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TABLE OF CONTENTS

ARTICLES

/ČLANCI

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THE ANATOMY OF PRICE GOUGING: A REGULATORY OR COMPETITION LAW ANTIDOTE

Unlike other natural disasters, the coronavirus disease pandemic is global in character, which is why interest among researchers in the price gouging phenomenon is on the rise. Without disputing many solid arguments favouring the market mechanism, we will reconsider the goals and means of potential government intervention. One possibility lies in economic regulation, the other in competition law. In the first case, price ceilings are usually imposed for necessary goods, followed by rationing and export restrictions. On the other hand, competition policy focuses on preventing the exercise of temporary market power. We will try to show that market failures can provide specific

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arguments for regulation but relying on competition protection policy seems unjustified. Still, since the critical issue is defining excessive prices in the short run, we expect competition authorities to address this issue, considering that they are permanently monitoring various markets.

Key words: *Price gouging*. – *Excessive prices*. – *Competition law*. – *Regulation*. – *Windfall market power*.

> "*High prices and high profits might be an indication that it is worth looking at the industry [...] but certainly by themselves they cannot justify intervention by competition authorities.*"
>
> Massimo Motta (2004, 70)

1. INTRODUCTION

In some regions of the world, nature causes disasters (floods, hurricanes, wildfires, etc.) more often than in others. They often lead to pessimism accompanied by substantial supply or demand shocks, i.e. shortages or sudden hikes in the prices of certain goods. When the hike is significant, the consumers may face price gouging. Due to frequent accidents, the abundant experience of those regions has been crystallised, in the formal legal sense, in the adopted rules for combating such situations. Elsewhere, such laws are absent or barely existent. The shortage of medical face masks and disinfectants during the coronavirus disease pandemic illustrates this problem well. The question is whether the suppliers exploit this situation to make high short-term profits.

For example, during the shortage of masks in March 2020 in Serbia, the Prima chain of pharmacies in Belgrade increased the price of surgical masks to 200 dinars. It previously sold them for 80, while the price was 27.70 dinars in state-owned pharmacies.[1] It was widely reported by the media at the time that this trade practice was not an isolated case. However, a somewhat more interesting case happened in the US, where the manufacturer of masks itself complained about the high prices. A lawsuit was filed against retailers on Amazon who sold N95 face masks to consumers at a price close to 20 times higher than the one suggested by the manufacturer, the 3M Company.[2] In both

[1] See: Vlaović (2020).

[2] See: US District Court, C.D. California. Case No. 2:20-CV-05049 *3M Co. v. KM Bros. Inc. https://www.leagle.com/decision/infdco20200819744* (last visited 25 January, 2022).

cases, the increase was not permanent, and it did not apply to all consumers, but rather to those who used such sales channels. The circumstances have significantly affected the consumers' reservation prices for this product, which many retailers have tried to take advantage of.

Imposing some form of government intervention requires a clear and precise definition of price gouging and, consequently, its recognition by some corresponding law. Since specific laws that prevent price gouging practices exist in many states, they can serve as a good starting point for a definition. Despite some differences in treatment, different laws seem to have some common elements (Zwolinski 2010, 335): a) almost all laws state that they refer only to a certain period of disaster or state of emergency; b) laws often refer to certain classes of products necessary for survival or combatting the problems caused by the disaster, however, in some cases, the law may apply to other products as well; and c) laws aim to set a price ceiling and are often accompanied by export restrictions and rationing during a state of emergency. These three points depict the anatomy of the phenomenon of price gouging. Of course, the main goal of price ceilings is to prevent "excessive" prices. However, there is still a lack of consensus on how "excessive" should be defined, as can be seen from the subsequent definition attempt by Zwolinski (2010, 336): "Price gouging occurs when, in the wake of an emergency, the price of some good that is necessary or extremely useful for coping with the emergency is set at what appears to be an unfairly high level."

There are several problems with the accuracy of this definition that the author himself acknowledges. Even if we exclude the issues of defining the state of emergency, the definition of "necessity" could be too narrow or too broad. Of course, the idea is that during a snowstorm, the prices of shovels are treated differently from the prices of, say, lawnmowers. However, the increase in the demand for alcoholic beverages in the same situation can lead to a sharp rise in their price, but we could hardly label alcohol as a necessity. The problem is that necessity is always defined with reference to a given end. Sandbags are helpful for fighting floods, but they are not essential for survival in other emergencies. Hence, Zwolinski considered that "necessary or extremely useful for coping with the emergency" could be a good solution. The biggest problem is with the "unfairly high" attribute. What price increase should be deemed unfairly high? There are severe problems with the *legal predictability* of a such defined property, as it may be subject to different interpretations.

We have already shown (Njegovan *et al.* 2021) some weaknesses of arguments for intervention by comparing the neoclassical and Austrian approaches to price gouging. This paper aims to consider under what

conditions intervention might be desirable and what form it should take. In general, we focus on economic regulation and competition policy. *Economic regulation* usually implies the imposition of price ceilings and the related complementary policies to prevent goods shortages. For example, the US laws mentioned above provide the basis for such intervention. In addition, if this sudden rise in prices is attributed to the exploitative abuse of a dominant position (in some jurisdictions but not in the US[3]), the development falls within the domain of *competition law*, which should prevent such practices. In the latter case, it is justified to ask whether the phenomenon of price gouging is equivalent to excessive prices because the prices are "too high" in both cases. Finally, these two policies are not mutually exclusive and can be implemented simultaneously.

In this context, we will try to examine the hypothesis set by the OECD (2020b) that some form of economic regulation is necessary but should exclude competition policy. However, competition authorities may still play an essential role in combating this problem. The statement, from the beginning of the paper, by Motta (2004, 69–70) is precisely in line with this hypothesis. More specifically, we will try to point out that externalities and the need for price stabilisation impose the need for economic regulation. However, not every price increase should be considered price gouging. Some price increases may be just a manifestation of cost increases, so intervening in such cases may be superfluous and even harmful. Furthermore, standard arguments against competition policy apply both to excessive prices and price gouging. In addition, it will turn out that the specific time dimension that characterises price gouging provides more conclusive arguments against applying competition law.

The rest of this paper is organised as follows. In section 2, we will briefly review the experience in treating the phenomenon of price gouging in light of the ongoing COVID-19 pandemic. Section 3 will highlight the most important arguments for implementing economic regulation in this case, while Section 4 considers the possibility of applying competition law. Furthermore, we will examine the link between the exploitative abuse of a dominant position and price gouging. Section 4 will also address the issue of the price gouging benchmark. Finally, Section 5 concludes this discussion.

[3] Exploitative abuse is prohibited in many other countries, including all OECD countries, except the U.S., Canada, Australia, New Zealand, and Mexico (Gilo, Spiegel 2018).

2. PANDEMIC EXPERIENCE

Different countries have seen different reactions to the same phenomenon during the COVID-19 pandemic. Despite the long history of emergencies, the world generally seemed unprepared for price gouging. The case of the United States differs somewhat from this general statement thanks to the experience with devastating hurricanes that often hit this country. That is why most US states had laws in this area (about 2/3 of the states) even before the COVID-19 pandemic. However, an increase in the number of the US states with price gouging laws during the pandemic was noticeable. Hence, as of March 2021, as many as 42 US states have laws related to price gouging, although there is still no federal law regulating this phenomenon. Curiously, in 2012, 40 leading economists from American universities participated in a survey on attitudes regarding the need to pass a law that would prohibit "unconscionably excessive" price gouging during natural disasters in Connecticut.[4] Only 3 participants took the unequivocal position that such a law should be passed.

The declaration of a state of emergency in the United States created a precondition for implementing laws governing price gouging in individual states. Moreover, US President Donald Trump signed an executive order to prevent the hoarding of vital medical equipment and resources, as well as price gouging, which provided a broader base for price gouging treatment in the United States than the laws of individual states. As in all the cases of exploitative abuse of dominant position caused by excessive prices, the role of antitrust in treating price gouging was omitted. Price gouging should have been detected and banned as an unfair and thus unlawful business practice—but outside the scope of exploitative abuse. This non-interference approach to excessive prices did not mean that the bodies implementing this policy—such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—would not interfere in a certain way in the case of price gouging. Namely, as good connoisseurs on the functioning of the market, the DOJ and the FTC are expected to play an active role, however, outside of exploitative abuse, with some other antitrust tools. Accordingly, on 9 March 2020, the DOJ announced, "Individuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks could face criminal prosecution. Competitors who agree to allocate among

[4] See: Initiative on Global Markets (2012).

themselves consumers of public health products could also be prosecuted".[5] For example, the DOJ formed a COVID-19 Hoarding and Price Gouging Task Force to reach this end.

In the European Union, at the national and supranational level, which "does not recognise" price gouging in the US sense, one gets the impression that price gouging can be regulated based on the Article 102(a) of the Treaty on the Functioning of the European Union (TFEU), related to the exploitative abuse of a dominant position.[6] This is supported by the words of the European Commissioner for Competition Margrethe Vestager: "a crisis is not a shield against competition law enforcement" (Cary *et al.* 2020).[7] In other words, a pandemic cannot be an excuse for violating competition law. However, it is evident *ex post* that despite numerous initiatives to include competition law enforcement in solving this problem,[8] few cases have been formally opened. The activities of the EU competition authorities have focused mainly on just monitoring. The activities of the United Kingdom in this field had a similar course as in the EU. Namely, the Competition and Markets Authority (CMA) formed a particular organisational unit (COVID Task Force) to monitor and receive complaints from customers about price gouging—but not to intervene from the standpoint of competition law enforcement. An exception in this regard is the South African competition authority, which has diligently enforced competition law whenever there was a clear indication of price gouging (Boshoff 2021). Some cases of price gouging were characterised as exploitative abuse of a dominant position and treated accordingly.

After introducing a state of emergency in Serbia (15 March 2020), the Government of the Republic of Serbia imposed temporary measures to prevent significant price hikes during the state of emergency: "Decision to limit the level of prices and margins of basic foodstuffs and protective equipment".[9] This decision set price ceilings for necessary products at price levels prevailing on 5 March 2020 (immediately before the official introduction of the state of emergency). At the same time, from the standpoint of the exploitative abuse of the dominant market position, the

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5 See: Department of Justice (2020).

6 Unlike the EU competition law, laws related to price gouging apply to any undertakings, regardless of their market power.

7 For a short overview and analysis of some competition authorities' responses to the COVID-19 emergency see: Rakić (2020).

8 For examples of European countries where competition authorities have considered this phenomenon see Cary *et al.* (2020).

9 *Official Gazette of RS* No. 30/2020.

Commission for Protection of Competition of the Republic of Serbia (CPC) did not react to "unfair" prices[10] — unambiguously justified according to the position that this paper advocates.

Previous examples show that a particular type of intervention took place in the mentioned jurisdictions. Other jurisdictions relied solely on economic regulation, with the exception of South Africa, which boldly applied competition law as if it were the case of excessive prices. However, the common point that "competition authorities had a role to play" is precisely in line with the OECD (2020b) suggestion.

The fact that price gouging is a short-term phenomenon, whose occurrence cannot be predicted, limits the possibility that a particular regulator be permanently in charge and specialised for price gouging related issues. However, suppose we start from a reasonable assumption that good market knowledge, i.e. specific knowledge about the context in which various businesses operate, is paramount to the successful identifying of price gouging. In that case, the competition authorities may be a reasonable candidate. Of course, their role would be outside the context of competition law, aimed at monitoring and making policy recommendations (for example, the role assumed by the DOJ, the FTC, the CMA, and others). It should not be expected that competition authorities will become regulators in any case, particularly not in the case of price gouging. Accordingly, the following sections will consider the arguments related to applying regulation and competition law to price gouging.

3. REGULATION AND PRICE GOUGING

Moral arguments are by far the most common ones when it comes to condemning price gouging practices as well as those related to preserving the competitive environment and ensuring the proper functioning of markets. We have previously discussed various arguments and counterarguments regarding this issue in detail (Njegovan *et al.* 2021).[11] In this paper, we want to go further and consider the arguments *for* regulation related to market failures, namely, the inability of the market to generate an efficient outcome

[10] According to Article 16 of the Law on Protection of Competition (LPC), *Official Gazette of the RS*, 51/2009 and 95/2013.

[11] For further arguments on the distinction between immoral people and immoral acts, as well as with the problems of equality and distribution see: Snyder (2009a), Zwollinski (2009) and Snyder (2009b).

if there are circumstances due to which the market deviates significantly from that presented by economic models. Although the superiority of outcomes achieved by government intervention is not hypothesized in this case, nor is the notion of government intervention unambiguous (there may be different forms of intervention), the emergence of market failures could justify government interference.

3.1. Allocative Efficiency

One argument tries to point out the problem with the allocative function of prices in a state of emergency. Increasing the price leads to the product being bought only by those in great need. But a rich person may end up buying more of the product than a poor one even when the intensity of her need is lower. Hence the cardinalist argument for regulation that addresses distributive injustice. However, the Second Fundamental Theorem of Welfare Economics recalls the possibility of separating the allocative and distributive functions of prices (Njegovan *et al.* 2021, 62). If we believe that the problem is in the distribution, we should not try to solve this problem through the pricing system.[12]

3.2. Signalling Function of Prices

A sudden increase in some products' prices, which is not accompanied by a rise in their costs, leads to increased profits, which is a signal for entry. The standard argument goes that preventing price increases impairs the signalling function of prices, i.e. stifles innovation and discourages entry. Notwithstanding, Fung and Roberts (2021, 7–9) provide some arguments for regulation. First, they analyse the effects of the COVID-19 pandemic on both the demand and supply side. On the demand side, the pandemic limited the consumers' options (local shops became one of the few options available to some consumers due to lockdown rules), restricted their ability to shop around (social distancing created long queues, search costs possibly increased, while access to online groceries and shops was limited), and

[12] Moreover, in anticipation of the signalling function argument, our moral intuitions often fail to consider the market dynamics. In a static world with fixed resources, we are faced with a zero-sum game where only the rich get the goods. We fail to see market competition as a process (Zwolinski 2008, 364).

inflated their willingness to pay (uncertainties and fear of shortage may lead to stockpiling behaviour). On the supply side, the intensity of competition was possibly reduced (lack of supply leads to higher markups for the remaining goods, and shortages may even be artificial), which is why some retailers gained windfall market power. Furthermore, as opposed to the seasonal demand fluctuations, the sellers did not necessarily charge below-average markups when the emergency was over.

Finally, Fung and Roberts (2021, 8–9) provide two main arguments for regulation. We agree with the first argument that in states of emergency retailers may be the one raising prices (just like in the mentioned case involving N95 masks) and limiting their margins will not affect the producers' incentives to expand. However, their second argument seems more controversial. Namely, economic theory does not imply that arbitrarily high prices are needed to induce efficient entry. Lower prices/profit margins with high sales volumes may be enough to lead to expansion. More precisely, since the industry short-run supply curve is almost vertical, the demand curve determines the price. The shock caused by the crisis shifts demand upwards, and the price increase is significant with a vertical short-run supply. The price does not need to be that high to ensure entry. The price ceiling could be set at a lower level and still ensure equilibrium in the long run, i.e. the intersection of demand and long-run supply curve. That would provide an increase in consumer surplus and lead to efficient entry.

The proposed argument for intervention is controversial on several grounds. Firstly, conventional theory implies that the abuse of market power is disputable based on creating inefficient outcomes (deadweight loss) and not on the redistribution of surplus between producers and consumers. Furthermore, Fung and Roberts (2021) assume that the supply and demand curves are known to the benevolent planner. Therefore, all the planner needs to do is set prices at the equilibrium level. One could claim that high prices may provide a stronger entry signal and cause faster adjustment. However, this argument would be inappropriate because Fung and Roberts (2021) assume that any price above the existing one is equally effective in encouraging entry. The real problems (dynamics, learning, subjective knowledge, competitive process) are explained away by assuming that the regulator has all the relevant information. The omniscient planner simply sets prices at the equilibrium level and thus ensures long-term equilibrium.

3.3. Externalities

In some instances, price increases refer to a group of products that can cause significant positive externalities. For example, private demand for face masks does not reflect the positive external effects on society that wearing masks causes. Since the market cannot be expected to lead to an efficient outcome, intervention becomes a viable option, i.e. introducing regulations (mandatory use of face masks) or providing subsidies for their production. Suppose the circumstances accompanying the pandemic lead to a sharp increase in the price of face masks. In that case, an obstacle for positive externalities is created, and government intervention could be desirable to prevent this practice. Government intervention could make sense when externalities are very high, and market reactions to shocks are slow. After all, we have already seen that the market can be a slow coordination mechanism in times of war (Galbraith 1980).

Another consequence of uncertainty created by the state of emergency is panic buying, which can reduce the allocative efficiency of resources and lead to deadweight loss (Chua *et al.* 2020, 1). Can this phenomenon justify regulation, and if so – of what type? This primarily depends on identifying the causes of panic buying. Regarding potential causes, Yuen *et al.* (2020, 6) provide a detailed literature review covering the 2009–2020 period. After classifying the papers, they identified four possible causes of panic buying: (1) perception, (2) fear of the unknown, (3) coping behaviour, and (4) social psychological factors.

Chua *et al.* (2020) start from the Health Belief Model that was formerly used to link health behaviour with undergoing medical examinations. In the context of panic buying, it is relevant because it studies the protection motivation behaviour of consumers when faced with the threat of a disease outbreak. This model is combined with theories of perceived scarcity and anticipated regret to give a more comprehensive interpretation of the causes of this phenomenon. Finally, the state may "contribute" to panic buying through adopted practices of announcing movement restriction measures for citizens. Accordingly, Prentice *et al.* (2020) emphasises the connection between the timing of the announcement of government measures for combating the pandemic and panic buying.

Given that economists are interested in presenting panic buying as the product of rational choice, one could make the analogy to the bank run model (Diamond, Dybvig 1983). It implies a possibility of multiple equilibria—a good one in which there is no bank run and a bad one in which bank run occurs. Similarly, panic buying can be presented as a coordination game where panic buying represents an unfavourable Nash equilibrium. As Awaya

and Krishna (2020, 5) argue, the key difference between a bank run model and their consumer panic model is that there is no analogue for market-clearing via prices in the former. We will discuss this model in more detail below.

Standard cases imply that panic buying is a response to a shock of supply or demand (Noda, Teramoto 2020, 7). It is interesting, however, that there doesn't have to be a change in supply or demand at all, which is a situation where classical theory is useless. For example, "classical market theory does not apply well to the paper product market because the pandemic caused neither a supply disruption nor a surge in need for consumption of the paper products" (Noda, Teramoto 2020, 7). Noda and Teramoto (2020) work with the idea of non-pecuniary costs associated with shopping activities (shopping costs) as a fundamental driving force behind panic buying. Thus, panic buying results from rational behaviour in the absence of misinformation.[13] They rely on a recent empirical study by Keane and Neal (2021), which finds that announcements of movement restrictions played an essential part in triggering panic buying. In terms of recommendations, the authors consider the role of taxes, direct allocations of necessities and the introduction of quotas on purchases. In their simulations, under certain assumptions, taxes can have drastically different consequences depending on the timing, direct distribution generally improves social welfare, while the introduction of quotas produces unequivocally positive effects in terms of preventing panic buying. The question remains to what extent rationing (quotas) can be implemented in practice.

The consumer panic model by Awaya and Krishna (2020, 2) starts from the assumption that consumer decisions on when to buy are *strategic complements* so that the more people buy during the panic, the more it pays for the individual to do the same.[14] On the other hand, the price mechanism (increasing prices) should prevent such purchases. In a model without supply uncertainty (sufficient supply), there is an equilibrium with fixed prices that is (weakly) better for consumers than any equilibrium with flexible prices. Since the supply is satisfactory, there is no need for rationing. However, if there is a possibility of reselling (speculative motive), the solution is to impose some form of rationing. If supply is uncertain, there are two states of nature, high state (sufficient supply) and low state (insufficient supply). Rumours of a shortage arise regardless of the state and are completely

[13] As opposed to some models that study misinformation-driven panic buying (Noda, Teramoto 2020, 8).

[14] The "infection" argument is familiar from (Rubinstein 1989). See: Awaya, Krishna (2021, 1–2).

uninformative. Hence the focus shifts to the corrective messages (counter-rumours saying that there is no shortage) that appear only in the case of high state. Although such a message is credible, consumers do not know how many other consumers received the message, which may cause panic buying. A comparison of the two mechanisms in the case of uncertain supply provides specific arguments for regulation, but the results depend on many parameters. Interestingly, the market mechanism fails for minor shortages but may work for significant ones, due to a lack of complementarity between the consumers' choices of when to buy and the state (high or low).

Contrary to the arguments presented in Njegovan *et al.* (2020) and those presented in this paper (related to the allocative efficiency and signalling function of prices), a particular type of regulation can be effective if shortages of goods prevent positive externalities or if panic buying ensues. Depending on the conditions, fixed prices are not always better (Awaya, Krishna 2021, 23–25). Therefore, regulation may include price ceilings, rationing (introduction of purchase quotas), or accompanying non-economic policies, to ensure optimism and avoid an undesirable equilibrium. Furthermore, we have seen that panic buying could occur even when all consumers are entirely rational, and there is no misinformation nor disruptions in demand or supply, i.e. due to anticipated/expected rise in shopping costs, which causes a surge in demand. Since anticipated shopping-cost shocks produce more severe panic buying than unanticipated ones, the government could implement immediate movement restrictions or announce them well in advance. Furthermore, a temporary sales tax increase could discourage stockpiling behaviour and prevent panic buying if it is implemented in a timely manner (Noda, Teramoto 2020, 45–46).

