of fragmentation and creation new nations in Eastern Europe has not been completed. It is true that no other region, as the author points out, has witnessed so frequent, radical, and

[5] For Fukuyama (1992) this was not only the end of the 20th century but rather the end of history: victory of free market capitalism and liberal democracy. Well, history went on: at the beginning of the 21st century, one of the most powerful countries in the world is based on state capitalism and autocracy. And liberal democracy is not something that is thoroughly spread throughout the world, even with the small clubs of the European Union.

[6] Irrespective of whether such a historiographic timeline division, based only on the criterion of political extremism, is justified, it is obvious, although with hindsight, that there has been no demise of extremism, as Islamic extremism, which existed well before 1991, assumed the leading role in early 21st century. Perhaps 11 September 2001, at the very beginning of 21st century, can be symbolically taken as the beginning of the new age of (Islamic) extremism.

violent changing of borders in the past century or so, but it is the open end of the long 20th century in Eastern Europe that puzzles historians and casts a sinister shadow over the region.

For the author, the two ethnic nations in Eastern Europe that distinguished themselves from the rest are the Serbs and the Poles. The reasons for this are presented in the chapter with the telling title "Insurgent Nationalism". The list of differences between the two ethnic nations is long and substantial, starting with their confessions and ending with the literacy rates, at least in the past. Nonetheless, what is more important is what binds them together. "Serbs and Poles [...] passionately promoted their national causes, and although some did so through scholarship, the most effective, dramatic, and widespread method was military. Tens of thousands of Serbs and Poles took up arms beginning in the late eighteen century in efforts to throw off foreign rule. This reflects a political impulse: the conviction that nations not only had to build language and culture but also must seize territory and create independent statehood" (p. 130).

The author claims that many Serbs and Poles were nationally conscious before the dawn of modern nationhood. This claim, the author is aware, challenge the idea that mass national consciousness had to wait for modernisation, in particular the advent of print culture, but also the modern roads and infrastructure that supposedly make a modern nation possible among people who were strangers, the agents of empires.

The insurgent nationalism of both ethnic nations is explained in the book in details, especially the role of the church in it, which has given a messianic flavour to the insurgency. Both the Serbs and the Poles gained their nation states through substantial casualties, with military victories and defeats, but almost every time against a more powerful enemy. They were not right every time, nonetheless they paid handsomely for every mistake they made. The author points out that "The traditions of insurgent nationalism explain why, in 1939 and 1941, the Polish and Serb governments were backed massively by their respective populations, across deep political divides, when they decided to defy German power, against which there was no chance of success, at least not in rational terms. Struggle, more often in defeat than in victory, had made them who they were" (p. 153). Through the book there is a substantial understanding for the position of peoples and nations in Eastern Europe, even justification for some of their political or military moves, perhaps some sympathy for some of them in certain situations, but the admiration is reserved only for two: the Serbs and the Poles.

Special attention has been paid in the book to 1918/1919. For good reason. As the author points out, what revolutionaries in Eastern Europe failed in 1848, they succeeded in 1918/1919. And much more, the reader would comment. Not only were the nation states created after the collapse of the empires, but a radical social revolution took place on the fringe of Eastern Europe, with one unsuccessful spin-off in the region (Hungary). The challenges to the new nation-states were enormous, with substantial Bolshevik influence in the region, bellicose Germany, and substantial ethnic minorities in almost all the countries. The economies of the nation states of Eastern Europe were not performing well, and the level of economic development, save Czechoslovakia, was far below that of Western Europe. Part of the reasons for the poor economic performance of the new nation states was precisely because they were independent now. A beneficial effect of empires is that they provide the framework of free trade, large internal markets, boost division of labour, i.e. specialisation, and provide the grounds for materialisation of economy of scale. All that produces increased productivity and enhanced economic efficiency. With the empires gone, those benefits were missing. Well, that was the price of being independent.[7]

The two multinational states struggled with this diversity from the very beginning. As pointed put by the author "What is astounding is how quickly the recognition dawned that the new 'Yugoslav' and 'Czechoslovak' peoples were semi-fictions" (p. 343). Obviously, much more is needed to build a nation than the idea of well-wishing intellectuals.[8] The author rightly emphasises the huge ethnic/cultural heterogeneity of the South Slavs, now united in their own independent state. Perhaps that can explain the failure of the Yugoslavia project, with its two distinctive but equally unsuccessful stages—(politically) nothing worked.