4. COMPETITION LAW AND PRICE GOUGING

Jurisdiction of competition policy for price gouging exists in the case of exploitative abuse of a dominant position, for example, under Article 102 (a) (TFEU) or in Serbia, under Article 16 of the LPC. It can be implemented if there is market power that can be used to exploit consumers. In this section, we will try to point out the general inexpediency of this approach. Generally speaking, barriers to enforcing competition law to excessive prices also relate to price gouging. However, specific differences exist, and they further complicate the application of competition policy in this case. Generally, we distinguish two groups of arguments for the (non)application of competition law to price gouging. The first directly derives from the discussion about the role of competition law in cases of excessive prices, and the second highlights

the short-term character of price gouging. The fact that competition law activities were largely absent, with a few rare exceptions, further supports the presented view.

We start with the assumption that competition law applies to cases of excessive prices if it is consistent with the established goal of protecting competition. In the European context, the goal is to maximise consumer welfare in a dynamic setting (Bishop, Walker 2002, 26). If the goal is the same for all principal pillars of competition law, excessive prices and price gouging must be treated like an exploitative abuse of a dominant position. This is the only rationale for applying competition law to price gouging. The question is whether the firms involved can be considered dominant if their market power has suddenly increased amid a state of emergency. An affirmative answer would undoubtedly imply a deviation from the standard definition of dominant position. We would have to employ some very narrow relevant market, which would provide windfall market power.

Conventional competition law views market power as a long-term structural feature. It refers to changes in the market that result in higher long-term margins, not temporary price increases. The mere observation of price increases under the given conditions does not offer any evidence of market power. Moreover, as we pointed out earlier (Njegovan *et al.* 2021), the identification of short-term market power with the inevitable costs of the competitive process hinges on several premises: focusing on the market process as opposed to the equilibrium approach and comparative statics; viewing competition as a discovery procedure; reference to the second welfare economics theorem, which stipulates the separation of the allocative and distributive function of prices; recognising that market interaction is not a single-stage game, i.e. the importance of reputation.

Can we nonetheless speak of short-term market power abuse? Considering market power brings us to the issue of the relevant market. Looking back at the standard approach, Boshoff (2021) notes that a narrower market definition should be employed if we are to identify windfall market power in states of emergency. In that case, even tiny businesses can gain significant market power. Consequently, it is necessary to determine which structural changes caused by the pandemic led to a sudden increase in market power. Of course, this means focusing on particular products.[15] Below, we consider some general hypotheses about the potential causes of windfall market

[15] Porter's Five Forces Analysis could be helpful in such an endeavour (Porter 1979).

power and refer to several examples. We note that some of the arguments for applying competition law to price gouging cases are based on these hypotheses.

4.1. Hypotheses and Arguments for Competition Law Enforcement

As in Boshoff (2021), the first hypothesis could concern increased transaction costs and search costs during a state of emergency. Since the availability of substitutes is an essential factor of market power, because it affects the elasticity of firm demand (Porter 1979, 138), increasing costs could reduce the availability of substitutes for certain products and thus increase market power. Namely, the consumers' mobility and willingness to respond to price increases may be impeded, as well as their willingness to search for substitutes for health reasons.

The first hypothesis could be considered in the context of a specific product or market. For example, in the case of disinfectants, initially, there were many substitutes for 70% alcohol: Asepsol, some other lower percentage alcohol-based disinfectants or even alcoholic beverages. In the case of face masks, it can be easy to sew a cotton mask or just to put a cloth or a scarf over one's face. However, as knowledge about the coronavirus progressed, the list of substitutes was narrowed down. The advancement of knowledge has led to a change in the population's beliefs regarding the effectiveness of certain health-protection goods. However, in the case of face masks, the set of substitutes is still not negligible, as Andrejko *et al.* (2021) and Tanisali *et al.* (2021) point out. When it comes to the availability of substitutes, it is often argued that high prices epitomise the creative function of the market—the search for new ways to meet the consumers' needs. It should be noted that this argument has somewhat less value in the short run.

Secondly, barriers to entry are one of the main arguments for intervention, and the question arises whether they represent a significant factor in ensuring windfall market power. Let us proceed with the specific example of face masks. As suggested in OECD (2020a), identifying bottlenecks involves value chain analysis. In terms of inputs, oil and metal are the primary raw materials for manufacturing non-wovens, metal strips and earloops (and sometimes other textile materials, such as cotton). Additionally, paper pulp is required for cardboard and packaging. Metal is only needed for nose strips, and various metals can be used. The main bottleneck in the value chain (in terms of inputs) is the non-woven fabric made of polypropylene. Since it is used in the production of baby diapers, cosmetics and handkerchiefs, automotive and construction industries, and its production requires a

significant initial investment in heavy machinery, specific barriers to entry apply in this case. On the other hand, the problems with transport and logistics and the export restrictions that are in force in some countries represent a severe problem for distribution, which is undoubtedly another bottleneck in the value chain of face masks. These factors can significantly affect short-term market power.

Finally, by considering the previous hypothesis, it seems that the crown argument *for* competition law implementation is that raising prices manifests the application of market power and directly reduces consumer welfare, which competition law seeks to protect. Undoubtedly, increasing prices in a state of emergency affect consumer welfare. The problem, however, is that the time frame should also be considered. Excessive pricing does not pertain to short-term price disturbances. Competition law should indeed maximise consumer surplus, but this should be in a dynamic context, dealing with competitive constraints.

4.2. Arguments Against

On the other hand, the list of critical arguments *against* competition law enforcement in cases of excessive prices is somewhat longer.[16] First, it is believed that the prohibition of excessive prices can reduce the incentives for firms to invest and innovate, which applies to firms that may come under the scrutiny of competition law and their potential competitors. Clearly, in this way, a restriction is imposed on the pricing policy of dominant companies, which creates uncertainty as to which manifestations of market power can be characterised as exploitative. The fact that the standard orientation of the competition law is towards exclusionary abuses also contributes to that uncertainty from a different angle, which in a way limits the practice of lowering prices. Thus, both directions in conducting the pricing policy in the hands of market participants become limited.

Second, there are practical difficulties in identifying the "excessiveness" that requires intervention. The main question that arises here is: when does a specific price level indicate exploitative abuse? Hence, defining a competitive benchmark for comparison purposes is crucial. As Gilo and Spiegel (2018) point out, "[a] main obstacle to effective implementation of the prohibition of excessive pricing is the lack of a commonly agreed upon definition of

[16] Motta, De Streel (2007) and Ezrachi, Gilo (2009) elaborate the "for and against" arguments.

what constitutes an 'excessive price' or how to measure it". Mainly, there are two approaches for identifying "excessiveness" that requires action. The first approach involves comparing the prices of different firms (comparative benchmarking). The prices under scrutiny are compared to those charged by direct competitors or similar companies from other markets at the time of observation. The second approach focuses on intertemporal price comparisons of the same company—the one under scrutiny (intertemporal benchmarking).

Boshoff (2021) argues why the intertemporal comparison is a better option for detecting price gouging, which is also the official choice of South Africa's competition authority.[17] Generally, the need to link such price increases to changes in competitive conditions, caused by the state of emergency, imposes the prices of the same firm in different periods (during and prior to the state of emergency) as the least biased option. In addition, this seems to be the most efficient approach due to the urgency of the intervention and the fact that we can hardly find similar firms from other markets and comparable rivals from the same market in such a short time frame.

If the price deviates significantly from the chosen benchmark, it is considered an excessive price. However, what does "significant deviation" mean in this context? For example, in the case of South Africa, the threshold of 20% is considered a safe harbour for companies, while the intertemporal comparison of prices also considers the change in costs (Boshoff 2021).[18]

Indeed, the determination of "excessiveness" in this context must be sensitive to changes in the input prices and the firm's average costs. It is not uncommon for costs to rise in a state of emergency (increased transport costs, higher margins for inputs, and sometimes complete disruption of supply chains during a limited period of time[19]). In other words, if the sharp rise in prices stems from a sharp rise in input costs, the need for intervention

[17] See, for example, Gilo, Spiegel (2018), who use formal models of quantity and price competition to examine the competitive implications of applying different benchmarks in banning excessive prices.

[18] However, it should be noted that distributions of the probability of regulatory errors (types I and II) can be sensitive to the choice of a competitive benchmark and the price increase threshold. For more on type I and type II errors in the context of excessive pricing, see Evans, Padilla (2005).

[19] Lately, in addition to the coronavirus disease pandemic, the war in Ukraine has provided a most striking example of the devastating consequences of supply chain disruptions.

of this kind is harmful and, therefore, superfluous. Price-gouging regulations typically treat any demand-based price increase as "unfair". Hence, according to Boshoff (2021), price gouging exists if:

$$p_t - p_{t-1} > c_t - c_{t-1} + \varepsilon,$$

where p is the price, c denotes costs, and ε is a parameter that reflects the burden of proof, which eliminates the prosecution of intertemporal profit differences of an appropriately small degree.[20] Related to the mentioned Decision of the Government of the Republic of Serbia, $t-1$ could refer to 5 March 2020 (certainly sometime before the official introduction of the state of emergency) and t to the period of the declared emergency.

Third, any regulation of excessive prices is considered redundant because free entry will eventually neutralise them, i.e. excessive prices are self-correcting. Ezrachi and Gilo's (2009) influential work represents an attempt to challenge this argument, thus directing the reasoning against intervention to the first two points. They show that excessive prices are not self-correcting, regardless of how low entry barriers into the market are and whether or not potential entrants are informed about the incumbent's relative efficiency in the time frame characteristic for excessive pricing considerations. Furthermore, if we narrow down the relevant time frame, new entries that are motivated by high prices become less likely.

4.3. Decision Criteria

If we assume that competition policy can deal with the consequences of windfall market power, the application of competition law to price gouging must face the same arguments that accompany its application in the domain of excessive prices. Evans and Padilla (2005) argue that a legal standard based on maximising consumer welfare in a dynamic context should not include ex-post intervention on price the decisions of dominant firms. However, this general statement does not apply to specific cases that meet the established criteria. In other words, only special cases of consumer exploitation deserve treatment under the competition law. These criteria are based on the above-discussed pros and cons of applying competition law to price increases. Evans, Padilla (2005) proposes a list of such criteria below:

[20] Although the logic presented is intuitive, Boshoff (2021) does not raise the issue of arbitrariness in determining the parameter ε. Some objective criteria would be needed in this context.

A) The firm enjoys a (near) monopoly position in the market, which is not the result of past investments or innovations, and which is protected by insurmountable legal barriers to entry;

B) The prices charged by the firm widely exceed its average total costs;

C) There is a risk that these prices may prevent the emergence of new goods and services in adjacent markets.

Meeting these criteria would suggest relevant cases of excessive prices to be considered by competition law, i.e. reasonable "unfairly high prices" candidates.

Competition law should be applied if the case meets all three criteria. Even though these standards refer to excessive prices in the context of Article 102 (a) (TFEU), they can also refer to the phenomenon of price gouging. In both cases, the prices can be characterised as unfairly high. In a way, price gouging satisfies criterion B) if unfairly "high implies" that the price "widely" exceeds the average total costs of production. Undoubtedly, if the retail price is 20 times higher than the one suggested by the manufacturer, as in the mentioned case involving traders on Amazon, "widely", in the sense of Evans, Padilla (2005), may sound justified. The same cannot be said for criteria A) and C).

Namely, in most cases, the "(near) monopoly" position would be consistent with very narrow—almost micro—definitions of the relevant geographic market. Absurdly, some corner shops might feel like ones with significant market power due to panic or movement restrictions. Accordingly, competition authorities may identify "situational monopolies", where a firm holds considerable market power during a limited period (OECD 2020b) on some narrowly defined relevant markets. Competition law should not apply to short term (near) monopoly positions, time-framed by the duration of a panic or a state of emergency. With the first sign of returning to customary conditions, every (near) monopoly from this context will vanish. Likewise, "insurmountable legal barriers to entry" cannot be expected to protect such short-term positions in narrowly-defined markets. Finally, the emergence of new products and services in adjacent markets is unlikely in the short run. Therefore, the mere satisfaction of criterion B) is not sufficient for the intervention in terms of exploitative abuse of a dominant position.

Assessing the mentioned criteria as too restrictive, Motta and De Streel (2007) offer their own somewhat relaxed list. We summarise it, following Fung, Roberts (2021):

a) The firm holds a dominant position in a defined market;

b) The firm's position is not the result of, or is only partially the result of, the firm's investment and innovation;

c) There are substantial barriers to entry, and a lack of other means for the market to correct itself;

d) No sector-specific regulator has jurisdiction to resolve the matter.

Specialised sectoral regulators operate only in specific markets, so criterion d) is satisfied in most cases. The same can be asserted for b) since a firm's position cannot be attributed to investments and innovation but to the surge in demand along the almost vertical supply curve and other obstacles to consumers during a state of emergency. As opposed to the previous, a) and c) could be satisfied only under some strong assumptions that would lead to windfall market power—a narrowly defined relevant geographic market in a concise time frame. That dominant position supported by significant entry barriers will not last long, and the same could be said for the durability of windfall market power. These assumptions virtually reduce competition policy to the static context, typically just a few days. The ultimate goal of maximising consumer welfare in a dynamic context would not be met in this way. Hence, it seems that criteria limiting the application of competition policy in the case of exploitative abuse of a dominant position prevent its application in the event of price gouging even more effectively—windfall market power cannot be durable enough.[21]

However, even if price gouging meets all the previous criteria, we will try to explore how reasonable it could be to apply *ex-post* intervention to the needs caused by this short-term phenomenon. Application of Article 102 (a) (TFEU) takes time, especially with judicial review. In some cases, it can take years.

If the public expects a quick reaction, the ex-post nature of competition policy regarding the abuse of dominant position will fail to meet such expectations. Satisfaction, if any, would come late when the state of emergency is long over. That is why we should not expect competition law

[21] Accordingly, in Case C-177/16 par. 56 the EU Court of Justice clarified, "for the rates concerned to be regarded as 'abusive' [...] that difference must persist for a certain length of time and must not be temporary or episodic". By indicating the change in prices as the manifestation of abusive behaviour, this statement demonstrates that episodic images of market power cannot cause exploitative abuse related to Article 102 (TFEU). See: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0177&from=en* (last visited 23 May, 2022).

to solve the problem of externalities. Furthermore, competition authorities have limited resources. This observation seems especially significant because the need for intervention exists only during a state of emergency, and the affected markets may be too many, e.g. as many as 36 products were included in the mentioned Decision proclaimed by the Government of the Republic of Serbia.

To what extent is price gouging short-lived? It lasts at least until the supply meets the market's needs or the panic buying ends. A survey conducted in 54 countries between January and April 2020 suggests that panic bursts typically last about 7–10 days (Taylor 2021). If this is true, we should expect that the effects of a sharp increase in demand would be contained promptly. In any case, competition law should not address the problems caused by increased demand due to panic buying. However, panic shopping was not the only cause of price increases during the pandemic. Some goods became mandatory during the pandemic, such as face masks, indicating a more permanent increase in demand. Even in such circumstances, we have witnessed that after the first wave of lockdowns, the price of comparable protective masks stabilised at the pre-pandemic level. The supply met demand, and new types of face masks appeared on the market, which increased the variety of choices.

Finally, even if we challenge the need of employing ex-post policy for prompt achievements, it remains possible to argue that competition policy may produce a deterrent effect. Knowing that they can come under the scrutiny of competition authority due to excessive prices, market participants will avoid raising prices excessively, especially in a state of emergency. The deterrence effect might be more effective in the case of market participants with previous experience, or at least with some awareness of the restrictions that competition policy may impose. Consequently, it may be effective only for large companies, particularly those with a dominant market position. Therefore, it is not uncommon for sizeable electronic trading platforms and distributors of necessary goods and services to become the subject of interest of competition authorities in connection with price gouging, e.g. Amazon and eBay in Italy, Amazon, Bol.com, Marktplaats in the Netherlands, distributors of face masks in Poland, and even the market participants in the funeral services sector in Spain.[22]

However, one should keep in mind that any small business beyond the scope of competition policy could acquire windfall market power. So, the deterrence argument only partially makes sense—it applies "mostly" to

[22] See Cary *et al.* (2020).

large companies. As we have argued earlier, in the case of small businesses, applying competition policy would require a narrower definition of markets, which could capture the notion of short-term market power. There may be too many such cases. The costs of pursuing the firms would undoubtedly outweigh the potential benefits. Hence, even if we limit activity to large companies, one question still arises: to what extent are such companies willing to sacrifice their reputation for a short-term profit increase? In the mentioned case involving N95 masks amid the pandemic, the manufacturer did not raise the price; moreover, it sued the downstream companies for using windfall market power to exploit the buyers. As we have already stated, since it is not a one-shot game, reputation can substantially limit market power. Cabral, Xu (2021) shows that reputation can be an adequate substitute for regulation in the case of large companies.[23] They propose a measure that would restrict price increases above the prevailing level just for newcomers in the state of emergency. The weakness of this measure is, as they point out, that it rests on the assumption of initial competitive conditions. Of course, reputation is not important in the case of new participants driven by speculative motives. Since this measure is related to newcomers, notice the terminology difference: the definition of price gouging is about "setting the price" and not about "raising the price".

In some countries, rare experiences with states of emergency may weaken the "deterrent effect" argument. However, it may be relevant for countries that often face such troublesome situations, e.g. the United States. Nevertheless, in the US, the protection of competition is not initiated in the case of price gouging, not even for regular excessive pricing. Therefore, employing this *ex-post* policy for prompt achievements could be misleading.

5. CONCLUDING REMARKS

Numerous catastrophic events, such as the last pandemic and the war in Ukraine, have resulted in regional and systemic instabilities, which revived the need to define clear rules that would apply to price gouging. There seems to be a lack of legal certainty regarding this phenomenon. This is likely due to its short-termness and unpredictability, similar to that expressed in windfall market power. Hence, the need to reconsider the necessity of the intervention, its eventual scope and means. Contrary to the

[23] Noda, Teramoto (2020, 6) cite authors who show that US retailers were hesitant to raise prices even to the extent not prohibited by anti-price-gouging laws, emphasizing that reputable retailers maintained their prices in times of emergency.

arguments *for* the market that we discussed earlier (Njegovan *et al.* 2021), we have considered justifications for applying regulation and competition policy in this paper. Economic regulation would include price ceilings and accompanying measures to prevent shortages of necessary goods. At the same time, competition policy would contribute to "measures" against exploitative abuse of a dominant position. In particular, the paper aimed to argue why regulation may be necessary—but not competition law enforcement.

First, the problem with externalities is evident when price gouging of necessary goods occurs, indicating the need for regulation. However, the question of the scope remains crucial. While price ceilings seem necessary, accompanying policies depend on specific conditions, e.g. the presence of supply or demand shocks. Similar conclusions follow in the case of panic buying, except that fixed prices are not always superior. Additionally, we have indicated the results that speak of the effectiveness of rationing, export restrictions, temporary sales taxes and other non-economic policies aimed at ensuring optimism. A sudden price increase in a state of emergency may be a reason to believe that price gouging is at work. However, not every short-term price increase is excessive if we consider the changes in costs. If necessary, the intervention should be strictly targeted and not more comprehensive than required.

Competition authorities could play a role in directing regulation towards the markets where price gouging has been observed. However, we do not expect competition authorities to become regulators but rather to be the governments' consultants in adopting price gouging measures. The fact is that there are no jurisdictions that have a permanently employed regulatory body for this mostly short-term phenomenon. At the same time, the competition authorities still possess superior knowledge of the particularities of various markets. Following these facts, the paper points to examples of jurisdictions that have engaged their competition authorities on the occasion of pandemic price gouging—but outside the standard pillars of competition law. In some rare cases, such as in South Africa, competition law has been applied to price gouging. The paper argues why this last example most likely illustrates a wrong approach. The analogy of applying competition policy in the case of excessive prices under normal conditions is illustrative. We also considered additional arguments specific to price gouging, but not to excessive prices.

Through this discussion on price gouging, based on the relevant literature, we hoped to draw attention to the necessity of providing an appropriate legal framework and specific arguments for concrete measures, pointing out the danger of their automatic application. Once again, it turns out that close cooperation of law and economics can be vital in achieving suitably defined welfare-enhancing outcomes.

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A FEW THOUGHTS ABOUT COMPETITION POLICY IN TWO-SIDED MARKETS

The paper reviews recent literature concerning two-sided markets or platforms. These markets are characterised by indirect externalities since the utility of users on one side of the market increases in the number of users on the other side of the market. There are many examples of two-sided markets, such as payment cards, newspapers, Internet advertising, search platforms for accommodations, software applications, etc. Competition policy has special features in two-sided markets, and the wisdom from standard markets may induce wrong decisions by competition authorities. Therefore, the paper discusses the definition of the relevant market in two-sided markets, when horizontal merger is beneficial to users, how predatory behaviour is defined, and other anti-competitive practices.

Key words: *Platforms. – Relevant market. – Horizontal mergers. – Predatory behaviour.*

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1. INTRODUCTION

Two-sided markets have imposed a necessity for reconsideration of competition policy that should be adapted to the special features of such markets. The European Commission (EC) proposed a Digital Markets Act (DMA)[1] with the aim of regulating competition in online two-sided markets. The DMA identifies 'gatekeepers' as online platforms that connect users on two sides of the market, and which sometimes also sell their own products. The European Parliament adopted this document on 15 December 2021, and gave its green light to begin negotiations with the member states. Once the document is adopted by the member states, it will be applied across the EU.[2] The EU legislation is based on one-sided markets, and the DMA is a supplement.

Two-sided markets (platforms) enable interaction between two groups of users that benefit from indirect externalities, which means that the utility of one group of users depends on the number of users on the other side of the market. For example, the utility of advertisers in newspapers depends on the number of newspaper readers. For this reason, a platform may set a price below the marginal cost on one side of the market, in order to attract users on the other side of the market. Newspapers create content that attracts readers, and readers attract advertisers. Readers can value advertisers positively if they are interested in advertisements but can also be indifferent to advertisements or annoyed by ads if they are primarily interested in the newspaper's content. Some platforms are three-sided or even multi-sided. Moreover, platforms where content providers and content consumers meet, also attract advertisements (YouTube).

Payment cards are the second example of two-sided markets, with Visa and MasterCard being the most commonly used ones. There are four participants in the transaction: merchant, cardholder, card issuing bank, and merchant's bank. The cardholder pays an annual or monthly membership fee to the bank that issued the card, which can also be negative if the cardholder receives coupons and refunds, depending on the volume of transactions. Merchants receive the amount of the transaction, minus the discount that

[1] *https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN* (last visited 13 May, 2022). The latest procedural developments as off 24 March 2020, available at: *https://www.jdsupra.com/legalnews/digital-markets-act-now-firmly-on-its-7932391/* (last visited 14 May, 2022).

[2] In the following text certain articles of this document will be commented on, bearing in mind that it is yet to be adopted by the EU member states.

represents the commission of the merchant's bank. The merchant's bank pays the interchange fee to the bank that issued the payment card to the cardholder.

Other examples of two-sided markets are Internet search engines, which connect users –who search for particular keywords – and advertisers; accommodation platforms, which connect people in search for accommodation and hotels and apartment owners; and software platforms, which connect developers and users of applications. Google Play is an example of a software platform. In the case of this platform, more applications attract more users, and more users attract more software application developers. Online shops, such as eBay, Amazon, Alibaba, and AliExpress, have become very popular, which is also the case with video streaming platforms: Netflix, HBO, Amazon Prime, and Disney+. Some of these platforms, in addition to connecting two sides of the market, offer their own products for sale. Amazon offers Kindle, and video streaming platforms provide their own movies and series.

According to Evans and Schmalensee (2011), users can use one platform (single-homing) or multiple platforms (multi-homing).[3] For example, merchants accept different payment cards, while cardholders typically use one payment card, although some users hold different types of payment cards. Advertisers advertise in several daily newspapers, while readers typically buy one daily newspaper. In online versions of newspapers, both sides use several platforms.

Two-sided markets can be non-transactional markets, where there is no direct transaction between platform users on the two sides of the market. For example, newspapers do not have a direct transaction between readers and advertisers, although advertisers benefit from the increasing the number of readers. Newspapers charge readers only for membership, but not for use, since readers paying for the print version of the newspaper pay a fixed sum, regardless of how many members of their households will read the newspaper. In two-sided transactional markets, there is a direct transaction between platform users on two sides of the market, as in the case of payment cards. Another example of a transaction market are mobile network operators. On one side of the platform is a user who makes a call, and on the other side of the platform is a user who receives the call. In this case, the platform (mobile network operator) charges the user making the call for membership (monthly subscription) and for using the platform (the platform deduces minutes within the monthly package). Hence, Rochet and Tirole (2008) distinguish between membership indirect externalities

[3] The rest of this section is based on Evans and Schmalensee (2011).

(*ex ante* externalities) and usage indirect externalities (*ex post* externalities) on a platform. Platforms can charge an access fee, usage fee or both. In the case of payment card platforms, users pay an access fee in the form of a monthly membership fee and no usage fee, and merchants pay a discount on each transaction (usage fee, but no membership fee). In some cases, there is no fee for one side of the market. For example, this is the case with clients who search for accommodation on Booking.com who do not pay an access or usage fee.

In two-sided markets, there is a distinction between the price level, which is the sum of prices paid by both sides of the market, and the price structure, which represents the ratio of the prices paid by the two sides. For example, if one weekly business journal that it is printed in 100.000 copies per week demands EUR 10.000 for the advertisement on the front page, the price of the advertisement per copy is EUR 0.10. This business journal can be bought by readers for a price of EUR 2. The price level is the sum of the two prices, 2 + 0.1 = 2.1, and the price structure is the ratio of the prices, 2/0.1=20. If users on one side of the market can transfer part of the price they pay to users on the other side, the price structure is irrelevant, and the platform would have no control over it. For example, if stores could charge higher prices for clients who pay by card than in cash, the platform would not have control over the price structure. Due to the competition from other sellers, an individual seller cannot transfer the merchant's discount to consumers. This kind of transfer is certainly not possible in non-transactional markets, and partial transfer is possible in transactional markets.

Due to the indirect externalities in two-sided markets, when the platform increases the price on one side of the market, it reduces the number of users on that side of the market, but it also reduces the number of users on the other side of the market. Furthermore, the reduction of the number of users on the other side of the market reduces the number of users on the first side of the market.

The DMA has defined 'gatekeepers' as platforms that provides online intermediation services, online search engines, social networks, video-sharing platforms, operating systems, cloud computing services and Internet advertising (Article 2). A gatekeeper must have annual turnover of at least EUR 7.5 billion, a market capitalisation of at least EUR 75 billion, more than 45 million personal users in the EU, and more than 10.000 active business users in the last fiscal year. The DMA can identify a platform as a gatekeeper even if it does not meet the previous thresholds, but if it estimates that its size, turnover, market capitalisation, number of users, entry barriers, and network effects make it a dominant player in a particular market (Article 3).

The aim of this paper is to emphasise differences in the competition policy in two-sided and one-sided markets by reviewing the literature on two-sided markets. The paper will discuss some competition policy issues in two-sided markets through the lens of the DMA. The rest of the paper is organised as follows. In the second part, some conducted cases in two-sided markets are considered, followed by an explanation of special features of the relevant market definition and mergers in two-sided markets. Predatory behaviour is also defined differently in two-sided markets than in standard markets. Finally, other anti-competitive practices in these markets will be analysed. The last section concludes the discussion.

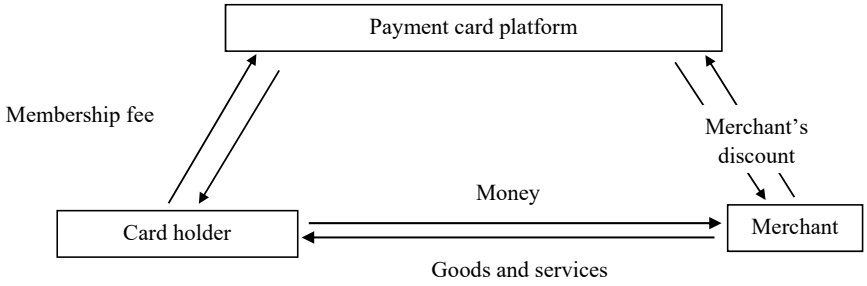
2. SOME CONDUCTED CASES IN TWO-SIDED MARKETS

In this part, the nature of two-sided markets will be explained through the example of payment cards, accommodation platforms, and Internet advertising. Some anti-competitive practices of these platforms will also be illustrated.

2.1. Payment Cards

According to Schmalensee and Evans (2011), in 1950 Diners Club was the first payment card platform, which charged cardholders an annual membership fee of USD 3 at the time, while the cost of a transaction for cardholders was negative due to various bonuses based on the volume of transactions. Sellers paid a discount of 7% of the transaction value. This platform generated 70% of its total revenue from sellers' discounts. American Express card appeared in 1958 and had a slightly higher membership fee and a lower amount of seller's discount. This platform generated 65% of its revenue from seller's discounts.

Figure 1. *Payment card platform with* 3 *participants*



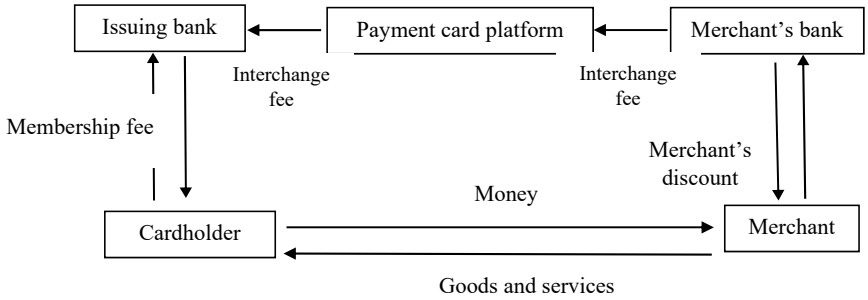
Source: Filistrucchi *et al*. (2014)

In 1958, Bank of America launched its payment card platform where cardholders did not pay a membership fee, while the seller's discount was 5%.[4] Bank of America was both the issuer of payment cards and the bank that processed transactions for the seller, which determined the level and structure of prices. This system can be shown with three participants in Figure 1, based on Filistrucchi *et al*. (2014). In 1966, Bank of America began selling franchises to other banks for issuing payment cards, which independently determined the fees for the two sides of the market. If a buyer owned a card issued by bank α, while merchant's bank was β, bank β was obliged to transfer the entire amount of the merchant's discount to bank α. Therefore, bank β had an incentive to show that it collected a smaller amount of merchant's discount than the amount it actually collected. Consequently, banks were demotivated to represent merchants because they had zero profit from that business if they transferred the entire collected discount to the card-issuing bank. The problem was overcome in 1970 when the interchange fee was introduced,[5] which the bank processing the transaction for the merchant paid to the bank issuing the card to the cardholder. This fee was set at 1.95% of the value of the transaction independently of the amount of merchant's discount. To make some profit, the merchant's bank charged a higher discount than the amount of interchange fee it paid to the bank issuing the card. This system with 5 participants is shown in Figure 2, based on Filistrucchi *et al*. (2014).

[4] This part is based on Schmalensee and Evans (2011), and Fillistrucchi *et al.* (2014).

[5] Baxter (1983) has shown that interchange fees can increase the volume of card transactions as well as total welfare. Carlton and Frankel (1994) claim that the application of interchange fee is isomorphic to the situation when merchants charge higher prices for card transactions than for cash transactions. However, due to the competition between merchants, this type of price discrimination, based on the payment method, is unlikely to be seen in practice.

Figure 2. *Payment card platform with* 4 *participants*



Source: Filistrucchi *et al.* (2014)

In the payment card system, there is an inter-brand competition between different payment card platforms (Visa, Master Card, American Express, etc.). In addition, there is an intra-brand competition between banks that represent one payment card company to issue cards to as many clients as possible. In the latter form of competition, banks offer different benefits to users to differentiate their offers from competitors. Banks may offer travel insurance, discounts in some stores, free coupons for purchasing in some stores, etc. Banks add these benefits to make their offer more attractive to clients, and these benefits do not stem from card companies.

NaBanco filed a lawsuit against VISA to the court in 1984, accusing the banks of collusive behaviour due to the collectively determined amount of the interchange fee. However, the court determined that bilateral bargaining between banks would lead to high transaction costs, which would jeopardise the existence of a payment card system. In addition, buyers and sellers would need to know whether their banks have a bilateral agreement before attempting to make a payment. The lawsuit ignored the two-sided structure of the market and the need to balance the number of users on both sides of the market through the amount of the interchange fee. In a recent case *Ohio v. American Express Co.*, the US Supreme Court decided that it is not sufficient to show that only one side of the market is harmed by a platform; it must be shown that both sides are harmed.[6]

One of the concerns for EC was the decision of the National Bank of Serbia to require all banks in Serbia to issue Dina cards free of charge to all their clients. The concern of EC was that this measure of the Serbian central bank was anti-competitive, since banks' clients would have to pay

[6] For more details about this case, see Wright, & Yun, (2019). The author is grateful to the referee for pointing out to this case.

monthly membership fees for competing payment cards, such as Visa and Mastercard.[7] It should be noted that competition in the financial sector in Serbia is supervised by the central bank as the sectoral regulator.

2.2. Platforms for Accommodation: The Case of Booking.com

Platforms that offer hotel or apartment accommodation are also two-sided markets. On one side of the market are users who search for accommodation, and on the other side of the market are hotels and apartment owners who offer accommodation. On these kinds of platforms, both sides of the market have positive indirect externalities from a number of users on the opposite side of the market. The search for users is free, and on some platforms, such as Booking.com, the search is even subsidised since Genius level 3 users obtain up to 20% discount on hotel reservations, free breakfasts or free upgrades to a better hotel room. Platforms obtain revenue from hotels and apartment owners who pay 10%–30% of the hotel reservation to platforms. In addition to prices for accommodation, guest reviews are a very important factor for owners, and in general, accommodations with higher ratings from guests can charge higher prices. These platforms offer additional services such as transfers between airport and hotel or car rental services.

The anticompetitive behaviour investigation details against Booking.com are provided by Caccinelli and Toledano (2018). To prevent the free-rider effect, when a platform user finds accommodation on the platform and then goes to the hotel site and pays a lower price, Booking.com has introduced a clause that prevents hotels from offering accommodation at a lower price than on the platform, through any online or offline sales channel in travel agencies (broader clause). The national competition authorities (NCA) of France, Italy, Germany and Sweden have launched investigations to determine whether such behaviour is against competition rules, and only the French NCA recognised the two-sided nature of this market. In response to the launching of the investigations, Booking.com amended the disputed clause on 1 July 2015, to allow hotels to offer a lower price on other platforms or in offline sales through travel agencies, but they were not allowed to offer a lower price on the hotels' websites (narrower clause). The NCAs have accepted amendments to this clause in France, Italy and Sweden. The German NCA considered even the amended clause to be restrictive.

[7] *https://www.istinomer.rs/analize/dina-kartica-pod-skenerom-brisela/* (last visited 14 May, 2022).

The NCAs in France, Italy and Sweden have defined the relevant market as the market for online accommodation search. Consequently, the broader clause reduced competition between accommodation search platforms and prevented new platforms from entering the market. In addition, Booking.com was able to use its market power and increase the commission it charges to hotels. Concerning the narrower clause, the NCAs in these countries have determined that it is not restrictive since the offer of accommodation on the hotel's site belongs to another relevant market, and the narrower clause has no impact on the competition between platforms. In contrast, the German NCA determined even the narrower clause to be problematic due to the dominant position of Booking.com in the accommodation search market in Germany (50%–55% market share). In addition, the German NCA concluded that the narrower clause has an adverse consequence on the upstream price competition between hotels. Article 10 of the DMA prohibits the practices that restrict the market's contestability, and the broader clause used by this platform violates this act.

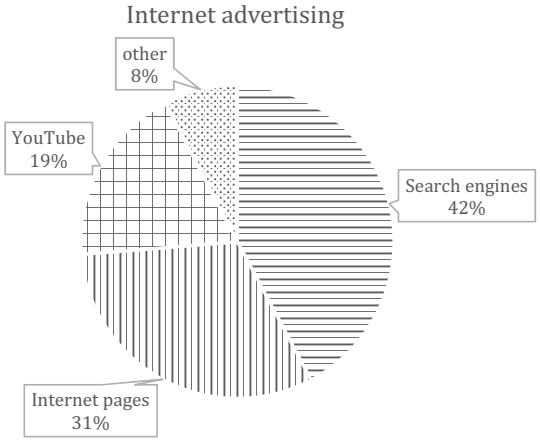
2.3. Internet Advertising

Internet advertising has taken a dominant position compared to traditional advertising. In the US, the total expenditure for Internet advertising has increased from USD 31.7 billion in 2011 (USD 36.4 billion in 2020 USD) to USD 139.8 billion in 2020. Internet advertising can take different forms: advertising on websites (for example, online versions of newspapers or social networks), in software applications, in Internet search engines, video advertising (on YouTube), email advertising, etc. These types of advertising (with the exception of email) represent two-sided markets. One side of the market are users (readers of online newspapers, users of software applications, users of Internet search engines and YouTube), and on the other side of the market are the advertisers. There is also an increasing trend of expenditures on mobile device advertising, compared to computer advertising. In 2011, total expenditures on mobile device advertising were only USD 1.6 billion in the US, and total expenditures on computer advertising were USD 30.1 billion. After only 9 years, in 2020, total expenditures on mobile device advertising were USD 98.3 billion in the US, while total expenditures on computer advertising were USD 41.5 billion[8].

[8] These data were collected from *https://s3.amazonaws.com/media.mediapost.com/uploads/InternetAdvertisingRevenueReportApril2021.pdf*. (last visited 21 January 2022).

The share of different types of Internet advertising in 2020 in the US is presented in Figure 3.

Figure 3. *Internet advertising by type in the US, in 2020*



Source: *https://s3.amazonaws.com/media.mediapost.com/uploads/InternetAdvertisingRevenueReportApril2021.pdf* (last visited 21 January 2022).

Advertisements on websites are published based on the user's IP address, search history, web browser history, etc. Hence, this advertising is more effective than traditional advertising, since advertisers target individuals with some interest in buying their products. In Internet advertising, user data is an essential element of competition. A platform with a more considerable accumulated amount of user data[9] has a significant advantage over competing platforms entering the industry, which is a substantial barrier to entry, according to Katz (2019). These advertisements are on a per-impression base, which means that advertisers have to pay each time the ad is displayed to users. Typically, an advertiser pays for 1,000 impressions. The price depends on the advertisement's position, and the top right corner of the page is more expensive than the bottom left corner.

The website (social network) can negotiate the terms of advertising directly with the advertiser. The other possibility is indirectly through the network of advertisers. Small platforms (websites) use the indirect method because it is expensive to hire additional employees for direct negotiations.

[9] Article 5a of the DMA prohibits a platform from using data collected on other platforms provided by the same gatekeeper or data collected from third-party services.

Large platforms sell the most requested space in direct negotiations, and less sought-after space on the page by indirect method. For large platforms, 70% of advertising revenue is generated in direct sales and 30% in indirect sales.

As explained above, when users type a certain keyword into a search engine, they receive two kinds of results: organic search results – which stem from the search engine's algorithm – and advertisements. In this type of advertising, the advertiser pays only if the user clicks on the ad. The advertiser should have his ad in the highest position on the screen because he can receive more clicks. The order of advertisers is determined in a position auction. The advertiser with the highest pay-per-click bid gets the first position, the advertiser with the second-highest bid the second position, etc. Each advertiser pays the amount offered by the advertiser in the position below him, and this mechanism is called generalised second-price auction (GSP). At the present, Google weighs the bidder's bid with an estimated click-through rate and advertiser's quality to maximise its advertising revenue, and bidders are ranked according to these weighted bids. This market is highly concentrated, with Google having a global market share of 91.54% in 2020, Bing 2.44%, Yahoo 1.64%, Baidu 1.08%, Yandex 0.54%, DuckDuckGo 0.45%, etc. Cabral (2011) discusses the effects that lead to market concentration in two-sided markets. Search users will find more useful ads on a large search engine than on a small search engine, especially for keywords that are not searched often. Also, advertisers prefer to advertise on large platforms due to more clicks and more purchases after clicking on an ad. These indirect network externalities cause further concentration in the search engine market, which is evident when the constant increase in Google's market share is observed. Halaburda *et al*. (2020) explains the factors that might work in the opposite direction, such as diversification, congestion, and interoperability. Article 6g of the DMA states that Internet advertising platforms should provide advertisers with the data necessary to evaluate the effects of online advertising.

In the latest relations between Microsoft and Google, MS Edge can use Google's algorithm. When installing Windows, users are informed that they will not lose any of the benefits of Google Chrome by choosing MS Edge. It seems that through this relation, Microsoft is strengthening its dominant position in the OS market, and Google is strengthening its dominant position in the search market. In this relationship, Microsoft is sacrificing its search engine, Bing (which is rarely used outside the US).

Google has a widely used horizontal keyword two-sided search platform. In addition, Google has a specialised platform, Google Shopping (vertical search).[10] In its results for a horizontal search of specialised shopping platforms, Google placed its specialised platform in the first position and other competing specialised platforms in lower positions. This case is described extensively by Iacobucci and Ducci (2019). The European Commission has fined Google EUR 2.42 billion for abusing its dominant position in the horizontal search market. The Commission concluded that biased horizontal search results favouring Google Shopping prevented new competitors from entering the specialised search market, put existing competitors in the specialised search market at a disadvantage, and harmed search users and advertisers. Google should treat all specialised search engines in the same way in horizontal search results. In order to prevent such behaviour, Article 6d of the DMA defines that search engines should not prioritise their own additional services in search results.

3. DEFINITION OF THE RELEVANT MARKET

The relevant market definition is quite different in two-sided markets than in standard markets, and this section follows Evans (2011) and Fillistrucchi *et al*. (2014) concerning this definition. The example of the print version of newspapers is illustrative for this purpose. Daily newspapers and TV may be in the same relevant market on the side of advertisers but not on the side of the audience. If audience members read the newspaper in the morning and watch TV in the evening, these two media types are not substitutes for each other. On the other hand, if advertisers want their ads to reach readers only once a day, these two media types are substitutes for each other. TV and daily newspapers will be in the same relevant market on the side of advertising, but not on the side of the audience. In the case of mergers of daily newspaper publishers, it should be borne in mind that TV competes with daily newspapers on the side of advertising but not on the side of content creation.

In two-sided markets, it is possible that one side of the market does not pay anything (free newspaper or TV channel) and that the platform generates revenue only from the other side of the market – advertisers. Access is free for customers (or even subsidised if free parking is taken

[10] Vertical search is related to a particular area of interest (specific parts of the Internet). Google Images or Google Shopping search engines are examples of vertical search. Horizontal search is performed over the entire Internet.

into account) at a shopping mall, while the shopping mall charges rent to tenants. However, shopping malls are also competing for customers because reducing the number of customers reduces merchant interest in renting, and the shopping mall must reduce the rental price. In this case, the rule applicable to standard markets – stating that where there is no price, there is no market – does not apply in the case of two-sided markets.

Therefore, in non-transactional two-sided markets, two interconnected markets should be defined, while in transactional two-sided markets, only one market should be defined. Namely, in two-sided transactional markets, the platform generates revenues on both sides of the market, and there is no point in considering two separate markets.