An interesting notion is presented in the book about the differences in the political stability of Czechoslovakia and Yugoslavia between the world wars.[9] It was the Czechs in the first case and the Serbs in the other that were the *spiritus movens* of the unification and creation of the democratic

[7] Lal (2004) provides a list of economic arguments in favour of empires.

[8] Careful reading of this book could bring immense benefit to the Western political elite and decision makers in obtaining the answer to why their massive nation building programs throughout the world have mainly failed. Especially considering that it was indigenous, domestic intellectuals that supported both the Yugoslav and Czechoslovak ideas, not remote academics and decision makers on another continent, obsessed, for whatever reason, with some bold ideas.

[9] "Yugoslavia" stands as the name for the country in this review, although in the first period after the unification (1918–1929) the official name of the country was The Kingdom of Serbs, Croats and Slovenes.

centralized nation-state, whether republic (in the case of Czechoslovakia), or monarchy (in the case of Yugoslavia). In the former case, although Slovakian preferences were for a federal arrangement, the Slovakian political elite was not strong enough, because of a lack of vibrant political public life in Slovakia under the Kingdom of Hungary, as the constituent of Austria-Hungary, and because of that it was not up to the task to bring forward the federalisation agenda to the debate.

Contrary to that political constellation, in the latter case, the author explains, Serbs met a formidable political adversary. The Croat political elite of the time was well developed, as a brisk political public life existed prior to the unification, and it was able to effectively formulate its political stance. "The elections of 1919 produced stunning majorities in Croatia for the Croat Peasant Party, led by the mercurial, charismatic, popular, and erratic but principled Stjepan Radić, who decided to boycott the meetings that drafted the new state's constitution" (p. 377). The Serb political elite at the time was rather fragmentated, fighting each other as they did for decades when Serbia was an independent kingdom. Even after Radić's death in 1928 (he was assassinated in the parliament by another deputy), the Croat political elite was strong enough and determined to pursue its own goals. There was exactly a political balance and contest of the equal that created instability in Yugoslavia between the Serbs and the Croats, tilting the balance in the last years before World War II towards the Croats.

It is not only these two countries that experienced ethnic/cultural heterogeneity and the trade-off regarding territorial expansion, whatever the motivation. Post-1918 Poland's strategy was expansion to the east, even fighting a war with the Soviets for the eastern borders and winning it, for bringing if not all, then as many Poles as possible into the territories under the auspices of the nation state. But that successful expansion to the east brought in many other ethnic nations (Ukrainians, Belarusians, Lithuanian, and Jews) into Poland in substantial numbers. In terms of economic theory (Alesina, Spolaore 2003), with the increase in size of the nation, there is economy of scale in production of public goods, meaning that the government is more efficient in fulfilling its duties (like national defence, or law and order), but there is also increased ethnic heterogeneity, meaning different preferences of the people regarding public goods (due to the heterogeneity), which stoke political conflicts and undermine the trust between the peoples and mutual confidence. From the review of domestic political life between the world wars, provided in the book, Poland paid a hefty political price for overexpansion to the east.

During World War II Eastern Europe was perhaps the worst place in the world in human history (Kershaw 2015). The reasons are obvious: it was the place of the Holocaust and other forms of genocide. It was a place of massive human suffering and casualties. Again, it was Germany's role that was pivotal for Eastern Europe. It was the German political elite at the time that decided that the final solution to the Jewish Question would take place in Eastern Europe (Browning 2004).[10] It was the German political elite's decision to attack the Soviet Union, as part of the of the *Lebensraum* creation project that, after several tens of millions of dead, brough the Red Army to Berlin, as well as the new historical stage for Eastern Europe–its bolshevisation, against the will of most of the people in the region.

The new age started with massive ethnic cleansing in Eastern Europe, primely of Germans who were on the wrong side of the new borders, those along the Oder and Neisse rivers. None remained to the east of these rivers. Poland's territory was moved around 300 kilometres to the west, together with the Polish population.[11] Massive reshaping of Eastern Europe was carried out along the ethnic lines in the form of ethnic cleansing, though Marxist doctrine predicted that nations would cease to exist, as workers have no fatherland. Nationality not only came back with a vengeance, but also with massive violations of basic human rights.