The critical loss analysis considers whether an increase in the price of a hypothetical monopolist selling one product is profitable.[11] If the price increase is not profitable, it means that there is a product that is a substitute for the product sold by the hypothetical monopolist, and this product should be added to the analysis. This procedure is repeated by adding substitute products until the price increase becomes profitable in some iteration. This group of products makes up the relevant market. Thus, the relevant market is the smallest set of substitutes for which the monopolist can profitably increase the price from the initial price level.

In the case of the hypothetical monopolist test in two-sided markets, the possibility for a profitable price increase is more limited than in standard markets due to the presence of indirect externalities, and the platform must balance the number of users on both sides of the market. If the increase in the price reduces the number of users on one side of the market, it will reduce the number of users on the other side of the market. Moreover, due to the feedback effect, a reduction in the number of users on the other side of the market leads to a further decline in the number of users on the first side of the market. Thus, the probability of anti-competitive effects of mergers in two-sided markets is smaller.

Newspapers are differentiated vertically,[12] according to the number of readers. If daily newspapers with a larger readership increase the price of advertising (in the hypothetical monopolist test), the number of advertisements in these daily newspapers will be reduced to a lesser extent than in the case of newspapers with a lower readership.

[11] See, for example Harris and Simmons (1991).

[12] Horizontal differentiation refers to differentiation of the product according to the consumer's preferences. For example, some consumers prefer coffee with a small amount of sugar, while others prefer coffee with large amount of sugar.

In the hypothetical monopolist test in two-sided markets, the question arises on which side of the market the increase of price should be considered and whether profits on only one side of the market or on both sides of the market should be taken into account. If only the impact of an increase in price on one side of the market on the profit of a hypothetical monopolist is considered, the fact that an increase in the price on that side of the market leads to the reduction in the number of users on the other side of the market should be ignored. Thus, if only one side of the market is considered, the reduction in profits of the hypothetical monopolist would be underestimated.

The hypothetical monopolist test should be conducted in two-sided transactional markets by increasing the price level (the sum of prices on both sides of the market). There are different opinions regarding the change in the price structure in this test.[13] However, the prevailing opinion is that the hypothetical monopolist should be allowed to optimally adjust the price structure because if the price structure cannot be adjusted, the reduction of the hypothetical monopolist's profit would be overestimated. Thus, the hypothetical monopolist test in which monopolists would not be allowed to change the price structure would estimate the upper limit of the relevant market. In non-transactional markets, the price should be increased first on one side of the market and then on the other, allowing the hypothetical monopolist to optimally adjust the price structure.[14]

4. HORIZONTAL MERGERS IN TWO-SIDED MARKETS

The merger of platforms in two-sided markets affects the level and structure of prices. In addition, the merger of platforms increases indirect externalities, as users on one side of the market can interact with more users on the other side of the market. This effect is specific to two-sided markets. Competition commissions have often neglected these specificities in the past, e.g. the British NCA in the case of the merger of Archant and Independent News, when it considered the impact of the merger only on advertisers and not on readers.

Vertical differentiation refers to differentiation in the quality space and this is objectively measurable.

[13] See more on this discussion in Filistrucchi (2011), Emch & Thompson (2006), and Evans & Noel (2008).

[14] Formal analysis of the hypothetical monopolist test in two-sided markets is presented in Ribeiro & Golovanova (2020).

The method used to analyse the effects of platform mergers, proposed in Correia-da-Silva *et al*. (2019), compares prices adjusted for indirect externalities on each side of the market with marginal costs on each side of the market. Consider the case of newspapers, and denote the readers' side of the market as R and advertisers' side of the market as A; the price on the market side R is p_R and that on this side of the market there are n_R users. On the market side A, the price is p_A, and on this market side, there are n_A users. The price adjusted for externalities on market side A is:

$$p_A - \alpha_A n_R, \qquad (1)$$

where α_A measures the effect of indirect externalities that advertisers have (market side A) from a certain number of readers on market side R. Here, the effect of indirect externalities that advertisers have is deducted from the price advertisers pay to newspapers.

The price adjusted for externalities on the market side R is defined in the same way:

$$p_R - \alpha_R n_A, \qquad (2)$$

where α_R measures the effect of indirect externalities that readers have (market side R) from a certain number of advertisers on market side A. Here, the indirect externalities that readers have are deducted from the price readers pay to newspapers. Suppose readers are interested in advertisements, the level of positive indirect externalities increases in the number of advertisers. In empirical studies,[15] it is assumed that readers either have positive indirect externalities from advertisements or that readers are indifferent to the level of advertising.

If the price adjusted for externalities is higher than the marginal cost on a particular market side, after the merger, the effect of higher market power will dominate the effect of higher indirect externalities. The explanation of this result lies in the context of the strength of indirect externalities. Based on the previous expressions, it is evident that as the strength of indirect externalities increases, the price adjusted for indirect externalities decreases, with other unchanged circumstances. Therefore, when indirect externalities are strong on both sides of the market (the adjusted prices are low and probably lower than the marginal costs on the respective sides of the market), there is a higher probability that the merger will be beneficial to users on both sides of the market. If indirect externalities are weak on both sides of the market (the adjusted prices are high and probably higher

[15] E.g. Van Cayselee & Vanormelingen (2019) that will be discussed later on. It is true that some consumers dislike advertisements, but not all of them.

than the marginal costs on respective sides of the market), the merger will harm users on both sides of the market. Finally, if indirect externalities are strong on the A-side of the market (advertisers have strong positive indirect externalities from readers) and weak on the R-side of the market (readers have weak positive indirect externalities from advertisers), then the merger is more likely to be beneficial to the A-side of the market (advertisers) and harmful to R-side of the market (readers).

In the 2004 simulation of the merger of Belgian newspaper publishers De Persgroep and VUM, Van Cayseele, and Vanormelingen (2019) assume that readers create positive indirect externalities for advertisers but that readers are indifferent to advertisements. These two publishers accounted for 60% of the total circulation in Belgium and 50% of advertising revenue. Newspapers in Belgium have on the average negative price-cost margin on the readers' side, but the overall price-cost margin (including the advertising side) is positive.

In the simulation of the merger of two newspaper publishers in Belgium, Van Cayseele and Vanormelingen (2019) assume in the first scenario that there was no increase in efficiency due to the merger, in the second scenario that there was a 2% reduction in marginal costs on the readers' market side, and in the third scenario that there was a 2% reduction in marginal costs on both sides. Based on the simulation, it is possible to determine that the selling price of the newspapers would increase by 1.8% after the merger. Although the two newspapers had greater market power after the merger, the possibility of increasing the price for readers was limited because reducing the number of readers decreases advertising revenue. The impact of the merger on change in consumers' surplus (ΔCS), change in producers' surplus (ΔPS) and change in total welfare (ΔW), depending on cost savings, is presented in Table 1.

Table 1. *Merger simulation of Belgian newspapers*

marginal cost reduction		ΔCS		ΔPS	ΔW
for readers	for advertisers	for readers	for advertisers		
0	0	-1.15%	-1.61%	1.64%	-1.35%
2%	0	0.02%	-0.42%	2.11%	-0.2%
2%	2%	0.18%	-0.08%	2.18%	0.09%

Source: Van Cayseele and Vanormelingen (2019)

From Table 1, it can be seen that with cost savings of 2% on both sides of the market, the producer's surplus of publishers and the consumer's surplus of readers increase as well as overall welfare. The merger only slightly

reduces consumers' surplus for advertisers. Therefore, a reduction of 2% of marginal costs on both sides of the market is needed for the merger to improve welfare.

5. PREDATORY BEHAVIOUR IN TWO-SIDED MARKETS

Areda and Turner (1975) define predatory behaviour as a situation in which a dominant firm sets a price below the short-run marginal cost or the average variable cost. This rule can lead to erroneous conclusions if it is applied to two-sided markets with indirect externalities. As explained above, the price level in a two-sided market is the sum of prices paid by both sides, while the price structure is the ratio of the prices paid by the two sides of the market. The prices paid by the two sides of the market must be expressed in the same units of measurement to be aggregated. In the case of daily newspapers, the price level is the sum of the price at which the newspaper is sold and the total advertising revenue divided by the daily circulation (advertising revenue per daily newspaper copy).[16] The price structure represents the ratio of the price at which the newspaper is sold and the revenue from advertising per one daily newspaper copy. In two-sided markets, the platform's profit depends not only on the price level but also on the price structure. Therefore, for daily newspapers, it may be profitable (in terms of overall profitability) if the price for readers is below marginal cost. This increases the number of readers, which allows the newspapers to increase its advertising revenue. However, competition authorities often neglect this two-sided aspect of the market. Consequently, Berhinger and Filistrucchi (2015) propose a modification of the Areda-Turner rule in two-sided non-transaction markets by comparing the sum of the prices paid by both sides of the market with the sum of average variable costs on both sides of the market.

According to the modified rule for two-sided markets, if the price is below marginal cost on one side of the market, this should not be considered as predatory behaviour. If the price on both sides of the market is below marginal cost, this can be characterised as predatory behaviour in two-sided markets. More precisely, the newspaper with a dominant position behaves predatorily if the sum of prices on both sides of the market, weighted by marginal network effects, is less than the sum of marginal costs weighted by marginal network effects. In other words, if the newspaper with a dominant

[16] As already explained, if the price of the newspaper is EUR 2, and advertiser pays EUR 0.10 per copy of the newspaper, the price level is EUR 2.10.

position cannot compensate for the loss on the readers' side with the profit on the advertising side, this can be considered predatory behaviour. Therefore, if the price-cost margins on both sides of the market are negative, this is a sufficient condition for predatory behaviour. A necessary condition is that the weighted sum of price-cost margins on both sides of the market is negative.

Since marginal costs are not observable, average variable cost is used to approximate marginal cost, while the number of readers and the number of advertisements are used as an approximation of marginal network effects.[17] The prices set by the platform can be considered predatory if:

$$n_R (p_R - AVC_R) + n_A (p_A - AVC_A) < 0, \qquad (3)$$

where p_R and p_A are prices that newspapers charge to readers and advertisers, AVC_R and AVC_A are average variable costs for platform on the readers' and advertisers' sides of the market, while n_R and n_A are the numbers of readers and advertisers, respectively. An operational rule that can be used in competition policy in two-sided markets is that if the weighted total price on both sides of the market is lower than the weighted average variable cost, such behaviour is predatory.

Berhinger and Filistrucchi (2015) consider the behaviour of three of the four most important daily newspapers in Great Britain: The Times, The Independent and The Guardian. All three newspapers had a price for readers of 45 pence on 1 September 1993. On 6 September 1993, The Times reduced the price from 45 pence to 30 pence. On 24 June 1994, there was a new reduction in the price of The Times from 30 pence to 20 pence. This was followed by a reduction in the price of The Independent, which filed a lawsuit before the UK NCA. The UK NCA concluded that The Times did not have a dominant position in the market and rejected the complaint for predatory behaviour but did not consider the two-sided aspect of this market and the fact that losses from selling newspapers to readers could have been offset by advertising revenue.

When only the sale of newspapers to readers was taken into account, the average variable cost of the Times was 32.5 pence, which is higher than the price for readers of 30 pence and even higher than the price of 20 pence which it later established. Hence, when only this side of the market is considered, the price-cost margin is negative. However, the sum of

[17] Marginal network effects measure the change in the number of users on one side of the market, due to the change in the number of users on the other side of the market. Formally, $\partial q^R / \partial q^A$ or $\partial q^A / \partial q^R$.

price-cost margins on both sides of the market was positive because the reduction in the price for readers increased the number of readers, which induced an increase in advertising revenue. Based on this example, it is evident that the wrong conclusion about predatory behaviour can be made when considering only one side of the market.

The DMA prohibits all practices conducted by platforms that limit the market's contestability, which includes predatory behaviour and other restrictive practices such as exclusive contracts that will be discussed in below (Article 10).

6. CARTELS IN TWO-SIDED MARKETS

A cartel between platforms can exist on one or both sides of the market. For example, newspaper publishers can fix prices of daily newspapers for readers but set prices competitively for advertisements. In fact, in this case, the prices will be higher for newspaper readers, but the prices for advertisers may be lower due to the higher revenue generated from the sale of newspapers. In this situation, one side of the market is harmed by the cartel and the other benefits from the cartel on the opposite side of the market.

Cartel agreements are less stable in two-sided markets because if an agreement is reached on fixing prices on one side of the market, cartel members can compete on the other side of the market, thus reducing the stability of the cartel. The empirical research in Italy by Argentesi and Filistrucchi (2007) has shown that some daily newspapers fixed selling prices of newspapers for readers during a certain period but did not fix the prices of advertisements. Restrictive horizontal agreements are not explicitly mentioned in the DMA, but they also fall under Article 10 of the DMA as practices that limit the market's contestability.

7. OTHER ANTI-COMPETITIVE PRACTICES IN TWO-SIDED MARKETS

A detailed discussion about other anti-competitive practices in two-sided markets is presented in Jullien and Sand-Zantman (2021). In some two-sided markets, there are high barriers to entry due to the presence of indirect externalities and the need to have a sufficient number of users

on both sides of the platform. For example, the many applications written for Windows operating system represent a high barrier to entry for other operating system vendors.

Platforms may use exclusive agreements, preventing users from using more than one platform. However, by using this practice, the platform can monopolise the market. Namely, if the platform has exclusive contracts with users on the market side that create a high level of indirect externalities, it influences users on the other side of the market to leave competing platforms and join the platform that binds users with exclusive contracts. In addition, exclusive contracts make it harder for a competitor to undermine the platform's dominant position.

8. CONCLUSION

The literature on two-sided markets is relatively new. The first paper published on this issue was Rochet and Tirole (2002). Since then the literature has been developing considerably. Following the logic presented in this paper, many real-life situations having features of two-sided markets can be identified.

The recent literature on two-sided markets has shed light on new aspects of competition policy. The main conclusion is that standard market competition policy cannot be extrapolated to two-sided markets. As explained, the definition of the relevant market is quite different. Mergers of platforms induce a considerably lower increase in prices than in standard markets and increase the level of indirect externalities, which is beneficial for users. Hence, the main issue for mergers is to evaluate the trade-off between post-merger price increases and the increase of indirect externalities. There is a natural tendency towards market concentration in two-sided markets due to the indirect externalities, and competition authorities should focus on the abuse of dominance by large platforms. If competition authorities are not familiar with the profit-maximising strategy of many platforms (to charge prices below marginal cost on one side of the market), they might reach the wrong conclusion about predatory behaviour. Cartels are less stable and less likely to occur in two-sided markets. If cartel members fix prices for one side of the market, they can compete on the other side of the market, which undermines the cartel agreement. Also, collective negotiations between banks about the level of interchange fees should be exempted as restrictive horizontal agreements. The one-sided wisdom of the competition authorities might consider this multilateral agreement between banks as collusive.

As previously mentioned, the European Parliament endorsed the Digital Markets Act which should regulate competition in online two-sided markets (platforms), and it will be implemented by a Digital Markets Advisory Committee (Article 32). The main aim of this document is to prevent abuse of dominance. This act prohibits platforms locking users with exclusive contracts, making strategic barriers to entry for other platforms, or favouring its own services or products (or its another platforms) to users. The DMA envisages fines of up to 10% of the platform's worldwide annual turnover if it conducts prohibited practices (Article 26). The platform may also be fined of up to 1% of annual turnover if it does not provide required information or provides incorrect data to the EC. The EC can impose periodic penalty payments of up to 5% of the average daily turnover if a platform denies access to its algorithms or undermines on-site inspections in other ways (Article 27). All fines and penalties imposed by the EC may be reviewed by the Court of Justice of the EU, which may confirm, cancel, reduce or increase the fines imposed by the EC (Article 36). The EC can conduct on-site inspections (Article 21) and impose non-financial measures such as behavioural or structural measures, e.g. selling part of the business (Article 16). Similar concerns about the abuse of dominance were present in the US, where American Innovation and Choice Online Act was proposed to the Senate in October 2021.

In Serbia, two-sided markets are present to a lesser extent than in the EU or the US. Nevertheless, this also requires special legislation tailored for such markets, partly based on the DMA. Serbian regulation is based on one-sided market logic, and it should adopt a supplementary regulation that identifies specific features of two-sided markets. The timeframe for the adoption of the supplementary legislation should depend on the pace of development of platforms, but it has become evident that the first steps should already be taken. In that process, the economic analysis should significantly impact the domain of law. The platform regulation could be based on the DMA but with lower threshold levels for defining gatekeepers than in the EU. After the adoption of this regulation, it should be accompanied by precise guidelines for the Serbian competition authority.

There are other platforms that operate in Serbia as well: newspapers, accommodation search platforms and Internet advertising. From the previous discussion, it is evident that there is a need for the Serbian Commission for Protection of Competition to analyse potential anti-competitive practices through a different perspective than in one-sided markets to avoid the mistakes that some European commissions have made in the past.

This paper provides a sketch of up-to-date literature about competition policy in two-sided markets. The main finding of the paper is that the number of two-sided or even multi-sided markets is growing particularly due to the increasing number of online platforms, and these markets have a natural tendency for high market concentration. Thus, academics, competition authorities and practitioners should adopt a different point of view on competition issues in two-sided markets. Moreover, competition legislation that is based on the logic of one-sided markets should be complemented with supplementary legislation that deals with two-sided markets.

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SOMETHING IS ROTTEN IN THE STATE OF AMERICA: PRODUCT MARKET COMPETITION DECLINE IN THE US?[**]

Based on available theoretical and empirical research, the paper demonstrates that although some decline in the product market price competition in the US has been observed, the non-price competition has become more intensive, therefore enhancing competitive constraints. Increased markups (although the magnitude of the change is disputed) are primarily due to investments in Research and Development and brand development, which have created a substantial increase in intangible assets and rise of fixed costs. In the environment of cost-heterogenous firms, markups are not necessarily evidence of market power, which should be associated only with negatively sloped residual demand curve. The declining share of labour in the value added and increasing income inequality cannot be explained by the ostensible decline of competition in the US product markets, but by technological progress and globalisation. Three vulnerabilities of the competition in the US are identified: killer acquisitions, common ownership, and legal barriers to entry.

Key words: *Competition decline. – Competitive constraints. – Market power. – Markups. – US product markets.*

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1. INTRODUCTION

In light of the indisputable increase in the industrial concentration at the national level in the US in recent decades, and the substantial change of the industrial structure of the US economy, there is widespread speculation that there has been a decline of competition in the product markets in the US and a rise of market power as a consequence of it (Baker 2019; Philippon 2019; Eeckhout 2021). Various sources of the ostensible decline of competition have been suggested, mostly regarding malfunctioning competition policy (Barker 2019) and increasing barriers to entry (Philippon 2019), and various macroeconomic consequences of that decline have been considered (Eeckhout 2021). The issue of product market competition decline in the US and its sources is not only an academic question. If competition in the US is substantially undermined, then it is intuitive that the US competition policy (antitrust in the American parlance) has failed to produce a socially desirable outcome, i.e. benefits for the consumers and for the society. Accordingly, if this is the case, the straightforward idea is that something should be done to reform the US antitrust law, or at least the way how the legislation is enforced. Furthermore, other countries, especially advanced economies, could learn a lot from such an exercise, perhaps avoiding competition decline in their own product markets. Even if the hypothesis of competition decline in the US product market is not confirmed, its testing and related research would provide ample information about the developments in the US economy regarding its structure and operations, which are relevant for the competition law and possibly its reform. Taking into account that the US economy is on the technological frontier, these developments are something that other countries, especially advanced economies, should expect in due course, hence the analysis of this experience from the competition law perspective could be useful beyond the US, particularly taking into account that methodological issues of the exploration of the intensity of competition are the same in all countries.

The primary aim of the paper is to explore whether competition in the US product market has declined in recent decades and, if such a decline is confirmed, to answer the question what is its origin. The secondary aim of the paper is to explore whether some of the US macroeconomic developments, like decline of share of labour in the value added, can be explained by ostensible decline in product market competition, irrespective of whether this decline is actually observed. This will be done by reviewing the most important theoretical and empirical contributions in the field, published in recent decades. The structure of the paper follows its aim and the selected methodological approach. The first section of the paper deals with clarification of the notion of market power and its relation to competition

decline. The following section of the paper focuses on the ambiguous relations between market power and consumer welfare. The fourth section deals with the indirect approach to the measurement of market power. The fifth section of the paper focuses on the attempt at direct measurement of market power and the methodological problems of measurement of markups as proxies for market power. The sixth section is dedicated to the macroeconomic consequences of the ostensible decline in the US product market competition. The seventh section of the paper deals with possible vulnerabilities of the US product market competition, which is followed by the conclusion, containing some recommendations for the reform of the US competition policy.

This paper is only about the US product market competition. The analysis of developments related to competition in the US factors markets is not included. What is taken into account is only the impact, if any, of the developments in the product market competition in terms of the demand for production factors. These developments can influence the outcomes in the factors markets, but they do not change the character of the competition in those markets.

2. THE IMPORTANCE OF BEING PRECISE: THE DECLINE OF COMPETITION AND MARKET POWER

Competition always takes place in a relevant market, both product and geographic. It is about competitive pressure produced by the rivals (competitive constraints in the EU competition law parlance) that matters. These constraints produce incentives to firms for conduct desirable for consumer welfare maximisation. Declining competition means weakening competitive constraints, i.e. a decrease in competitive pressures between the rivals, compromising or even removing those incentives and undermining consumer welfare. Perfect competition generates competitive constraints that result in perfectly elastic residual demand for each incumbent firm. Departure from perfect competition, i.e. a decline of competition (in terms of demand substitutability), makes residual demand not perfectly elastic, shifting its curve to a negative slope. Full decline of competition eventually produces monopoly, a situation without any competitive constraints, in which the only incumbent firm faces a negatively sloped curve of residual demand that is identical to the curve of total market demand.

The lack of competitive constraints, embodied in a negatively sloped residual demand curve, enables a monopolist to be a price maker and to set the price, rather than to take it. A profit maximising price of the monopolist

is inevitably above the marginal costs and the difference between the two depends only on the elasticity of demand. This was basically the idea of introduction of the concept of monopoly power (Lerner 1934), measured by using the Lerner index, the difference between the price and marginal costs – the greater difference, the higher value of the Lerner index and the stronger monopoly power is. In such a set-up, a necessary condition for the existence of monopoly power is the absence of perfectly elastic residual demand, meaning that the firm faces a negatively sloped residual demand curve. Accordingly, monopoly power is nothing but the power of a monopolist to set price. The equilibrium price is higher than the one in perfect competition, the output is lower, consumer welfare reduced, monopoly profit (rent) is created and appropriated by the incumbent firm, and deadweight loss is recorded.

In the modern industrial organisation (hereafter IO) parlance monopoly power is frequently confused with the market power and the terms are used interchangeably (Carlton, Perloff 2015) with possible misunderstanding.[1] Hereafter in the paper, only term the market power is used.[2] Taking into account the origin of the notion, and the very aim of Lerner (1934) and his contribution, which have recently been profoundly debated (Elzinga, Mills 2011), it is reasonable to specify market power as a situation in which a firm, irrespective of how many firms compete each other in the market, faces imperfectly elastic residual demand, meaning that the price is not exogenous to the firm, what is appropriately labelled as pricing power – the firm is a price maker, not a price taker (Katz, Rosen 1994, 429; Pyndick, Rubenfield 2012, 355; Goolsbee, Levitt, Syverson 2016, 379). The difference between price and marginal costs, i.e. a positive value of the Lerner index, is only an inevitable consequence of market power (specified in this way, as the power

[1] It is suggested (Carlton, Perloff 2015, 117) that it would be useful to distinguish between the terms by using the "monopoly power" term to describe the situation in which the firm that set the price above the marginal costs earns economic profit, and the "market power" term to describe the situation in which a firm with prices above marginal costs earns only competitive (normal) profit, i.e. zero economic profit, as fixed costs are covered by the wedge between price and marginal costs. Within this framework, it is obvious that market power, specified as the wedge between price and marginal costs, is not a sufficient condition for economic profit.

[2] In the world of IO and competition law economics, the notion of market power was introduced after the 1950 *Alcoa* Case (United States vs. Aluminium Company of America) in which Judge John Knox used the notion of the defendant's "market power" (Elzinga, Mills 2011).

to make the price),[3] though it is not the source of it, nor empirical evidence that market power exists. Hence, a gap between price and marginal costs, usually labelled as a "markup" – typically called "markup" when expressed multiplicatively and "margin" when expressed as a difference (Syverson 2019) – should not be *per se* mistaken for market power, the situation in which the firm is a price maker due to the imperfectly elastic residual demand, i.e. the firm facing a negatively sloped residual demand curve. If there is a market power, its magnitude can be imperfectly measured by the difference between price and marginal costs, but that very difference is not a sufficient condition for market power.[4] Unfortunately, market power is often confused with markups in recent academic contributions. Due to that confusion, the market power is wrongly and misleadingly specified as the difference between price and marginal costs. Contrary to that, market power is only one of the possible origins of markups, i.e. the difference between price and marginal costs.

Accordingly, the crucial question is what is the source of markups, i.e. why there is a sustainable difference between price and marginal costs. One possible answer is the decline of competition, specified as a departure from perfect competition (a situation with perfectly elastic residual demand), in which the competitive constraints are weaker, which makes residual demand imperfectly elastic, and tilts the residual demand curve to be negatively sloped. With a negatively sloped residual demand curve and competition reduced to price competition only, the static profit maximisation inevitably creates prices above the marginal costs.

The departure from perfect competition can encompass various versions of imperfect competition (with a negatively sloped residual demand curve): monopoly and monopolistic behaviour, dominant position of the firm and abuse of that position, Cournot-style oligopoly, or Chamberlain-style monopolistic competition. In all these cases there is some market power, and *ceteris paribus* the more inelastic residual demand, i.e. the greater the slope of the residual demand curve,[5] the greater market power is. It is, for

[3] It is exactly in this way that the market power is specified as "ability of the firm to make the price" (Belleflamme, Peitz 2010, 41). This ability does not exist without imperfectly elastic residual demand the firm faces.

[4] The Lerner index, i.e. the difference between price and marginal costs, can be expressed in terms of absolute value of the coefficient of residual demand price elasticity, and in the case of monopoly, market price elasticity of demand, as residual demand equals total market demand (Landes, Posner 1981).

[5] For the sake of simplicity, it is assumed in this paper that the residual demand function is linear, hence there is a straightforward relation between the coefficient of elasticity of residual demand and the slope of the residual demand curve. The

example, substantially smaller in the case of differentiated product and monopolistic competition than in the case of monopoly. Nonetheless, in all these cases all the incumbent firms feature some market power, though not necessarily economic profit.

The point regarding economic profit should be considered taking into account an assumption of this comparative static analysis that there are no fixed costs, hence no decreasing average costs. If that assumption is relaxed, so the firms operate in the domain of decreasing average costs, for example because of substantial fixed costs, market power becomes a necessary condition for production sustainability. The point is that marginal costs pricing (the first best solution from the allocative efficiency viewpoint), inevitably meaning that there is no market power as there is no gap between the price and marginal costs, generates financial losses. Decreasing average costs are always higher than marginal costs (the negatively sloped section of average costs curve is inevitably above the marginal cost curve), hence the marginal costs based price is not sufficient to cover the average costs, i.e. total revenues are below total costs. The higher the share of fixed costs in total costs and the lower the marginal costs, the more market power is needed for production to be sustainable. This means that, with fixed costs, zero economic profit can be consistent with market power or, from the other viewpoint, market power is not sufficient condition for economic profit.[6]

The other relevant issue is whether negatively sloped residual demand curve necessarily means a decline in competition. It is unambiguously a deviation from perfect competition, but that kind of competition exists only in microeconomics textbooks. The idea behind the Lerner index is to measure allocative inefficiency (deadweight loss) due to the reduced price competition because of limited demand substitutability, but it is silent about productive efficiency (both static and dynamic) and about non-price competition (Elzinga, Mills 2011, 559), especially relevant in the case of differentiated products. Accordingly, there is no straightforward relation between market power and competition, and it would be wrong to conclude that more market power necessarily means decline in competition, i.e.

smaller the absolute value of the coefficient of residual demand, i.e. the more inelastic residual demand, the greater the slope of residual demand curve. Relaxing this assumption would not change any result in the model but would only focus the analysis to the coefficient of the residual demand elasticity instead of the slope of the residual demand curve.

[6] Hence it is quite feasible, if the price is above marginal, but below average costs, for a firm that enjoys market power to record financial losses. This is just a special case of the above-mentioned classification of market power in opposition to monopoly power (Carlton, Perloff 2015).

undermining competitive constraints. Though the existence of market power inevitably creates deadweight loss, i.e. allocative inefficiency, due to the decline of price competition (limited demand substitutability), its relation to non-price competition and to other types of efficiencies are not straightforward and linear.

Irrespective of whether market power is necessary for the sustainability of production (it can be in some situations), the conclusion that observed markups are the evidence of market power and departure from perfect competition (decline of competition of some magnitude) is based on the assumption that incumbent firms are cost-homogenous, i.e. that they all utilise the same technology and feature the same cost function (including both exogenous and endogenous costs). Nonetheless, assuming that incumbent firms are cost-heterogenous, i.e. that they operate different technologies (with homogenous product as output) and have different costs functions, all the firms except the least efficient one have prices above their marginal costs and they appropriate economic profit, although they all face a horizontal residual demand curve (Carlton, Perloff 2015, 87–88). If that is the case, there is no decline of competition whatsoever, no market power, no monopoly behaviour, no reduction of the output, no deadweight loss – only the markups and economic profit of more production efficient firms. Accordingly, this gap between price and marginal costs is not caused by the decline of competition. Furthermore, existence of the many cost-heterogenous firms in the same industry indicates that the barriers to entry are reasonably low and that there are only barriers to access to cutting-edge technologies, for example, due to patent protection.[7]

There are two consequences of this theoretically feasible situation. The first is obvious: the decline of competition is not a necessary condition for markups, as such a situation can exist with perfectly elastic residual demand. The second that the markups itself is not a sufficient condition for concluding that there is a decline of competition. Furthermore, even if there is a decline of competition and the gap between price and marginal costs exists, that does not necessarily mean that incumbent firms earn economic profit (Carlton, Perloff 2015).

[7] To keep this model simple, it is assumed that the product itself is not differentiated, i.e. that all the cost-heterogenous firms produce homogeneous products, which are perfect substitutes for each other. Taking that assumption into account, the patent protection refers only to a new, superior production technology, not to a new, superior product.

Since the situation of technologically heterogenous firms is theoretical feasible, a theoretical hypothesis can be developed based on it. The hypothesis is that the existence of markups is due to the cost heterogeneity of firms, with the additional hypothesis that increased cost heterogeneity increases the average markup.[8] Moreover, a further hypothesis is that technological progress, which is inevitably uneven, increases the firms' cost heterogeneity – some firms adopt cutting-edge technology, others rely on traditional ones. Accordingly, the more intensive the technological progress (the higher the rate of technological innovations), the greater the cost heterogeneity of the firms.[9]

Two questions are related to this theoretical hypothesis and its verification. The first one is whether it is probable and the other one is related to the empirical evidence to support it. As for the first one, the crucial question is the whether the firms that obtained superior technology and are cost efficient have incentives to exclude, i.e. to drive out competitors that are technologically inferior and feature higher average costs. This is feasible in a price war, as with a price decrease, which would only decrease the economic profit of the more efficient firms, without generating financial losses, and the less efficient firms, due to the average costs above the price, would exit the market.[10] Such exclusionary practices, although enhancing selection efficiency, would lessen the competition and would eventually drive to monopoly, since only the most efficient firm would survive. This would enable the only surviving firm to further increase its markups, obtain market power, and maximise economic profit by reducing the output. Obviously, this is a strong incentive for driving out the less efficient competitors.

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[8] The cost heterogeneity of firms hypothesis does not rule out the decline of competition hypothesis, as both can in principle explain the existence and increase of markups. At the end of the day, the empirical question is about the relative strength of these two causalities, i.e. about their relative contribution to the level and change of markups. Contrary to that, Eeckhout (2021) attributes all markups and their ostensible increase in the US economy to the decline of competition and implicitly rules out the cost heterogeneity of firms hypothesis, although in his contribution he provides ample empirical evidence about that very cost heterogeneity of the firms in some US industries.

[9] This increase in cost heterogeneity of firms, stemming from the technological progress, is comparable to the concept of horizontal innovations in which the technological progress is embodied in new products, but the incumbent products are not crowded out (Romer 1990). The technological progress generates increased product diversification.

[10] Low searching costs of and reduced transaction costs due to advancing IT, which facilitates creation of the superstar firms (Autor *et al*. 2020) also accelerate price wars between the efficient firms and their less efficient competitors, which may possibly lead to the latter exiting from the market. Winer-take-all conditions are favourable for a Darwinian mechanism of selection efficiency.

Nonetheless, there are a few incentives for the technologically dominant incumbent firms not to engage in such a quasi-predatory behaviour. The first one is that the new equilibrium with lower competition constraints and with the consequently higher (economic) profit, i.e. higher returns to investments, would attract less efficient firms to enter the industry due to the reasonably low barrier to entry. For such high-cost and less efficient firms, their expected low profit is the most effective barriers to entry. Increasing profit inevitably decrease barriers to entry and increases the likelihood of new entries. Accordingly, the market structure is not sustainable, and the new long-run equilibrium would probably be very similar to the initial one. The choice for the efficient, technologically dominant incumbent firm is between the current high economic profit and the expected value of even higher economic profit with a rather small probability, due to the reasonably low barriers to entry. In the models of stepwise innovation (Aghion, Harris, Vickers 1997; Aghion *et al.* 2001) firms differ in the quality or cost of their product, meaning that the current high economic profit has produced incentives not to drive out the less efficient firms.[11]

The other reason for the technologically dominant incumbent firm (which in many cases can also be a dominant firm from a point of view of competition law) not to drive out the competitors is a possibility of the exclusionary behaviour of that firm being perceived as in violation of Section 2 of the Sherman Act (in the US) or violation of Article 102 of the TFEU (in the EU), even though it is not. The competition law has a substantial deterrent effect, and it can be divided into good deterrence (preventing anticompetitive, welfare reducing behaviour) and bad deterrence (preventing procompetitive, welfare enhancing behaviour). It is not feasible to separate the two (Stigler 1969; Bucciorossi *et al.* 2009), and it is evident that in this situation the deterrent is counterproductive. If the technologically superior firm drives out the less efficient competitors, their production will be moved to the more efficient firm, allocation of resources will be improved and efficiency enhanced, clearing the way for consumer welfare increase. Furthermore, if the most efficient firm operates in the domain of decreasing average costs, i.e. economy of scale, its increased output will additionally improving enhance economic efficiency as more economy of scale will materialise. Although the deterred process of reallocation of resources is at least up a

[11] This was hardly the aim of these models, but it is a collateral result. The mechanism of refraining from driving out less efficient firms could be compared to the replacement effect (Arrow 1962) in which a firm with market power refrains from innovation due to the prospects for replacing the current economic profit that is appropriated.

point countervailed by reducing competitive constraints, possibly generating decreased elasticity of residual demand, i.e. increasing the negative slope of its curve.

Hence, there are countervailing incentives for technologically superior firms to drive out (all) less efficient competitors, with the theoretical possibility of a scenario in which they do not to drive out all the less efficient rivals. Essentially, it is an empirical question whether the firms with different technologies and different cost functions can compete in the same industry, more precisely on the same relevant market. Eeckhout (2021) points out that the two US retail giants, Amazon and Walmart together have only a 15% share in the US retail industry.[12] Obviously, although those two undertakings are technology superior, each in its own specific way, neither of them has driven out all other technology inferior competitors from the retail industry – the US retail industry is technologically a very heterogenous sector.

Indirect empirical confirmation of the technological heterogeneity of the firms comes from a comprehensive study of markups in the US economy (De Loecker, Eeckhout, Unger 2020).[13] Although the main finding of the paper is that the markups, as indicators of market power according to the authors, on (weighted) average have increased in the US economy from 21% to 61% between 1980 and 2016, the finding is that the markup of the median firm has remained the same, and the authors demonstrated how skewed the distributions of the markups and of their increases are. These results provide indirect evidence about cost heterogeneity of the incumbent firms in the US, across the industries, as such a diversity of markups and their dynamics can be explained only by the diversity of the costs functions of the firms and their change over time – evidence of unevenly distributed technological progress.

[12] This does not mean that this is their share in the relevant markets, since the retail industry is notorious for highly differentiated product and geographic relevant markets, especially the latter, with a substantial number of separate local geographic relevant markets, as retail outlets located in one of those local market do not compete with the outlets located in another. More specifically, this share in the industrial sector does not mean that Amazon does not achieve dominant position in some of the (many) relevant retail markets, let alone wholesale markets in which the company is a buyer.

[13] Furthermore, the cost heterogeneity of the firms is an assumption of the model that was used for estimation of the markups in the US economy.

According to these results, not only cost heterogeneity of the incumbent firms has existed, but it has increased with the technological progress in recent decades.[14]

Furthermore, if product homogeneity assumption is relaxed, the model gets closer to the US reality, as well as reality of the other advanced economies. On the demand side, there are heterogenous, differentiated products and Chamberlain-style monopolistic competition, with a slightly negatively sloped residual demand curve, as the products within the same product relevant markets are not perfect substitutes. The competitors try to differentiate their products from the products of the rivals, which is in essence non-price competition, like for example quality competition in which firms invest in Research and Development (hereafter R&D) of new product. These innovations decrease demand substitutability and generate a negatively sloped residual demand curve or make it steeper, which in turn creates or strengthen market power. This may appear to be evidence of a decline of competition, but the product differentiation and negatively sloped residual demand curve, may be the result of innovation driven by intense competition (Gilbert 2020, 61). In essence, price competition is substituted by non-price competition.

Each rival invests in non-price competition, like investing in R&D and marketing/branding of their products, generating fixed costs that are to the great extent sunk costs (Berry, Gaynor, Scott Morton 2019). That means that sunk costs are endogenous for each firm: they are a necessary condition for improved differentiated products or for improved production technology (Sutton 1991).[15] In principle, the higher the sunk costs, the more improved the product, the more differentiated the product of the firm, and the greater the slope of its residual demand curve, i.e. the less the elastic residual demand, enabling market power. Furthermore, the higher the sunk costs, the more improved the production technology, and the lower the marginal

[14] The sample on which these results were obtained consists only of publicly traded companies, relatively large firms and they account for 29% of private U.S. employment (De Loecker, Eeckhout, Unger 2020, 572). It is reasonable to assume that if all firms had been taken into account, their cost heterogeneity would have been even greater.

[15] Contrary to that, if both the product and the technology (i.e. cost functions) of the firms are homogenous, all sunk costs will be exogenous, specified only by technology. Sutton (1991) provides a comprehensive endogenous sunk costs theory, with a clear distinction between endogenous and exogenous sunk costs, with a more recently compact summary of this theoretical framework (Perloff, Karp, Golan 2007, 35–39).

costs: the gap between fixed (to the great extent sunk) and marginal costs increases. Within this framework, there is clearly a link between markups and fixed/sunk costs of each firm, with causality going from endogenous fixed costs to markups and market power. This explains the heterogeneity of the firms in the terms of their markups, because they differ in endogenous sunk costs, with consequences on both the residual demand function and the cost function (marginal costs). The higher the (endogenous) fixed/sunk costs, the higher the markups.

Observing this regularity from the other viewpoint, higher endogenous fixed/sunk costs are an indicator of more intensive competitive constraints in non-price competition. It is rather intuitive that firms have strong incentive to differentiate their products only if there is strong competitive pressure from the rivals, as product differentiation is the way to relieve such pressure and "The best of all monopoly profits is a quiet life" (Hicks 1935). Combining this insight with the previous one (the higher the fixed/sunk costs, the higher the markups), the logically correct conclusion, however counterintuitive, is – the higher markups, the more intensive (non-price) competition.

Both these features, technology and product differentiation, are departures from perfect competition. On the one hand, firms are cost-heterogenous, utilising different technologies and featuring distinctive cost functions, with substantial fixed/sunk costs, though they may or may not face a horizontal residual demand curve, depending on whether the product is homogenous. On the other hand, and on the top of it, products are heterogenous, i.e. differentiated, which generates a somewhat downward sloped curves of residual demand, pointing to reduced demand substitutability, and in that way declined price competition, but without any implications on non-price competition, on the contrary, as demonstrated, clearing the ground for the hypothesis that price competition is substituted by non-price competition. This model, which could be labelled as a model of cost-heterogeneous firms selling differentiated goods (Syverson 2019), in all its versions (Melitz 2003; Asplund, Nocke 2006; Melitz, Ottaviano 2008; Foster, Haltiwanger, Syverson 2008) accurately corresponds to the reality of most of the contemporary industries in the US and the other advanced economies.

Furthermore, this model successfully explains the sustainability and potentially the increase of market power, with developments both on the demand side (differentiated products and imperfectly elastic residual demand) and on the supply side (technological progress with the corresponding increase in fixed costs and decrease in marginal costs). Accordingly, there is no doubt that this is a departure from perfect competition. Nonetheless, the crucial questions are: (1) does that departure, which enables market power (or rather markups as its highly imperfect

indicator) to be sustainable and even to increase, inevitably imply that there is a decline of competition, meaning weakening competitive constraints, and (2) what is the outcome of such market power on consumer welfare. The later question is to be figured out first.

3. MARKET POWER AND CONSUMER WELFARE: NO UNAMBIGUOUS RELATIONS

There is no unambiguous answer to the question about the consequences of market power on consumer welfare. Everything depends on what is the source of market power and the specific set-up within which it exists.

It is rather straightforward that increased prices with no change in the quality of the products decreases consumer welfare. This is basically the result of the comparative statics of the monopoly vs. perfect competition, a framework of the Lerner (1934) analysis. The point is, however, that generally prices in the US product market have not been increasing, save perhaps in a few sectors. Philippon (2019) claims that the prices in telecommunication and airline industries are currently not as low in the US as they are in Europe,[16] and according to his anecdotal evidence it was the other way around two decades ago, but there is no systematic evidence that across the board (quality adjusted) product prices in the US have been rising in the past several decades. On the contrary.[17]

Even Eeckhout (2021), who claims that there is widespread market power in all the US industries and points out ubiquitous market power as the cause of many (adverse) macroeconomic developments, at the same time claims that due to the technological progress prices have gone down, because production is more efficient, and new innovative products are now available to US consumers. In other words, consumer welfare in the US has improved despite of ubiquitous market power. His point is that consumer welfare would have improved even more without the market power, i.e. under conditions of perfect competition. The problem with this counterfactual claim is that within the framework of perfect competition technology is

[16] It is a bit ironic that the US airline industry is used in this anecdotal evidence of high prices due to its market power, as the industry is notorious for low profitability (low rate of returns) with widespread loss-making episodes, especially involving the largest (legacy) airline companies.