There was no dilemma that Moscow was in charge, but there were uprisings in Eastern Europe almost from the very beginning of the Soviet rule. Whatever the specific discontents were, they almost always surfaced along national lines. A possible exemption was Yugoslavia, the country which its ruler Josip Broz Tito turned into what the author labels a miniature Hapsburg empire, whose nations bonded together with the official ideology of "brotherhood and unity", which was enforced without any of the Austro-Hungarian subtility. Though the author suggests that Yugoslav split with

[10] The final solution was a German project, but some Eastern European nations provided thorough support and demonstrated deadly entrepreneurship. It was the Croats and the Slovaks in their newly independent states, given to them by Nazi Germany, who were the champions of this policy.

[11] The demographic story of city of Lwów (Lemberg in the Habsburg empire) is telling. Before World War II, the city was in Poland, with Poles comprising 50% and 32% Jews of its population, according to the 1931 census. After World War II, the city was in the Soviet Union (Soviet Ukraine), most of Poles who were not killed were expelled to cities like Breslau/Wroclaw in the newly acquired territories in the west and most of the Jews were killed at the nearby Belzec extermination camp. Joint share of Jews and Poles in Lwów was less than 10%, according to the 1959 census, the first one after the war (Risch, 2011). By the end of the century, there were virtually no Poles and Jews in the city.

Moscow in 1948 was along national, i.e. patriotic lines, it seems more like clashes of personalities of the autocrats and their ambitions to extent their own control.

Although the most prominent rebellions were in 1956 in Hungary and in 1968 in Czechoslovakia, which were crushed by Soviet armed forces, it was the Poles' sustainable effort to preserve national identity and to run the country by themselves that was the most bitter pill to swallow in Moscow, especially taking into account the centuries of troublesome relations between the two nations. Events of the recent past caused the Poles the most visible scares: Soviet occupation of Eastern Poland (subsequently renamed Western Ukraine), along the lines of the Molotov–Ribbentrop Pact, the Katyn massacre, and idleness of the Red Army during the deadly Warsaw Uprising in 1944. It was the Catholic Church in Poland that was the fulcrum for all national identity preservation efforts. One episode of the many disclosed in the book is compelling: building of church is Nowa Hutta, a new communist industrial town—a showcase of the success of the new order. After years of struggle, the church was eventually built. In charge of that endeavour, on behalf of the Church, was a young deputy bishop. His name was– Karol Wojtyła.

The collapse of communism in Eastern Europe in 1989 came as a surprise to well-paid Kremlinologists,[12] but it was the result of a lengthy process of sustainable social erosion. As the author points out "The collapse of 1989 grew out of a social and economic crisis that had been building for decades, yielding a malaise that reached deep into the Communist Party. For Communist regimes, faith was crucial. [...] Yet by the 1980s, Communism had become a church where people not only forgot their prayers but also scoffed at basic teachings– finding them hypocritical, fictitious, damaging, and irrelevant" (p. 685).

The gradual sapping of faith in communism in Eastern Europe, however strong that faith was at any time, is unquestionable, but it seems that the author downplays the crucial change that enabled that collapse was the weakening of Moscow's grip on the region. That development did not come as a good will but as the consequence of the Soviet Union's predominantly economic failure, which prevented the country to keep up in the Cold War. Mikhail Gorbachev only acknowledged this failure. The collateral

[12] Not only to them. It was György Konrád, a Hungarian writer and dissident, who in the early 1980s concluded that "The Soviet empire, despite all of its internal difficulties, is in good shape, not headed towards collapse" (p. 707).

convenience of his Glasnost political doctrine was letting loose the chains controlling Eastern Europe. Once that happened, the process of escaping the Soviet Empire was irreversible.