[17] The systematic product prices increase, across the board (quality adjusted), would inevitably generate a substantial inflation rate. Nonetheless, the inflation rates in the past several decades, prior to the COVID-19 pandemic, were very low.

exogenous and equally available to all firms – it is a static framework. Nonetheless, the observed technological progress – the one that has pushed product prices down – is endogenous: it is due to the investments in R&D, which have to be recuperated from the market power. Otherwise, due to the lack of incentives, there would have been no investment of the kind and no technological progress. This is a rather straightforward insight of modern IO. Basically, there is a conceptual trade-off between the world of perfect competition, without market power and without technological progress, which provides for the lowest product prices for a given technology, and the world of market power and technological progress, which pushes costs and prices down and improves the product quality. To have both perfect competition and technological progress is simply not feasible.

Furthermore, various digital platforms operated by technological giants, e.g. Google, Facebook/Meta and other hi-tech companies in the US, provide their services at zero price, increasing consumer surplus for all the consumers who are willing to use them. And those consumers who do not find any net utility in using them, simply do not use them, so there is no change in their consumer surplus.[18] At the end of the day, creating a personal profile on Facebook is not mandatory.

This is not to say that in every single case in the US product market the magnitude of market power is just enough to compensate the investment in R&D and other sunk costs. Apparently, there are some product markets and some industries in which market power is far beyond the level that is required for compensation of the fixed/sunk costs, leading to substantial economic profits. Such product markets should be specified as the prime suspects for markets with declined competition, i.e. with weakened competitive constraints. It is those specific cases that should be explored in the tradition of IO, as suggested (Berry, Gaynor, Scott Morton, 2019), especially the specific factors that created this situation and its implications on consumer welfare. Only the insights of such specific research can have implications on competition law enforcement, especially regarding the impact of the situation on consumer welfare, which is still a standard for enforcement of competition law and for a good reason (Hovenkamp 2019) – whatever increases consumer welfare, even if it produces and increases market power and enlarged economic profit, is desirable from a competition law enforcement viewpoint.[19]

[18] The term net utility is used because of the possible decrease of utility of consumers due to sharing information about their preferences with the platforms.

[19] This is not to say that such a situation (an increase in economic profit, and increase economic inequality as its consequence), if it is assessed as undesirable, should not be addressed through some other public policy, such as taxation.

It is obvious that there is no general, across-the-board unambiguous relation between market power, competitive constraints, and consumer welfare. No evidence has been provided that there is general causality from increase in market power in the US product markets to decrease in consumer welfare. In some specific situations that may be the case, it should at least not be ruled out, but there is no evidence for a general conclusion about the relation between increased market power and decreased consumer welfare.

This finding is important for answering the previous question: is the increase in market power evidence that supports the hypothesis that the competition in the US product markets has declined, i.e. that competitive constraints have been weakened? Based on the assumption – even an axiom for economics of competition law – that the increase of competition, i.e. strengthening competitive constraints, improves consumers welfare, there is no evidence to support that ostensible increase in market power in the US signals out the decline of competition. Furthermore, the reverse may be the case in the differentiated product markets, in which non-price competition (e.g. competition in quality) is important and in which the competitive advantage of a firm is gained by endogenous fixed/sunk costs that must be recuperated through market power. In these markets increased market power can be a signal of increased competition, the one that brings down the prices and improves products due to technological innovation, a situation in the US product markets referred to by Eeckhout (2021).

Since the relations between the increase in market power, decline in competition and consumer welfare have been clarified, the attention can now be turned to the question of whether the market power has increased in the US product markets in the past several decades.

4. MEASURING MARKET POWER: INDIRECT APPROACH

The only proper way to measure a firm's market power is to evaluate the coefficient of residual demand elasticity, as the Lerner Index, the appropriate measure of market power in the case of cost-homogenous firms, depends solely on that elasticity. The problem is that residual demand elasticity is not observable. Accordingly, the attention in measuring market power has shifted to the markup (the difference between price and marginal costs) as an inevitable outcome of market power in the case of cost-homogenous firms. Again, the obvious problem is that the marginal costs of the firm are

not observable.[20] Hence, it is intuitive that an observable proxy for market power should be selected for empirical research and conclusions regarding the level and dynamics of market power and, in that way, dynamics of the intensity of competition, i.e. the strength of the competitive constraints, although there is no straightforward linear relation between market power and intensity of competitive constraints.[21]

For decades that proxy has been relevant market concentration with the basic assumption that the higher the relevant market concentration, the greater the market power and the weaker the competitive constraints. This is basically the legacy of the structure-conduct-performance (S-C-P) paradigm in which there is inescapable logic that the market structure determines the firms' conduct, with inevitably produces performance in terms of competitive constraints (Scherer, Ross 1990).

The first problem with this approach is a conceptual one: that it is precisely the nature and intensity of the competition in the market that affects the equilibrium market concentration. It is the competition conditions in the relevant market that drive market concentration, not the other way around (Syverson 2019). More efficient firms exert stronger competitive constraints on their rivals, decreasing their maker share and driving some of them out of the market, reallocating activities towards more efficient firms, improving

[20] The average costs for the firm are observable, especially in the case of single-product firms, while some methodological dilemmas exist in the case of multi-product firms regarding the method of allocation of overhead costs. Nonetheless, average costs differ from marginal costs in every situation except the very special case: where there are no fixed costs and marginal costs are constant. It is even unobservable whether average costs are higher than marginal, as that depends on the output. Although in some contributions average costs – especially average variable costs – are used as a substitute for marginal costs, this approach is not promising, and the empirical results obtained through such substitution should be taken with a caveat (Karabarbounis, Neiman 2018).

[21] The methodological issue is that competitive constraints are not observable, hence they are not measurable. An indirect way of observing the intensity of competitive constrains is to survey consumer welfare, but the problem is that it is not quite observable. Some rules of thumb, though, can be established. If prices are falling with unchanged quality of product or if prices are falling and the quality of product is improving, then it is reasonable to assume that consumer welfare has improved. Also, if the sales grow simultaneously with the price, this can be an indicator of increased consumer welfare, especially in the case of improved and innovative products – the consumers' willingness to pay increases more than the price, generating an increase in consumer surplus.

overall efficiency of the industry.[22] Accordingly, in the process, more efficient firms grow larger and larger, increasing their market share and decreasing the number of competitors, i.e. increasing market concentration. Furthermore, if fixed costs share in total costs in the specific industry is substantial, then the larger firms materialize more economy of the scale than the smaller ones, additionally increasing competitive pressure that drives smaller firms (those that cannot materialise economy of scale) out of the business, contributing to the increase in market concentration. Accordingly, market concertation is endogenous to competition and in that process higher market concentration can be the consequence of more intensive competition. Therefore, it is wrong to use market concentrations as a liner measure of competition – the lower the market concentration, the more intensive the competition and the stronger the competitive constraints.

The other problem of this approach is that it is implicitly based on the Cournot model of oligopoly in which a relatively small number of cost-homogeneous firms compete with the quantity of homogenous product they supply to the market, taking into account the action of their rivals – their outputs (Syverson 2019). The equilibrium price is a result of a non-cooperative oligopoly game, and it is specified by the intersection of the product demand curve and the joint supply curve of all the firms. Indeed, in such a framework, an increase in market concentration generates an increase in average market power, but only if all assumptions of the model are valid, i.e. if all preconditions are met. The problem is that the assumptions of the model are far from the reality in most of the product markets in the US, as well as in product markets around the world, taking into account widespread product differentiation, implying substantial non-price competition, and cost heterogeneity of firms competing with each other and their distinctive costs functions. In these conditions using market concentrations as a proxy for market power and intensity of competition is quite misleading.

Furthermore, available data is usually related to industrial, rather than relevant market concentration. It has been pointed out (Shapiro 2018) that increasing industrial concentration does not necessarily signal increasing relevant market concentration: on the contrary, increased industrial concentration can be associated with decreased relevant market concentration. This is especially the case in small, local relevant geographic markets. The point is that the competition takes place in relevant markets, both product and geographic markets, not at the industry level. Defining

[22] Philippon (2019) referred to the case of increased concentration in the US retail market due to the advent of Walmart and reallocation of the retail activity to this efficient firm as an efficiency enhancing concentration.

the relevant market within each industry is a painstaking and time-consuming task with rather controversial outcomes. This is one of the most disputed segments in the majority of the competition law cases: there are no straightforward solutions (Bishop, Walker 2007). Hence, converting industrial concentration at the national and even local level into relevant market concentration is not a methodologically correct analytical endeavour.[23]

As already pointed out, some relevant geographic markets are inevitably local because of substantial transportation costs compared to the value of the product. Increased concentration at the national industrial level can produce decreased concentration in the local relevant geographic markets because of the new entries of bigger national firms into those markets (Shapiro 2018). It has been demonstrated (Rossi-Hansberg, Sarte, Trachter 2018) that in the US, from 1990 to 2014, there was simultaneously an increase in industrial concentration at the national level and a decrease in industrial concentration at the local level, with three different approaches to specifying the local level. Taking into account that this is related only to industrial (i.e. sectoral) concentrations at the local level, and not the concentration in the local relevant product and geographic markets, this insight only provides a hint about the false claims of decline of competition – even if a faulty measure of competition (market concentration) is used.

In short, market concentration is quite a misleading way of measuring market power, and the recorded increased industrial concentration at the national level in the US does not necessarily imply that there has been a competition decline in the US product market. The developments that generated the increase industrial concentration are not necessarily adverse developments and their impact to consumer welfare can be beneficial (Autor *et al.* 2017). Hence an alternative way of exploring the ostensible competition decline should be explored. One of the approaches that has gained substantial academic attention in the recent years is the direct measurement of the markups.

[23] It was the Council of Economic Advisers, under the Obama administration in 2016, that warned about rising industrial concentration at the national level as a signal of declining competition in the product markets in this country. Shapiro (2018) provides a long list of similar reports. Although the authors who are IO specialists (Philippon 2019) recognise that this is about industrial concentration at the national level and that it is irrelevant for any conclusion about the competition that is always in the relevant market, they still believe that there is reason for concern, based on the national industry concentration trends in the US.

5. INCREASED MARKUPS: THE PROBLEM OF MEASUREMENT

The crucial problem of measuring market power – specified as markups, i.e. the gap between price and marginal costs, as pointed out previously – is that the marginal costs of the firms are not observable. Nonetheless, a specific methodological approach has been developed to solve that problem, by to using accounting data on variable costs for the direct estimation of markups, circumventing the issue of the lack of the marginal costs data.

The most prominent empirical research of the kind (De Loecker, Eeckhout and Unger 2020), demonstrated that (weighted) average markups in the US economy have increased from 21% to 61% of the marginal costs, between 1980 and 2016, as previously pointed out in this paper.[24] Since the first version of the paper with these results was released in 2017, there has been a substantial debate on the methodological issues related to the approach used in the paper and its results.

The approach of the direct measurement of markups as proxies for market power is founded on the production approach (the opposite to the demand estimation approach) based on the seminal contribution by Hall (1988) and subsequent contribution by De Loecker and Warzybski (2012).[25] The approach relies on the individual firm input and output data, assuming profit maximisation by the firm, based on cost minimisation. A measure of the markup within this framework is obtained for each firm at a given moment as the ratio between the firm's total revenues and the variable input's expenditure (observable, according to the authors, in the accounting data for the firms) multiplied by the variable input's output elasticity, which is obtained by estimating the production function of each firm, using data on variable inputs. Hence it is crucial to obtain correct data on variable costs and unbiased estimates of the variable input's output elasticity.

[24] As previously pointed out in this paper, this finding is based on a sample of the companies that are traded on the stock market, since the accounting data is available only for those companies. It is reasonable to assume that the given methodological approach, applied to the population of the US firms rather that this biased sample, would have produced much lower estimates of markups and their increase, since traded companies are substantially larger than nontraded ones.

[25] In his earlier contribution, De Loeker (2011) emphasised that both demand estimation and production approach have their advantages and disadvantages, that there are trade-offs in selecting one, and that the appropriate selection of the approach depends on a number of factors. It seems that in due course he fully subscribed to the production approach.

According to US accounting standards, income statement based information provides operational expenses (OPEX), which includes costs of goods sold (COGS), selling, general and administrative expenses (SG&A), and residual items that are capital expenses (CAPEX).[26] It is indisputable that the CAPEX are by and large fixed costs.[27] De Loecker, Eeckhout and Unger (2020), justifiably assumed that CAPEX are completely fixed costs and excluded them from the analysis. Nonetheless, SG&A are also assumed to be entirely fixed, so only COGS was used as variable costs. As pointed out by Traina (2018), substantial segments of SG&A are not fixed but rather variable costs, as they mostly consist of marketing and management costs, i.e. costs of selling the products and operating the firm. This means that the estimations of the markups done using only COGS as variable costs are inevitably biased upwards as not all variable costs are taken into account. One source of bias is downward bias in the estimation of the amount of variable costs, as some variable costs are not included, thus increasing the markup. The other source of bias is the upward bias of the variable input's output elasticity, again increasing the markup. Accordingly, the biases due to the failure to include full variable costs are not countervailing, but they reinforce each other.

The observed upward bias remains the same if the share of SG&A in OPEX is constant, i.e. if the magnitude of markups estimates are inaccurate but stabile, hence it does not influence the markups dynamics. Nonetheless, with increase in the share of SG&A in OPEX, the bias increases over time. Accordingly, in such an environment, a recorded trend of markups increase is spurious, because the markups are positively correlated with the share of SG&A in OPEX.

Triana (2018) pointed out that the share of SG&A in OPEX has been steadily increasing for US publicly traded firms since 1980 and that the share of COGS in OPEX has been steadily decreasing from 85 % in 1980 to 77 % in

[26] Methodological issues in utilising accounting data in empirical economic analysis, due to the substantial difference between economic and accounting concepts, have been recognized earlier (Fisher, McGowen 1983) in the case of distinction between accounting and economic profit. Mistaking one for the other leads to the wrong conclusion about the profitability of firms.

[27] It can be argued, though, that depreciation, as annualised CAPEX, depends on the intensity of the utilisation of the physical assets, and that intensity depends on output. Accordingly, there is also an element of variability in the depreciation, as it does not depend only on time, irrespective of the output. Amortisation is annualised CAPEX in the case of financial assets, hence there is no element of variability.

2016, demonstrating that there has been a proportional increase of SG&A.[28] Obviously, the bias in the estimation done by De Loecker, Eeckhout and Unger (2020) is not only evident, but it also increases in time, meaning that the markups increases recorded in their research can be spurious. Accordingly, Triana (2018) used the same approach only assuming that both COGS and SG&A are thoroughly variable costs, and the result is quite distinct from the one of De Loecker, Eeckhout and Unger (2020). The markups' estimations with the alternative assumption in which costs are variable (with broader encompassment of variable costs) demonstrates not only that the markups are much lower, but that there has been no significant increase in them in the US economy since 1980. The markup increase was from 10% of the marginal costs in 1980 to 17% of the marginal costs in 2016, as opposed to 21% and 61%, respectively, according to De Loecker, Eeckhout and Unger (2020). Accordingly, the total increase is 70% rather than 290% – quite a distinctive result.

There are two relevant issues regarding these results and the discrepancy between them. The first one is that not all SG&A expenses are variable costs, as some of them are indisputably fixed. For example, regarding the marketing costs, an advertising campaign is an investment in the brand and the cost of the campaign does not depend in any way on the output – a typical case of fixed costs. On the other hand, a substantial segment of marketing costs depend on the costs of selling a specific unit of product, hence they are variable costs. As to the management costs, some of them are fixed, but some of them depend on the output and its variation. The share of fixed and variable costs within SG&A is not observable, so the only regularity is that the greater the share of variable costs in SG&A when they are omitted from the analysis, the greater the upward bias of the markup estimates. Furthermore, it is reasonable to assume that the share of variable costs in SG&A varies from industry to industry, as industries have specific marketing and management operations, and even from firm to firm in the same industry.

Accordingly, it is reasonable to assume that the estimates of the markups and their increase since 1980 are biased upward if SG&A are excluded from the analysis, and biased downward are they are included in the analysis. However, the magnitude of the bias is not observable. One way or the other, it is reasonable to conclude that there has been some increase in the

[28] Residual OPEX are treated by Triana (2018) as SGA, hence in his analysis the sum of COGS and S&GA equals OPEX.

markups since 1980, though of uncertain magnitude – probably greater than the magnitude estimate by Triana (2018) and lesser than the estimate by De Loecker, Eeckhout and Unger (2020).

The second issue is the origin of the increased share of SG&A in OPEX. Since these costs are mostly costs of marketing, i.e. the cost of selling the products, and costs of managing the production process, it is reasonable to assume that the competition between firms has increased, the competitive pressure from the rivals has gone up, hence competitive constraints become stronger, increasing marketing and management efforts for selling the products. Improvements in IT and communication technologies, which have enabled customers to be better informed, have also spurred IT and communication activities of the firms in now winner-takes-all/most competition increasing the share of SG&A in OPEX. Finally, there is an issue of intangible assets and to what extent the rise of these assets and their mismeasurement increases the share of SG&A. Some of that increase, like marketing activities on brand creation and strengthening, are part of OPEX, but some are part of CAPEX, e.g. franchise purchasing. In the case of innovations, some of the intangible capital increase can be traced back to OPEX, e.g. salaries in R&D, but others, such as license purchasing or investments in new equipment for R&D departments, are part of CAPEX. One way or the other, in an economy with differentiated products and intensive innovation based non-price competition, it is reasonable to expect the increasing share SG&A in OPEX due to the intangible assets (Peters, Taylor 2017; Crouzet, Eberly 2019). Furthermore, all of these reasons are indirect testimony of increased non-price competition in the US product markets.

Finally, there is the issue of the biased sample of firms, because only traded companies are analysed. It is reasonable to assume that these companies are larger than other traded firms, hence the question is whether larger firms have higher markups than smaller firms. Autor *et al.* (2020) provide evidence that this is the case especially regarding the dynamics, i.e. that the markups of the large, superstar firms, increased faster than the markups of smaller firms. Their explanation is based on the two complementary developments–globalisation and technological innovations–that both benefited large firms, due to their capacity to materialise economy of scale in both cases. Economy of scale and innovations decrease marginal costs and that increases markups, sometimes even when the price is falling. The revenues appropriated due to the markups are used to cover substantial fixed costs (CAPEX) that are the source of economy of scale. The other possible explanation is that larger firms obtained market power due to the decline of competition and that market power enables them to charge the prices above the marginal costs

and earn economic profit. The bigger the firm, the greater the market power. This causality, along the lines of the SCP paradigm, is suggested by Eeckhout (2021), although no evidence to support it is provided.

Whatever the methodological problems of the contribution of De Loecker, Eeckhout and Unger (2020) may be, the most intriguing insight is that although a substantial aggregate markups increase is reported, the median markup is unchanged. This demonstrates, as already pointed out, that there is technological and cost heterogeneity among the firms in the same industry (operating in the same relevant market), but also the reallocation of the activity and market share from low– to high-markup firms. This is further (indirect) evidence that large firms are high-markup firms. These firms feature substantial fixed costs, including intangible assets, and these costs cannot be recovered by marginal cost pricing in the situation of economy of scale, i.e. when the average costs are higher than marginal costs. In short, without markups these firms with huge total factor productivity gains, which made customer prices lower, would not be sustainable at all.

It is quite possible that these firms face negatively sloped residual demand curves as an indicator of declined price competition and market power–typical conditions of monopolistic competition. It is indisputable that such conditions decrease the output of profit-maximising firms producing allocative inefficiency (deadweight loss) compared to hypothetical perfect competition and marginal cost pricing.[29] Nonetheless, perfect market competition does not provide for increased productivity due to increasing returns and innovation. In that sense, the increased markups, to the extent that they exist, although some increase is indisputable, signals the rise of monopolistic competition conditions and the superstar firms within that framework.

In short, the debate regarding markups levels and dynamics has demonstrated that there are substantial methodological obstacles for an unbiased estimate of markups and their dynamics in the US economy. A wild guess is that there has been some markups increase since 1980, but it is rather likely that this increase is not as high as reported by De Loecker, Eeckhout

[29] The most prominent case of deadweight loss is the one of the monopoly due to patent protection. Since there are no rivals (assuming that there is no substitute for a patented product), market demand equals patent holder residual demand, hence the negative slope of the residual demand curve equals the slope of the market demand curve, maximising deadweight loss. Contrary to that, the patented production technology need not generate monopoly on the product market, depending on how close substitutes are and what would be the strategy of the cost-efficient patent holder regarding driving the competitors out of the market.

and Unger (2020). The increase in the markups in the US economy, to the extent that it exists, does not necessarily mean the proportional increase in market power, due to the technological and cost heterogeneity of the firms and the rise of superstar firms to whom the production was allocated from the low productivity firms. Although market power, which is a convincing evidence that price competition declined (though not necessarily non-price competition, on the contrary), is inevitably associated with the deadweight loss, the unanswered question is to what extent this loss is compensated by the increase in productivity and the decreases in customer prices due to falling costs. Obviously, there is a trade-off between deadweight loss of consumer welfare and consumer welfare gain due to increased productivity, improved product quality, and/or lower prices.

The analysis can now move to the further debate about markups, market power and their macroeconomic consequences.

6. MARKUPS, MARKET POWER AND THEIR MACROECONOMIC CONSEQUENCES: THE PROBLEM OF CAUSALITY

The is no doubt that the share of labour in value added in the US has declined since 1980, after decades of stabile share, following the end of the Second World War (Elsby, Hobijin, Sahin 2013; Autor *et al.* 2017). According to the US Bureau of Labor Statistics, the labour share in value added dropped from around 62% to 56% in the second decade of the 21st century. Although there is no doubt about the trend and its magnitude, there is a controversy about the origin of this development, with potential explanations being, for example, labour substitution with capital (Karabarbounis, Neiman 2013), increased intangible assets/capital and its inadequate measurement (Koh, Santaeulalia-Llopis, Zheng 2017), structural changes in the US economy with offshoring labour-intensive work (Elsby, Hobijin, Sahin 2013), and substantial technological changes, predominantly those in the IT, with the advent of superstar firms (Autor *et al.* 2020) and the transfer of the resources to them.

Finding these explanations unconvincing, De Loecker, Eeckhout and Unger (2020) suggested that the market power, i.e. declining competition in the US product markets, is the source of the declining labour share in the US economy. They pointed out that an increase in markups implied a decrease in aggregate output (actually compared with the perfect competition

conditions), whenever residual demand was not perfectly inelastic. Lower output then implies lower demand for labour. This results in both lower labour force participation and lower wages.

There are several issues regarding this reasoning. First, as the authors pointed out, the increase in markups implies a decrease in output only if residual demand is not perfectly elastic. As already pointed out in this paper, in an economic environment with cost-heterogeneous firms, markups can coexist with perfectly elastic residual demand (Carlton, Perloff 2015). In this case increasing markups indicates only increasing cost heterogeneity of the incumbent firms (as all the firms, save the least efficient one, appropriate rents) with no decrease of output whatsoever. Second, in conditions of monopolistic competition of cost-heterogeneous firms, residual demand is not perfectly elastic, but it is an empirical question to what extent the observed markups are due to technological superiority of the firms and to what extent due to the negatively sloped residual demand curve. Decreased output (and reduced labour demand due to it, consequential for lower wages) in this situation, the monopolistic competition of cost-heterogenous firms is proportional to the elasticity coefficient of the residual demand, not to the markups.[30] Furthermore, the share of the markups due to the cost heterogeneity of the firms and the negatively sloped residual demand curve is not observable. Nonetheless, it is evident that markups are inaccurate, upward biased indicators of the reduction of the output compared to perfect competition conditions. The greater the cost heterogeneity of the firms operating on the relevant market, the more biased the indicator it is.

Third, the decrease in the output due to the market power can be more than compensated by decreasing costs in cases when the market power is associated with technological progress embodied in new cost-reducing production technology. Such a development, reducing marginal costs and shifting marginal costs curve (effectively the supply curve for profit maximising firm, its section above the average costs curve) downward, can produce an equilibrium in which the output of a profit maximising firm is greater than it was in the initial perfect competition situation, which featured a horizontal residual demand curve and the initial (before technological

[30] It should be expected that, because imperfect substitutes of differentiated products exist, for a given market demand elasticity the absolute value of the residual demand elasticity coefficient in the case of monopolistic competition is rather high, i.e. that the slope of residual demand curve is relatively shallow compared to monopoly, meaning that the output reduction is lesser than in the case of monopoly. The more competitors, i.e. the more the differentiated products that are imperfect substitutes, the higher the absolute value of the residual demand elasticity coefficient that each competitor faces (Katz, Rosen 1994, 484–485).

innovation) high marginal costs, with the supply curve being above the one generated by the technological innovation. Hence, in a dynamic setting, with strong non-price competition, market power need not produce output reduction or a decline in labour demand. Effectively, evidence of falling prices of some products points to the decrease of marginal costs and produce hints, if not evidence, that the output is not reduced but increased due to the downward shift of the supply curve.

This is not to say that the increase of markups, interpreted as increase in market power due to the decline of competition, cannot cause a decline in labour demand (and consequently the decrease in the share of labour in value added), but this causality should be accepted with all the mentioned caveats, especially considering alternative explanations of the origins of the declining labour share that takes into account two developments that are missing from the declining competition explanation of increasing market power: technological change and globalisation.

These two developments imply that the competition in the US product markets, considered as competitive constraints, has actually strengthen, not declined. As to the technological change, the advances in IT increase information for the customers, decreasing both price and quality information asymmetry, increasing competitive pressure and creating environment for "winners-takes-all/most" games. As for the globalisation, it is self-evident that the import flow of tradeables from the countries with comparative and sometime absolute advantages has increased competition in the US product markets. Furthermore, Autor *et al.* (2000) demonstrated that these two developments are the origin of both superstar firms and declining labour share, as the sales, i.e. economic activity, has been reallocated to the superstar firms (firms with substantial competitive advantage) which feature a lower share of labour – both in terms of composition of production factor and distribution of the added value. Hence it is intra-industry reallocation of activities from less productive to more productive firms that causes the decline of the share of labour in value added. Autor *et al.* (2020) also observed that superstar firms have experienced faster growth of productivity than the average, meaning that reallocation of activities to these firms increases overall efficiency, i.e. the reallocation of the resources to these firms is efficiency enhancing, producing the ground for lower prices of the products of the same quality or improvement of the price-quality

combinations.[31] Furthermore, it is empirically supported (Autor *et al.* 2020) that superstar firms are greater than the average and that they enjoy higher markups.

The question is whether these two developments provide support for thesis on the decline of competition in the US product markets. As already demonstrated (Syverson 2019), the size and number of firms are correlated with competition constraints (with linear relation: more smaller firms, stronger competition), only withing a very specific Cournot oligopoly framework with very restrictive assumptions. These assumptions are not met in the US economy, and actually hardly in any real-world economy. Higher markups, as already demonstrated, need not be related to market power (i.e. decline of price competition), due to cost heterogeneity of the firms, and that heterogeneity is emphasised with the advent of superstar firms. That is not to say that market power does not exist in the US, but in fact its magnitude hardly demonstrates substantial decline in competition in the US markets and it is not a convincing explanation of the origin of the declining labour share in value added.

The increase in markups, as it was empirically demonstrated (Díez, Leigh, Tambunlertchai 2018; Autor *et al*. 2020), is not unique to the US and has been recorded in a number of advanced economies. Obviously, the observed increase of the markups, whatever the magnitude observed, is not a national but a global phenomenon. Accordingly, there must be something global that is origin of this development, such as technology or globalisation, not national, specific for the US, such as decline in competition in product markets. The insight that while competition has been declining in the US product markets, it has been increasing in the European Union (Gutiérez, Philipon 2018), indirectly supports the notion of the increased markups as a global phenomenon. If this insight is accurate, and if the increase in markups is the consequence of the decline of competition, then markups should have been declining in the EU. That is just not the case.

Furthermore, it is feasible that at least some segment of declining labour share in the added value in the US can be explained by developments on the US labour markets. These markets hardly operate perfectly, as monopsonies have been identified in the US, especially in certain local labour markets (Posner 2021), but that is related to the market power in labour markets,

[31] Even if the mechanism of the market power drives down labour demand and declines nominal wages, the increased efficiency argument points to the possibility that real wages have actually gone up.

i.e. the buyer's power, and not product market power – and the two are by and large not related. At the present, there is no evidence of causality from market power in the product market to market power in the labour market.

It was also suggested (Eeckhout 2021) that market power in the US, due to decline of competition in the product markets, is the reason for increased income inequality in the country. The causality goes from market power to excess profits, which in turn increases capital income, enlarging overall income inequality, since capital income is more concentrated in rich people than in the poor. Although this causality is undeniable if a set of assumptions is met (Crane 2016), the question is how strong is the link and whether the impact on increasing income inequality is negligible. The other point is that market power cannot explain the greatest driver of rising income inequality in the US – the increase in inequality in labour income. This rising inequality should be considered within the framework of technological change and globalisation. Not only has technological change increased education premium and replaced low-skill labour engagement in automated tasks, mainly in manufacturing, with automation (Acemoglu, Restrepo 2019), but together with globalisation it has changed the structure of the US economy since 1980 and consequently the pattern of labour demand. The good, well paid manufacturing jobs for people without a college degree have disappeared due to automatization and relocation to other countries in the process of offshoring substantial segments of production. Some of the demand for labour that was lost as well paid jobs vanished was compensated by increased demand for low-skill jobs in service industries, but these jobs are not well paid and that not only contributed to decreasing share of labour (being reallocated from intermediate wage jobs to low wage jobs), but also to the demise of the US middle working class (Case, Ditton 2020), significantly contributing to the increase in the economic inequality, and especially labour income inequality.

Ironically, it is increase of product market competition (in tradeables), due to the globalisation and offshoring of activities as its consequence, that made the US labour income more unequal – not the decline of competition in the US product markets.

Another point that is made (Philippon 2019) is that, due to the decline of competition and increased markups, investment rates in the US have dropped and the growth rate of capital has been generally declining since 1980. There is, according to the available data, no doubt that the investment dynamic in the US in the recent decades has been rather sluggish (Hall 2015; Gutierrez, Philippon 2017; Crouzet, Eberly 2019). Nonetheless, there are at least two important questions regarding the insight that decline of competition in the US product markets generates sluggish investments. The

first one is whether the available data on investments and capital stock dynamics is accurate, especially whether there might be any reason for the measurement error to change over time. It was demonstrated (Crouzet, Eberly 2019) that both importance and magnitude of intangible assets – such as software, intellectual property, brands, innovative business processes – have increased substantially in the past several decades, and that the share of intangible assets in the total assets/capital has grown considerably. The problem is that intangible assets have not been fully recognized in capital accounting, meaning that some of the intangible assets were not observed as capital. Although capital accounting has improved in the US in the recent years, encompassing more of the intangible assets, the share of these assets in the total assets has also increased. As it has been pointed out (Crouzet, Eberly 2019), it is very likely that the amount of investment and capital has been underreported in the recent decades due to the partial capture of intangible capital. According to this view, the problem of reduced/sluggish investments does not exist at all or exists on a very limited scale.

Nonetheless, even assuming that, contrary to the evidence, the measurement of capital stock and flow is correct, that the problem exists, i.e. that the investments have been reduced, then another question inevitably arises: the question about the causality from declined competition to reduced investments. What is the mechanism of this causality? After all, declining competition should produce economic rents appropriated by the investors, creating incentives for investment due to the higher expected returns. This is precisely the reason for advocating rather lax competition policy for countries that are in the investment-based stage of economic growth (Acemoglu, Aghion, Zilibotti 2006) – it is reasonable to expect that higher returns will attract more investments.

In explaining this conundrum, Philippon (2019) implies that the firms with the market power, i.e. firms that face a negatively sloped residual demand curve, maximise their profit and appropriate economic profit by reducing output (compared to perfect competition). Accordingly, firms with market power do not have incentives to increase output and that drives demand for investment lower than in perfect competition. The problem with this argument is that it only takes into account incumbent firms, thoroughly neglecting new entries attracted by economic profit, i.e. returns above the cost of capital.

Hence, it is crucial to demonstrate that the above normal returns in an industry at least do not induce an augmented level of investment in that very industry. One possible way to demonstrate this regularity is to identify an investment gap (Gutiérez, Philipon 2017). The rationale is that investments are channelled to the firms with a Tobin's q (the ratio between market value

of the firm and the replacement cost of its capital) higher than one, meaning that the market value (based on the expectations of future returns) of the firm is higher than the value based on the replacement cost of its capital, indicating high or at least above average expected returns. If an increase in Tobin's *q* of a specific firm is not followed by an increase of investments in it – which is counterintuitive – something is wrong, and it should be explained.

As usual, the devil is in the detail. Market values of the firms are available on the daily basis only for publicly traded companies – again a biased sample, as in the case of estimating markups. The estimation of the replacement cost of the firms' capital is a greater problem. Not only that exercise has not been done regularly, but the valuation procedure itself is infested with arbitrary evaluator decisions.[32] Even worse, the level of arbitrariness is not constant, but varies from one firm to the other, even within the same industry, and varies from one industry to the other. The advent of intangible assets only made these measurement problems more fervent. In short, the investment gap based on Tobin's *q* is not a reliable indicator, because Tobin's *q* estimates are unreliable.

Furthermore, even assuming that the observed indicators are reliable, the way that they are used to ostensibly demonstrate that the decline of competition generated the drop in investments (Gutiérezz, Philippon 2017) is flawed. First, the overall dynamics (for the US economy as a whole) of the fitted values of investment, according to the estimates of Tobin's *q* and actual values of net investment, with the significant wedge starting to appear after 2008, is hardly an argument supporting the link between declined competition and lower investments, among other things because competition is a matter of a specific relevant market – it is not a feature of the aggregated values. Furthermore, the sectoral dynamics of the wedge for the ten industries with the fastest increase of concentration (measured by the dHHI), dropping faster than the ten industries with the slowest increase of concentration since 2000 hardly proves anything, since it has already been demonstrated in this paper that industrial concentration is not an appropriate measure of the intensity of competition, i.e. the strength of competitive constraints. Finally, the analysis only looks at the investment

[32] Because the procedure is resource demanding and not legally required, it is not done frequently, in many cases not for many years, even decades. Book values of assets/capital are frequently used as a proxy for replacement cost value of the capital of firm. These values of the capital are even less reliable, because they are based on the accounting value of assets, calculated using the purchasing value and annual *ex ante* arbitrary chosen depreciation rate. Accordingly, most of the estimates of Tobin's *q* are not reliable indicators.

of the incumbent (not even all, but only publicly traded) firms and entirely excludes new entries – the most important source of competition in an advanced economy like the US.[33]

For all the mentioned macroeconomic consequences to be explained by market power there must be substantial and ever-increasing exploitative abuse of dominant position (in the EU competition law parlance) that, in the comparative statics, decreases the output, increase the prices, and redistribute incomes from labour income to capital. Even the authors who claim that market power is the explanation of these macroeconomic consequences have not provided any evidence of such exploitative abuse of a dominant position. Even if such abuse exists, is it not likely that its magnitude and dynamics are sufficient to explain most of the macroeconomic development. This is especially the case taking into account the technological progress, particularly in the IT sector, globalisation, advent of superstar firms, and changes in the structure of the US economy.

7. POSSIBLE VULNERABILITIES OF THE US PRODUCT MARKET COMPETITION

Most of the evidence of decline of product market competition in the US, provided by the contributions thus far reviewed in the paper, is not convincing: the hypothesises of the overwhelming decline of competition in the US product market does not sit comfortable with the facts. Nonetheless, this does not mean that the US product market competition is not vulnerable. Before the sources of these vulnerabilities – even threats to the competition – are evaluated (likewise from the available literature), the nature of the US product market competition should be assessed.

The point is that, since the US economy is on the technological frontier (i.e. the frontier of the cutting-edge technology), its growth heavily depends on innovation. Furthermore, it is reasonable to assume that most of the consumer welfare gains in the US are due to the productivity increases that are based on technological progress and innovations, resulting in either new and improved products or in superior new production technologies that decrease costs. After all, even the authors who fully subscribe to the market

[33] An implicit additional explanation of the investment gap based on the Tobin's *q* is the existence of barrier to entry (Philippon 2019). The problem is that the investment level in the analysis is only due to the activities of incumbent firms, while barriers to entry, if they exists, just keep returns high, providing stronger incentives for incumbent firms to invest more.

power hypothesis as evidence that product market competition in the US has declined, admit that due to the innovation and productivity growth product quality adjusted prices are lower than they were (Eeckhout 2021), a clear indication that the consumer welfare has increased.

Accordingly, it is reasonable to conclude that the competition in the US product markets, i.e. competitive constraints, should be considered from the point of view of incentives for innovation, i.e. dynamic efficiency, rather than static allocative efficiency. Accordingly, it is quite reasonable to suggest that the aim of the competition policy in the US should be innovations, rather than price efficiency – as it is suggested it should move "from price-centric to innovation-centric competition policies" (Gilbert 2020, 2). In other words, it is appropriate to sacrifice some deadweight loss (i.e. allocative inefficiency) for the dynamic efficiency gains due to innovation. Obviously, markups labelled as market power and considered as an indicator of declined competition in the US are hardly relevant within such a framework.

It seems, based on the insights of the recent contributions, that there are three major sources of weaknesses or possible threats to the product market competition in the US, especially to the competitive constraints regarding innovation. The first one is the practice of killer acquisitions (Cunningham, Ederer, Ma 2021), in which large dominant firms that are technological leaders in a given industry purchase small innovation intensive new entries (potential rivals) to prevent them from becoming actual rivals and potentially dethroning the technologically dominant firm. In infamous words of Facebook CEO Mark Zuckerberg "It is better to buy than to compete". It is obvious that such killer acquisition removes some incentives for innovation by the incumbent firms, hence from that point of view such mergers should be prohibited.

Nonetheless, if these mergers are prohibited, the outcome can be harmful for innovation. The point is that, at least in some cases, the opportunity to sell an innovative start-up or promising R&D project to an established firm is the most powerful incentive for innovation on the first place and the best way to commercialise a new product (Gilbert 2020). Without that incentive, one can expect a slower pace of innovation, and slower introduction of new products and new technologies that decrease the average costs of existing products: in short – the slowing down of dynamic efficiency.[34] Hence, there

[34] This mechanism works for both entrepreneurs who commit themselves to the innovative endeavour and to the venture funds that support them. Both entrepreneurs and venture funds expect capital gains as reward for their effort and the risk they are exposed, and they are *ex ante* aware that capital gain cannot materialise without the acquisition.

is an obvious trade-off in the area of killer acquisitions, but it is important to recognise that this practice can be a threat to competition in the US product market and that it makes competition constraints vulnerable, especially regarding incentives for innovation.

The other possible vulnerability of the competition in the US product market is common ownership of rivals. It is indisputable that financial institutions (mutual funds, sovereign wealth funds, etc.) are investing in competitors: firms that compete against each other in the same industry. Sometimes even in the same relevant market. It is rather intuitive that these institutional investors could benefit from restricting the competition between the firms they own as minority shareholders, since the economic profit the companies that they invested in earned this way would be transferred to the dividends and increased the earning of the financial investors, with benefits for the fund managers themselves (Scott Morton, Hovenkamp 2018, 2031).

Effectively, it is in the common interest of institutional investors that the firms they invested in collude and enforce horizontal restrictive agreements, in the EU competition law parlance. Such agreements generate or enhance market power of all the participants, which enables them to earn economic profit that would be transferred into increased dividends for the investors. This rationale has been confirmed by a highly stylized theoretical model (Azar, Vives 2019), whose results is that enlarged common ownership generates increased market power and deadweight loss. Nonetheless, as the authors of the model specify, we need to know much more about how the common ownership structure translates into a firm's business decisions. There are some suggestions of mechanisms that institutional investors may use to "soften" the competition (Scott Morton, Hovenkamp 2018, 2032), albeit without a thorough hypothesis of the causality.

The answer to the question regarding mechanism is rather difficult, as it has been demonstrated (Hemphill, Marcel 2020) that the causal mechanisms that might link common ownership to anticompetitive effects are rather vague. The authors believe that most suggested mechanisms either lack significant support or are implausible. Perhaps the most prominent empirical research focused to the airline industry (Azar, Schmalz, Tecu 2018; Azar, Vives 2021) and provided some empirical evidence that increased common ownership in the US airline industry is anticompetitive and that it has produced increased market power, although these findings have been challenged (Dennis, Schenone, Carola 2019). Obviously, more theoretical and empirical research is needed for the threat of common ownership to the US product market competition to be better evaluated, but it is evident that collusion among competitors not to innovate, as they would without the collusion, can be enforced much easier than the "classical" cartel collusion

regarding prices and outputs. This is the reason why common ownership can be more anticompetitive in the US than in the other countries, because it can be focused on innovation and dynamic efficiency, rather than on prices and output, i.e. allocative efficiency.

Furthermore, the trend of increasing shares of institutional investors (especially diversified mutual funds) in the equity of the publicly traded companies in the US, is viable and there is no signal of slowing down or trend reversal. This is quite consistent with the insight that increased wealth generates more demand for financial intermediation (Shiler 2012), including institutional investors as one of the most important financial institutions. Accordingly, with the increased personal wealth of individuals (in the US and abroad) who invest that wealth in institutional investors, allowing them to be the custodians of it, the problem of common ownership and its adverse impact to competition in the US product market is here to stay and will only become aggravated, making it possibly a significant vulnerability of the US product market competition.

Legal barriers to entry, due to entry regulation, are the third possible vulnerability of the US product market competition regarding innovation, as well as other anticompetitive inefficiencies. Although the proposition that increasing barriers to entry decline potential (in the short run) and actual (in the long run) competition is intuitive, there is still vast space for empirical sector-specific research regarding the causality and magnitude of the consequences. One way or the other, there is an indisputable long-term trend of increasing government regulation, erecting and enhancing legal barriers to entry. As pointed out by Davis (2017), the *US Code of Federal Regulations* has grown eightfold over the past 56 years and at the time of publishing this piece stood at nearly 180,000 pages.

The methodological problem is that the number of pages is not a reliable indicator of the regulatory burden that creates legal barriers to entry. The breakthrough came with the Index of Regulation generated by the RegData, a relatively new database (Al-Ubayadli, McLaughlin 2017) that cleared the way for introducing the regulatory burden, i.e. legal barriers to entry at the industry level. It was demonstrated that substantial negative correlation exists, with a consistent increase of the Index of Regulation (increase in legal barrier to entry) and decrease of the rate of new entries in the US since 1980 (Gutiérrez, Philippon 2019). Furthermore, there has been a consistent decrease of the young firms (those less than five years old) in total US firms, both in the number of firms and in employment. The employment share was 20% in 1980 and only 10% in the mid-2010s (Philippon 2019). Clearly, the strengthening of legal barriers to entry undermines new entries.

New entries are especially relevant for innovation – proportionally much more innovation is generated by new entries than by incumbent firms. Hence, in the case of innovation driven economy, such as the US, legal barriers to entry are a greater obstacle to dynamic efficiency that in other economies, which focus on "conventional" allocative efficiency aims. Nonetheless, the competition vulnerabilities from legal barrier to entry should be considered within the framework that in some of the cases these barriers contribute to consumer surplus, such as the barriers to entry in the financial sector (especially banking), which increase its stability (Vives 2016), or environmental barriers to entry directed at decreasing environmental negative externalities.