A long chapter is dedicated to the break-up of Yugoslavia and the wars of its succession. The chapter offers wide coverage in terms of facts and data, but rather dubious in terms of context and interpretation of what happened. Some of the author's interpretations and explanations look like the press coverage at the wars at the time, rather superficial and biased, with a political agenda, and with an obsession to produce a Manichean divide into good guys and villains. This is hardly serious historiography. Just as an example of this approach, the reader learns that the main reason for the US/NATO bombing of Serbia in 1999 is that "US secretary of State Madeleine Albright declared that the United States would not tolerate further acts of ethnic cleansing. Herself of Czech background, Albright was determined that neither Bosnia nor Munich would be repeated" (p. 760). To use a British sarcasm for a comment—if you believe that, you will believe anything. A cynical reader could even go one step forward and suggest the opposite reasoning. With her Czech background, Albright had full understanding for the Serbs' concern (like Czechs') of the expanding ethnic Albanian minority (like the Sudeten Germans) in Kosovo (like Bohemia) with support of the neighbouring country (like the Third Reich), which led to the separation of the region from the country (like the Munich Agreement). This reasoning is equally implausible as the one suggested in the book.

The author goes one step forward and suggests that in dealing with Western powers about Kosovo Slobodan Milošević was "perhaps 'learning' from Hitler's triumph at Munich" (p. 761). Be that as it may, the significant difference that made this insight absurd is that Hitler's military might at that moment was substantial, at least when compared to Great Britain and France, and that was the main incentive for them to accept the agreement. Milošević's military might was negligible compared to the Western powers. That disproportion was demonstrated in the war that followed shortly, in which the US Air Force did what it has been doing for decades and what it is good at: bombing the adversary into submission. This time without casualties on the US side.

The book ends with the Eastern Europe joining the European Union, in something that many, especially in Western Europe, considered the end of (European) history and the final victory in the Cold War. Nonetheless, illiberal democracy started to flourish in Eastern Europe, with autocratic leaders claiming that they are just protecting their nations from the foreign

empire, a new type of it—this time based in the Brussels. They are just riding the familiar wave. Old ideas die hard. Nationalism in Eastern Europe is alive and well, the reader concludes.

This book is the results of a huge historiographical effort. After various short histories focused to specific areas of the region (Kaplan 1993; Malcolm 1995; Malcom 1998), which had been written with a substantial political agenda and the ambition to influence political decision processes in the West, this is a long history of Eastern Europe written without any political agenda, and apparently only with honourable academic motives.

Nonetheless, most of the book, especially period prior to the 20th century, is about listing facts, rather than historiography. The reader is overwhelmed with detailed facts about Eastern Europe, its specific peoples and regions, its languages, and national champions and political leaders. The author produces ample data, but not that many interpretations and causalities. It can be a challenge for the impatient reader to drop the book or to skip a large number of chapters and go straight to the final one with, hopefully, some conclusions. Accordingly, the book requires an active and tenacious reader, who will, in most cases, process all the data with their own analysis, and compensate the lack of it in the book.

This book is rather poor in the economic history segment of Eastern Europe. The author provides some data, mainly for the Soviet period, nonetheless, without understanding the meaning of the data and that what is important for economic analysis is relative indicators (for example, the share of the country's foreign debt in its GDP), rather than absolute one (the amount of the debt in some currency, say USD). Economic analysis of other periods is almost entirely missing. The author's enthusiasm for the Soviet's early economic results, failing to realise that the outcome is only due to ruthless involuntary mobilisation of resources, demonstrates his poor understanding of the mechanisms of allocation of resources and the concept of economic efficiency.

Many potential readers will be discouraged from reading this book due to its scale, i.e. number of pages. They should not be. The book is very readable, and the author provides a lot of food for thoughts. It is up to the reader to make the most of it.

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Radulović, Branko. 2020. *Ekonomska analiza korporativnog stečajnog prava (The Economic Analysis of Corporate Bankruptcy Law)***. Beograd: Pravni fakultet Univerziteta u Beogradu, 217.**

The importance of an adequate [corporate bankruptcy law] and its reliable enforcement [...] is perhaps best appreciated when it is missing.[1]

A common, rather naïve view of bankruptcy law is that it boils down to a set of legal procedures that serve to facilitate the undesired yet inevitable scenario of a firm's demise. It is unsurprising that, outside the legal or economic profession, people usually hope to never have to become acquainted with its scope and consequences. The optimism bias inherent in almost any entrepreneurial endeavor is likely to undermine managers' effort to get to know bankruptcy rules at the time of issuance of debt. It is at the later stage, often at the time of financial or economic distress when the "nitty gritty" details start to matter a great deal. Is it worth making an extra effort to make the project succeed? Does it pay to hide unfavorable information from creditors? Would opting for a riskier investment reduce the chances of being left emptyhanded? Is it better to file for bankruptcy today or tomorrow?

Creditors, in contrast, are likely to price in the uncertainty surrounding collecting their claims well before any contingency appears on the horizon. Weak protection of creditors' rights in times of financial difficulties can lead to credit tightening ex ante, with far-reaching consequences for the economy. Once a credit is extended, so long as bankruptcy rules affect the debtor's incentives, the creditors adapt. They have to decide how much

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[1] These words are borrowed from Modigliani, Perotti (1997, 520), which use them to describe the importance of a regulatory framework for the development of financial markets. The same seems to hold true for bankruptcy law.

effort to put into monitoring the debtor's activities, aimed at minimizing the risk of project failure. As it becomes evident that collection of their claims is impaired, creditors also must make decisions on several important issues, including whether to provide additional financing or whether to give up a portion of their proceeds to enable the financial rescue of the debtor. Diverging interests between different classes of creditors is yet another concern that bankruptcy rules may sometimes attenuate.

The latest book by Branko Radulović sheds light on these important matters by describing different trade-offs created by rules that are more favorable to creditors or debtors. Focusing mainly on the rules in the US, which have influenced bankruptcy regimes worldwide, the author provides perhaps the very first systematic account of the economic analysis of corporate bankruptcy law. He critically examines state-of-the-art theoretical and empirical scholarship to reassess the merits of different procedures for resolving financial distress. The reader of the book is likely to be particularly drawn into the issue of how the optimal bankruptcy framework depends on a wider legal and economic context, which the author uses to conclude his investigation of the topic.

One should not feel overwhelmed by the number of questions announced at the very beginning of this review, as the author makes smooth transitions from introductory chapters and basic intuition to more technical formal models. At the very beginning, the author explains the three core functions of bankruptcy law: 1) preserving the value of the debtor 2) deciding on the use of debtor's assets 3) deciding on how to distribute the proceeds. The second role is particularly important, as the choice between liquidation and reorganization has to ensure that debtors in financial distress, i.e. those with positive net present value, continue to operate, while those in economic distress are dissolved, so the assets can be more efficiently utilized for alternative uses.

One can ask why bankruptcy rules are fundamental for achieving these roles; after all, in well-functioning market economies, creditors can always attempt to collect their claims individually. To this end, the author explains the most important normative theories on why bankruptcy law matters. The most influential theory up to date has been the Creditors' Bargain theory. According to this theory, bankruptcy procedure serves to solve the collective action problem among creditors who otherwise have incentives to inefficiently liquidate the debtor in the race to collect their claims. The debtor's assets may be seen as a common pool problem, which not only leads to substantial strategic costs of being the first in line but may also decrease the total value of the debtor. Therefore, bankruptcy law serves to ensure the outcome that the creditors would have agreed on among themselves, had

they been able to negotiate ex ante, at the time of debt issuance. To use game theory jargon, bankruptcy law prevents the inefficient Nash equilibrium. Creditors' bargain theory has been modified several times. The aim is to revisit the original view that bankruptcy law should ensure that rules on settlement priority during the bankruptcy proceedings do not deviate from the applicable rules before such proceedings are initiated. The rationale for certain deviations may lie in risk-sharing scheme among creditors, ensuring that the debtor does not have incentives to take too much risk or to delay the bankruptcy proceedings, protection of idiosyncratic investments, protection of third parties' interests, or solving liquidity issues due to debt overhang. A somewhat different approach is taken in Casey (2020), emphasizing that bankruptcy rules are there to enable real ex post renegotiations, instead of simulating hypothetical ex ante negotiations among creditors. The reason is that ex ante contracts are inherently incomplete, given the number of creditors and possible contingencies. The bankruptcy proceedings allow creditors to fill the contract loopholes ex post with the help of a judge. In contrast to Creditors' Bargain theory, the contract theory approach to bankruptcy emphasizes that bankruptcy rules should not be mandatory, as coordination failure among creditors is not that common, allowing them to conclude ex ante contracts. Bankruptcy rules should instead serve to facilitate bargaining between creditors and the debtor. The author also critically examines a number of competing (traditional) normative theories, which believe that the bankruptcy law should serve a much wider set of goals. The author concludes this chapter by presenting two contrasting economic models that examine the merits of bankruptcy law as a mandatory regime for resolving financial distress, which are very much in line with conjectures of Creditors' Bargain theory and the contract theory approach to bankruptcy.

Bankruptcy regimes worldwide differ substantially with regards to some of their core concepts. One of the most debated questions in the literature is whether and when it is desirable to deviate from the absolute priority rule of settlement, i.e. to allow for a redistribution of proceeds from senior creditors to junior creditors and/or the debtor. Such a deviation is common in reorganizations. The rationale behind it is that it provides incentives for the debtor to reveal information and timely initiate bankruptcy, which otherwise threatens to impair the value of the company and create additional procedural costs. Moreover, it also disincentivizes the debtor to make an unrealistic estimation of the company's value, which may eventually dilute the share of creditors' claims in the company's proceeds. While these considerations are important, so are the changes in the ex ante incentives for both creditors and the debtor, as the author explains through a series of formal models. The effect of deviation from the absolute priority rule on ex

ante incentives is not unambiguous. The debtor may prefer to choose riskier projects, as they can appropriate some of the company's value even in case of a failure. This in turn incentivizes creditors to ask for a higher interest rate, which further aggravates the problem of adverse selection. However, the debtor's preference for riskier investments may reverse if the debtor is already facing financial distress, as one of the models shows. Moreover, redistribution of proceeds in the bankruptcy procedure may motivate the investor to make idiosyncratic investments, such as investments in human capital specific to the company or the project. Finally, deviation from the absolute priority rule makes creditors more alert about debtor's activities, thus increasing their monitoring efforts. As the author explains, the tension between ex ante and ex post incentives created by the absolute priority rule and its deviations shows all the delicacy of designing the optimal bankruptcy regime.

The author devotes much attention to the choice between mechanisms (procedures) for resolving financial distress: liquidation, reorganization, as well as out-of-court restructuring and hybrid mechanisms. The aim is to maximize the value of the debtor while minimizing the direct and indirect costs, including reputational costs for the debtor. Informal procedures (workout or out-of-court restructuring) are usually attempted first as cost-efficient and flexible alternatives, but they are difficult to implement when information asymmetry or the hold-out problem is pronounced. The latter refers to the situation in which certain creditors behave opportunistically to extract a larger share in the distribution of proceeds, which is common if there is a large number of investors. Hybrid mechanisms can attenuate some of these concerns, as the involvement of the court allows to impose the pre-packaged reorganization plan on dissenting creditors. Nevertheless, liquidation and reorganization continue to be the most commonly used procedures, and the greatest challenge in choosing between them lies in the efficient differentiation between efficient and inefficient debtors. Liquidation has the advantage of being fast and cheap, without redistributing value between different classes of investors and the debtor. However, the biggest disadvantage lies in the danger of decreasing the value of the debtor due to the high costs of information gathering for potential buyers. Reorganization suffers from a different set of weaknesses. In addition to being administratively complex, it allows debtors to behave opportunistically as decisions about the use and the distribution of assets are closely intertwined. Moreover, the evaluation of the debtor's value is done by the courts, which are often neither equipped nor incentivized to do it properly. The last part of this chapter is the most thought-provoking, as the author examines alternative ways of estimating the value of the debtor. The idea is to allow for a market-based valuation of the company while avoiding conflicts over

the redistribution of proceeds, inherent in a joint decision over the use and distribution of assets. The first alternative is an auction of a small portion of a company's shares (10%), which is done after all the debt is converted into equity. The author emphasizes that this process is nevertheless imperfect, not only because it is only applicable to listed companies, but also because the estimation may not be correct in a situation in which the buyer in the auction does not get control over the company. The second alternative implies the use of options. The proposed solution entails several steps. First, the claims of senior creditors are converted into equity, so they become the sole proprietors of the company. All the junior creditors and the shareholders of the debtor are given stock options to buy shares from senior creditors at a pre-determined price. Depending on their estimation of the value of the company, they can use their stock options, which would compensate senior creditors in the amount corresponding to their former claims, while junior creditors or the shareholders would appropriate the remaining value of the company. The convenience of this alternative is that it allows the absolute priority rule of settlement to be followed, without the need to determine the company's value beforehand. Some modifications of this solution also entail the involvement of the court. The author also presents other alternatives discussed in the literature, which are aligned with previously mentioned contract theory approach to bankruptcy.

The following chapter of the book is dedicated to the empirical research in the field of corporate bankruptcy. Before diving into a comprehensive overview of the most influential empirical findings up to date, the author explains in detail the key methodological considerations and challenges of empirical investigations in the field. These include sample selection bias, availability and reliability of data, appropriateness of most widely used indicators, and most importantly, the issue of self-selection bias. Namely, the decision to file for bankruptcy, as well as the choice of mechanism for resolving financial distress (e.g., liquidation or reorganization) is endogenous, i.e. it depends on the debtor's often unobserved characteristics, which may be correlated with the outcome of interest. The author also discusses potential solutions for each of these concerns, and then summarizes the findings of the empirical literature according to topic. Three topics have received the most attention in the literature: the size and determinants of costs of bankruptcy, determinants of procedure selection, and the determinants and effects of deviations from the absolute priority rule. Another strand of fast-growing literature focuses on the role of judges and determinants of biases in their decision-making.

The ultimate goal of the economic analysis of corporate bankruptcy law is providing guidance on the optimal design of rules. In line with the theoretical considerations above, as well as the diversity of empirical findings, it becomes evident that one size does not fit all. Moreover, the choice of bankruptcy provisions and diversity in national bankruptcy frameworks is in itself a very interesting research topic, which the author examines at the beginning of this chapter. One of the most heated debates has been what determines whether the framework is more debtor-friendly or creditor-friendly. One explanation offered in the literature is that a predominant corporate government mechanism may play a decisive role. Countries in which concentrated ownership is common, such as Germany and Japan, have primarily developed ex ante mechanisms of corporate governance, and consequently, have a preference for liquidation, or a creditor-friendly bankruptcy regime. This stands in contrast to countries with dispersed ownership structures, such as the US, in which ex post mechanisms of corporate control through takeovers have become predominant, and therefore, created the need for a more debtor-friendly bankruptcy regime. Another factor that received much attention in the literature is legal origin. The second part of this chapter examines how the optimal design of bankruptcy regime changes with the ability of judges to make proper estimates of a net present value of the debtor, as well as the degree of asymmetry of information between creditors and the debtor. In sum, liquidation may be more preferred in jurisdictions with higher quality judicial systems, and where banks are dominant creditors and can effectively monitor debtor's activities. In contrast, for countries with dispersed ownership and developed financial markets, as well as undeveloped countries with concentrated ownership, it is optimal to have both procedures (liquidation and reorganization).

The very rich account of the most important discussions on the topic of corporate bankruptcy, provided in this book, can be helpful to different audiences. Firstly, the book is intended for law and economic scholars interested in exploring research avenues in the field of corporate bankruptcy law either from a theoretical or an empirical perspective. The research gap seems particularly pronounced with regards to indirect costs of different bankruptcy procedures, the merits of alternative (market-based) solutions to financial distress, and other bankruptcy provisions not directly linked to the absolute priority rule and its deviations. The fact that most of the contributions in the field examine rules in developed economies, primarily in the US, offers a wide array of possibilities for scholars to explore jurisdictional divergences, including, as the author points out, the importance of culture and informal institutions for the choice and efficiency of different bankruptcy rules and procedures. Secondly, this book can be very useful to economists and lawyers specializing in this area. It will allow

them to fully grasp the economic tradeoffs behind certain legal solutions, as well as the consequences of deliberate choices made during the bankruptcy proceedings. Finally, the book may serve as a good starting point for considerations on how to reform an existing bankruptcy framework, taking into account the author's meticulous explanations of key factors for a well-tailored regime.

In the end, one may only wish that Radulović will continue to enrich this book as the scholarship in this important field continues to expand, with many more successful editions to come.

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[1] Casey, Anthony J. 7/2020. Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy. *Columbia Law Review* 120: 1709–1770.

[2] Modigliani, Franco, Enrico Perotti. 7–8/1997. Protection of Minority Interest and the Development of Security Markets. *Managerial and Decision Economics* 18: 519–528.

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(see, for example, Corcoran 2004; Mullen 2000)

(see especially Demsetz 1967)

(Scott and Coustalin 1995)

One author

T(ext): Following Ely (1980, page), we argue that

R(eference list): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

Two authors

T: As demonstrated elsewhere (Daniels, Martin 1995, page),

R: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

Three authors

T: As suggested by Cecil, Lind, Bermant (1987, page),

R: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

More than three authors

T: Following the research design in Turner *et al*. (2002, page),

R: 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.

Institutional author

T: (U.S. Department of Justice 1992, page)

R: 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.

No author

T: (*Journal of the Assembly* 1822, page).

R: 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.

More than one work

Clermont, Eisenberg (1992, page; 1998, page)

More than one work in a year

T: (White 1991a, page)

R: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal,* April 4.

Multiple authors and works

(Grogger 1991, page; Witte 1980, page; Levitt 1997, page)

Chapter in a book

T: Holmes (1988 page) argues that

R: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240 in *Constitutionalism and Democracy,* edited by John Elster and Rune Slagstad. Cambridge: Cambridge University Press.

Chapter in a multivolume work

T: Schwartz, Sykes (1998) differ from this view

R: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–64 in vol. 2 of *The New Palgrave Dictionary of Economics and the Law,* edited by Peter Newman. London: MacMillan.

Edition

T: Using the method of Greene (1997), we constructed a model to show

R: Greene, William H. 1997. *Econometric Analysis.* 3d ed. Upper Saddle River, N.J.: Prentice Hall.

Reprint

T: (Angell, Ames [1832] 1972, 24)

R: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Journal article

In the list of references, journal articles should be cited in the following manner: surname and name of the author, number and year of the issue, title of the article, title of the journal, volume number, pages.

T: The model used in Levine *et al*. (1999, page)

R: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 2/1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: According to Podlipnik (2018, page)

R: Podlipnik, Jernej. 4/2018. The Legal Nature of the Slovenian Special Tax on Undeclared Income. *Annals of the Faculty of Law in Belgrade* 66: 103–113.

Entire issue of a journal

T: The fairness or efficiency benefits of bad-faith laws are discussed at length in *Texas Law Review* (1994)

R: Texas Law Review. 1994. *Symposium: Law of Bad Faith in Contrast and Insurance,* special issue. 72: 1203–1702.

Commentary

T: Smith (1983, page) argues that

R: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240 in *Commentary to the Law on Obligations*, edited by Jane Foster. Cambridge: Cambridge University Press.

T: Schmalenbach (2018, page) argues that

R: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–55 in *Vienna Convention on the Law of Treaties: A Commentary*, edited by Oliver Dörr, Kirsten Schmalenbach. Berlin: Springer-Verlag GmbH Germany.

Magazine or newspaper article with no author

T: had appeared in *Newsweek* (2000).

R: Newsweek. 2000. MP3.com Gets Ripped. 18 September.

Magazine or newspaper article with author(s)

T: (Mathews, DeBaise 2000)

R: Mathews, Anna Wilde, Colleen DeBaise. 2000. MP3.com Deal Ends Lawsuit on Copyrights. *Wall Street Journal,* 11 November.

Unpublished manuscript

T: (Daughety, Reinganum 2002)

R: Daughety, Andrew F., and 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.

Working paper

T: (Eisenberg, Wells 2002)

R: Eisenberg, Theodore, Martin T. Wells. 2002. Trial Outcomes and Demographics: Is There a Bronx Effect? Working paper. Cornell University Law School, Ithaca, NY.

Numbered working paper

T: (Glaeser, Sacerdote 2000)

R: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Personal correspondence/communication

T: as asserted by Welch (1998)

R: Welch, Thomas. 1998. Letter to author, 15 January.

Stable URL

T: According to the Intellectual Property Office (2018),

R: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html* (last visited 28 February, 2019).

In press

T: (Spier 2003, page)

R: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Forthcoming

T: One study (Joyce, forthcoming) includes the District of Columbia

R: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Cases

F(ootnote)*:* CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Supreme Court of Serbia, Rev. 1354/06, 6. September 2006., Paragraf Lex; Supreme Court of Serbia, Rev. 2331/96, 3. July 1996., *Bulletin of the Supreme Court of Serbia* 4/96, 27.

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Legislation

F: Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, Art. 6 (3); Zakonik o krivičnom postupku [Code of Criminal Procedure], *Official Gazette of the RS*, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014, Art. 2, para. 1, it. 3.

T: Use abbreviated reference for in-text citations of pieces of legislation (Regulation No. 1052/2013; Directive 2013/32; ZKP, or ZKP of Serbia) consistently throughout the paper.

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