This is not to say that this list of vulnerabilities of the US product markets competition, i.e. potential culprits of competition decline, is a closed one. These are just a suggestion of apparently the most important threats to US product markets competition. They are based on some empirical evidence and on the assumption that dynamic efficiency is what really matters for the consumer welfare in the US product markets, and not allocative efficiency.

8. CONCLUSION: THE NEED FOR CHANGES IN THE US COMPETITION POLICY

The review of the recent contributions on markups, market power and the decline of competition in the US product markets, both theoretical and empirical, provides enough evidence that there has possibly been some decline in price competition, but it has been compensated by non-price competition within the framework of monopolistic competition and product differentiation. The rise of the share of intangible corporate assets (patents, brands, etc.) is indirect testimony of the increasing non-price competition in the US product markets and the efforts of the firms to isolate themselves from rivals and their competitive pressure. Accordingly, competitive constraints in the US product markets, predominantly in the area of non-price competition, have by and large gone up, not down.

The observed increase of the markups (regardless of the upward bias in their estimates), market power, and profit rates are consistent with the possible decline in price competition. Nonetheless, they are also consistent with the technological progress, mainly in IT, decreasing customer information asymmetry, and creating a winner-takes-all/-most business environment framework, clearing the path for the advent of superstar firms (who took all), reallocation of activities towards those firms, and increasing selective efficiency and industrial concentration.

With increased productivity and decreasing marginal costs, markups are needed to cover the substantial fixed costs (e.g. investments in R&D and brand creation), those that enable increased productivity, to provide sustainability for the firms enjoying economy of scale, as marginal costs pricing would inevitably create financial losses.

Globalisation, together with automatization, as the consequence of technological progress, have destroyed well paid manual manufacturing jobs in the US and this structural change helps explain decline in the share of labour in value added and the rising income inequality. Market power is hardly the culprit in those developments.

As to the threat of killer acquisitions to the US product market competition, it is obvious that some changes to merger control are needed. Since the controversial contribution of Kwoka (2015), whose insights were challenged (Vita, Osinski 2018), there has been a vast range of recommendations regarding tougher merger control reform, and some of them, such as the Klobuchar Bill (Ilić 2022), are in legislative procedure. It seems, though, that the best way forward regarding the merger control reform should be the cautious approach by Gilbert (2020) – that the notification thresholds should be modified to require reporting of acquisition targets with modest revenues, if the acquirer is a firm that dominates an industry. Even in such a case, the burden of proof should remain on the competition authorities.

Common ownership is a significant possible vulnerability of the US product market competition, especially regarding incentives to innovate. On the one hand, much more knowledge is needed about the mechanism possibly linking common ownership to anticompetitive effects – clearly, an academic task. On the other hand, the US legislative framework provides the ground for appropriate merger/acquisition control to check enlargement of common ownership (Scott Morton, Hovenkamp 2018). It seems that such an endeavour regarding common ownership will inevitably be post-merger control, with all the adverse effects to legal predictability and the regulatory risk associated with it. Accordingly, careful and restricted moves on this front are needed to not endanger the beneficial effects of common ownership, and to not increase the unnecessarily administrative burden of merger control and the legal uncertainty.

Finally, there is no panacea regarding legal barriers to entry and their expansion in the recent decades. It is obvious that lobbying is an inherent segment of the US political system, and this enables powerful incumbents to create legal moats around their business castles. Antitrust legislation and authorities can hardly do anything about these efforts, but something can be done do reduce their impact. In the intellectual environment which is so much

in favour of regulation and captivated by the belief in a benevolent regulator (Sunstein 2021), in which Stigler's theory of regulation (Stigler 1971) and its public choice approach are almost completely forgotten, some old-fashioned competition advocacy, so eagerly recommended to less developed countries, should also be applied to the US – the cradle of antitrust. After all, shaping attitudes cannot do any harm.

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*POŽELJNOST REGULATIVNE FUNKCIJE SUDSKE VLASTI***

It seems to me that at this time we need education in the obvious more than investigation of the obscure.

(Holmes 1920, 292–293)

Rasprava se sastoji iz dva dela i u njima se, respektivno, zastupaju dve osnovne teze. Prva je da sudske presude u svim razvijenim pravnim sistemima mogu da budu „izvori" opštih pravila koja će ubuduće na obavezujući način regulisati ponašanje sudova, a onda, sledstveno, i drugih pravnih subjekata, čak i ako nisu formalno priznate kao izvori prava. A druga je da one to treba da budu iz više razloga, od kojih su najvažniji predvidljivost i jednakost. U

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ovom delu rasprave najpre se izlažu upravo ti normativni razlozi u prilog vršenja regulativne funkcije sudske vlasti, a zatim se pokazuje u kojem pravcu bi sudska vlast mogla da vrši regulativnu funkciju u jednom tipičnom kontinentalnom sistemu, ako sudska vlast, kao celina, prihvata da je vrši.

Ključne reči: *Predvidljivost. – Jednakost. – Sudska vlast. – Regulativna funkcija. – Precedent.*

1. UVODNE NAPOMENE

U prvom delu rasprave (Dajović 2022, 233–281) ideju o obaveznosti precedenata u razvijenom pravnom sistemu branio sam konceptualnim razlozima, ali oni su samo otkrili da je primena doktrine *stare decisis* moguća i u pravnom sistemu u kojem se sudske presude ne smatraju aktima koji sadrže obavezujuće opšte pravne norme, ali ne i da je poželjna. Uostalom, čak i u anglosaksonskom sistemima precedenti nisu u početku imali autoritet koji imaju danas. Takav status zadobijaju tek u HIH veku (Lee 1999, 647–648; Hasnas 2005, 91–92). U pitanju je relativno nova praksa u odnosu na drevnost prakse *common law*, koje se vekovima efikasno i uspešno razvijalo i bez nje. Drugim rečima, ta praksa se ne može opravdati pozivanjem na samu sebe, to jest na drevnost i tradiciju, ona se mora podupreti dodatnim, normativnim razlozima. Prema tome, u razvijenom pravnom sistemu doktrini precedenata su uvek otključana vrata. Postavlja se samo pitanje da li sudovi *treba da* ih otvore.

Pre nego što se pređe na razmatranje tog pitanja, uputno je da još jednom naglasim na šta se tačno odnose normativni razlozi o kojima ću raspravljati u nastavku. Prvo, u raspravi se bavim pre svega problemom *horizontalnih* precedenata, kod kojih su sud koji je tvorac precedenta i sud koji precedent primenjuje ili isti sud ili sud istog stepena, jer obaveznost vertikalnih precedenata može da bude zasnovana na dodatnom razlogu sudske hijerarhije. I drugo, kada se u prvom delu rasprave govorilo o regulativnoj funkciji sudske vlasti, pretežno je bila reč o delovima sudskih presuda koji zadobijaju kanonizovanu formu pravila ili normi-definicija (Dajović 2022, 269), a koja su obavezna kao i druga pravna pravila. Ubrzo će biti jasno zbog čega insistiram upravo na toj formi precedenta.

Dakle, pošto konceptualno nije nužno već je samo moguće da sudovi u kontinentalnom pravnom sistemu vrše i regulativnu funkciju, da li oni *treba da je vrše* – posebno je pitanje. U prvom odeljku izneću četiri razloga zbog kojih sudovi ne samo da mogu da vrše regulativnu funkciju, nego je i normativno poželjno i opravdano da je vrše.

U drugom odeljku ću pokušati da, kratkom sintezom svih zapažanja i argumenata,[1] opišem konture jedne slike regulativne funkcije sudske vlasti koja bi bila optimalna za bilo koji razvijeni pravni sistem u kojem sudske presude inače, formalnopravno posmatrano, nisu „izvor" prava.

Najzad, u zaključku ću sumirati celokupno izlaganje, a zatim izložiti nekoliko napomena o tome čime se u raspravi *nisam* bavio. A držim da su to teme koje mogu biti prirodan nastavak ovog istraživanja. U tom smislu, ova rasprava, u svom integralnom obliku, može poslužiti kao prikladan uvod i temelj za novi istraživački poduhvat.

2. POŽELJNOST REGULATIVNE FUNKCIJA SUDSKE VLASTI – NORMATIVNI POGLED

Zašto bi bilo poželjno u budućim sličnim slučajevima donositi odluke koje su u skladu s precedentom? Ili, ako se pitanje obrne: zašto je pogrešno u takvim slučajevima donositi odluke koje su potencijalno najbolje, bez ograničenja koja postavljaju prethodne sudske odluke u sličnim slučajevima? Kada se pitanja ovako formulišu, jasno je da na zastupnike doktrine *stare decisis* pada „teret dokazivanja" njene poželjnosti (Waldron 2007, 204) jer bi, bez te doktrine, sudije bile slobodne da u svakom sporu u kojem sude, donesu odluku koju u konkretnom slučaju smatraju najboljom, najispravnijom, ne osvrćući se na odluke svojih prethodnika, što je, *prima facie*, najpoželjniji mogući ishod.

U pravnoj teoriji se najčešće navode dva ključna argumenta u prilog doktrine *stare decisis*: argument predvidljivosti u presuđivanju i argument jednakosti u presuđivanju („jednake slučajeve tretirati jednako") (Waldron 2007, 201; Solan 2016, 1174–1175).[2] U ovom odeljku prvo ću razmotriti ta dva argumenta, a onda izložiti još dva dodatna, prvi, koji je u stvari odgovor na jedan čest kontraargument protiv doktrine precedenata i drugi koji je kontekstualno specifičan za države pod „jurisdikcijom" Evropskog suda za ljudska prava (ESLJP).

[1] Ne mislim samo na argumente i zapažanja iz ovog već i iz prethodnog teksta (Dajović 2022).

[2] Naglašavam da predvidljivost i jednakost nisu osnovi zbog kojih se precedenti tretiraju kao obavezujući. Oni samo ukazuju na moralnu vrednost doktrine precedenta i, kao takvi, mogu da je opravdaju.

2.1. Predvidljivost

Predvidljivost je važna vrednost koju pravni sistem treba da promiče, ponekad čak i po cenu pogrešnih ili makar ne sasvim optimalnih odluka.[3] U pravnom sistemu u kojem su sudske odluke javno dostupne, subjekti koji nisu neposredni učesnici u konkretnom sporu očekivaće da će sudovi i ubuduće odlučivati na isti način i, shodno tome, težiće da svoje ponašanje usklade s takvom odlukom. Iz tog razloga, povezivanje doktrine precedenata s idejom predvidljivosti, predstavlja jedan od glavnih argumenata u prilog njenog praktikovanja. Jer, praksa poštovanja već donetih sudskih odluka koje su javno publikovane i dobro poznate na bolji način služi potrebi za predvidljivošću prava nego praksa u kojoj bi se sudijama dopustilo da u svakom sporu odlučuju onako kako oni smatraju da je najbolje (Waldron 2007, 201).[4]

Međutim, iako ovakav stav ne deluje kontroverzno, to je samo na prvi pogled tako. Naime, ako se pažljivije osmotri polje praktičkog delanja *uopšte*, lako se uočava da u mnogim situacijama pojedinac ne želi da počini „grešku" (po njegovom sudu) koju je prethodno u sličnoj situaciji neko učinio, jer ne želi da ponavlja uspostavljen obrazac delanja, samo zbog činjenice da je on već uspostavljen, to jest samo zbog njegovog vremenskog prioriteta. Drugim rečima, argument precedenta u korist nekog načina delanja često će (istina, ne uvek) odstupiti pred drugim, supstantivnim argumentima protiv takvog ustaljenog delanja. Primera radi, od političara čije odluke takođe imaju uticaj na život mnogih, baš kao i odluke sudije, nećemo očekivati da čini iste stvari kao njegovi prethodnici, samo da bi bio predvidljiv. Naprotiv, ukoliko su takvi postupci bili pogrešni ili ukoliko bi se to kosilo s njegovim uverenjem, očekujemo od njega da ne sledi uhodane obrasce (političkog) delanja. Zbog čega je onda snaga tog argumenta u pravu značajno veća? Zašto pravnici, a naročito sudije, pridaju takav značaj precedentu, do mere da ga u pojedinim pravnim sistemima slede kao obavezujuće pravilo delanja? Ili, ako se pitanje

[3] U prvom delu rasprave, u odeljku 4.2, nagovešteno je da je predvidljivost epifenomen vladavine prava (Dajović 2022, 260 i.d.). Ipak, kako u teoriji postoje razmimoilaženja povodom toga da li je vladavina prava element koncepta prava, ovde se predvidljivost ne posmatra kao deo dela koncepta prava već kao pravna vrednost.

[4] Kako kaže Šauer, „traganje za pravdom i pravičnošću u svakom slučaju je neizbežno u tenziji sa vrlinama predvidljivosti, pouzdanosti, izvesnosti i doslednosti koje bi doneo precizniji i rigidniji sistem pravila, kao i u određenoj tenziji sa transparentnošću koje donosi odlučivanje koje je zasnovano na pravilima" (Schauer 2005, 12).

zaoštri do kraja: zbog čega bi sadašnje sudije trebalo da poštuju precedent i da (ponekad) ponavljaju „greške“ nekadašnjih sudija, samo zato što su te „greške“ precedenti?

Takvu vrstu pitanja su postavljali tako značajni pravnici i sudije, inače odnegovani u sistemu precedenata, kao što su Holms ili Skalija (*Scalia*). Tako je Holms smatrao ideju precedenta „odbojnom“ ako ne postoji bolji razlog da sudovi budu obavezani pravilom od slepog imitiranja davne prošlosti, primera radi, od činjenice da je ono nastalo u vreme Henrija IV (Holmes 1897, 469). S druge stane, sudija Skalija je samu doktrinu *stare decisis* smatrao nespojivom s njegovom zakletvom da će poštovati Ustav, a ne odluke njegovih prethodnika (Schauer 2012, 131).

Na te primedbe može se odgovoriti idejom o stabilnosti i predvidljivosti pravnog sistema, *kao osobenog polja praktičkog delanja*. Tu je ideju pregnantno branio njihov, ne manje čuveni kolega, sudija Brendis (*Brandeis*) kada je u jednoj presudi[5] ustvrdio da je (doktrina) *stare decisis* obično mudra politika, jer „in most matters it is more important that [the question] be settled than that it be settled right“. Brendis je na taj način, smatra Šauer, identifikovao najčvršći argument u prilog doktrine precedenta: potrebu za stabilnošću stabilnosti radi i potrebu za predvidljivošću predvidljivosti radi. Ta je potreba za mnoge aspekte života značajnija od potrebe da se u svakoj mogućoj prilici donese najispravnija odluka. Stoga se doktrina precedenta ne zasniva na ideji da je potonji sud manje sposoban, stručan i savestan u odnosu na precedentni sud, te da se stoga, da bi ispravno odlučio, mora ustanoviti njegova dužnost da sledi precedent. Ona se zasniva na jednoj pozitivnoj vrednosti i prednosti koja u određenim oblastima ljudskog života nadjačava potencijalnu dobit od situacije u kojoj bi svakom sudu i sudiji bilo dopušteno da sâm nastoji da donese najbolju moguću odluku u konkretnom sporu i da tako popravi ili poboljša odluke njegovih prethodnika. A te pozitivne prednosti doktrine precedenata su predvidljivost i stabilnost *pravnog* poretka (Schauer 2012, 131).

Obavezujući precedenti doprinose predvidljivosti na dva načina. Prvo, opštost precedentnog pravila proširuje krug slučajeva (mimo onog konkretnog slučaja, u kojem je presuda doneta) koji se smatra regulisanim, a koji to nije bio pre, zbog neodređenosti prava ili iz drugih razloga (Dajović 2022, 252–260). Štaviše, u takvim slučajevima bi nepredvidljivost i neizvesnost u odnosu na pitanje „šta je pravo (u konkretnom slučaju)?“ podrile ideju vladavine prava. Jer, da podsetim: kada je zakon neodređen (nejasan ili višeznačan), njime je pravno pitanje samo donekle ili nije uopšte

[5] *Burnet v. Coronado Oil & Gas. Co*. (1932) 285 U.S. 393, 406.

unapred „rešeno“ i onda se sud pojavljuje kao dopuna ili zamena zakonodavca (Liebwald 2013, 392). Kada odluka suda, u takvim situacijama, počiva na precedentu, ona u konkretnom slučaju ne proističe direktno iz zakona (jer je zakon, recimo, neodređen) nego na interpretaciji ili na „dopuni“ koju je sud stvorio putem precedenta u prethodnom sličnom slučaju. Ipak, iako se ne zasniva na zakonu, takva odluka se zasniva na pravu jer je precedentni sud ovlašćen i dužan da samostalno i nezavisno presuđuje, a sastavni deo presuđivanja je, u takvim spornim slučajevima, i obrazloženje presude koja ne predstavlja samo puku primenu prava. Uostalom, kako konstatuje Sanstin, „ideal (vladavine prava) ne zahteva potpuno preciziranje pravnih pravila pre nego što je slučaj nastao. Za ljudska biće je to nemoguće ambiciozan cilj. Umesto toga, on postavlja skromniji zahtev da se poštuju prethodne odluke, i to iz pragmatičnih razloga: „olakšanog odlučivanja, jednakog tretmana [pravnih subjekata] i sudijske ‘skromnosti’ s obzirom na ograničeno iskustvo i mudrost koje poseduju kada donose odluku“ (Sunstein 1996, 192). Prema tome, doktrina *stare decisis* je u skladu s načelom vladavine prava, a ne vladavine ljudi (Lindquist, Cross 2005, 1160), jer dok je opravdano da u slučajevima kada je zakon neodređen precedentni sud „dovrši“ posao zakonodavca, nikako ne može biti opravdano da potonji sud, odstupajući od precedenta, zapravo izmeni tako dovršeno pravo (Solan 2016, 1177).[6]

Drugi način na koji doktrina precedenta doprinosi predvidljivosti jeste autoritativnost precedenta, činjenica da je on obavezujući i da potonji sud ne može da bira da li će ga poštovati ili ne, u slučaju u kojem su relevantne činjenice bitno slične činjenicama iz precedentnog slučaja. To garantuje *izvesnost* njegove primene u budućim sličnim slučajevima i na taj način dodatno ojačava predvidljivost i stabilnost prava. Time se, uopšte uzev, smanjuje i prostor sudijama da u odlučivanje unose vlastite političke, moralne i druge predilekcije, a uvećava se poverenje javnosti u nepristrasnost sudija (Alexander, Sherwin 2004, 8). O autoritativnosti precedenta biće još govora u narednom odeljku.

[6] „(I)f courts depart from an established interpretation of a statute, citizens who have relied on that statute as initially interpreted may turn out to have taken actions which they would have avoided taking had they understood what their obligations under the statute – as revealed by the new interpretation – in fact were“ (Duxbury 2013, 16).

2.2. Jednakost – „jednake slučajeve tretirati jednako"

U pravnoj teoriji i praksi opšteprihvaćena je ideja da strane u sporu treba tretirati na isti način kao što su tretirane strane u nekom prethodnom sličnom sporu (Alexander, Sherwin 2004, 3; Hasnas 2005, 88). Ili, drugačije rečeno, opravdana je pretenzija stranke da sud o njenom pravu odluči na isti način kao što je odlučio o istom ili sličnom pravu druge stranke u precedentnoj presudi. Ukoliko bi potonji sud odlučio drugačije, smatra se da bi postupio arbitrarno i da stranka ne bi imala pravedan i fer tretman. Iz tog razloga se u prilog poštovanju doktrine *stare decisis* navodi da ona omogućuje ostvarenje jedne od temeljnih vrednosti pravnog poretka da „s jednakima treba postupati jednako". Ta ideja je tim više opravdana kada je reč o takozvanim interpretativnim precedentima. Jer, rezonuje se, u samoj prirodi zakona je da su to opšti i univerzalno primenljivi propisi, a ta svojstva zakoni bi izgubili ukoliko bi ih u istim ili sličnim slučajevima sudovi različito *tumačili* i, shodno tome, različito primenjivali (Troper, Grzegorczyk 1997, 126).

Iako na prvi pogled princip jednakosti izgleda kao fundamentalan i opšteprihvaćen pravni princip, u literaturi se iznosi nekoliko prigovora ideji da taj princip predstavlja (samostalan) normativni argument u prilog doktrine precedenta. Pokušaću u nastavku, ukratko, da opišem nekoliko prigovora i da odgovorim na njih.

Najpre, iznosi se primedba da taj princip može da unazadi *moralnu* snagu zahteva „s jednakim jednako" ukoliko je u prvom, precedentnom slučaju doneta pogrešna odluka. Oslanjajući se na taj moralni princip potonji sudovi bi, ponavljajući istu grešku, zapravo usmerili odlučivanje ka nemoralnijim ishodima nego što bi to bio slučaj da su, ne oslanjajući se na princip jednakog tretmana, u narednim presudama ispravili početnu grešku. Tako bi se, zapravo, jedan moralni princip, ironično, stavio u službu nemoralnosti – konzistentnom primenom nemoralnog, neispravnog precedenta, ono što je bazično nemoralno postalo bi navodno „moralno" jer bi se zasnivalo na moralnom principu jednakosti (up. Alexander, Sherwin 2004, 4).

Međutim, meni se čini da se tim prigovorom zanemaruju dva bitna momenta. Prvo, princip jednakog tretmana jednakih slučajeva je, u osnovi, formalan princip. Ukoliko je „jednak tretman" supstantivno nemoralan, onda nemoralnost nije posledica jednakosti „tretmana" nego „tretmana" kao takvog. I ona se ne rešava tako što će se neki slučajevi „tretirati" nejednako a neki jednako u odnosu na supstantivnu nemoralnost tretmana u izvornom slučaju. Ona se uklanja tako što sam „tretman", kao takav, biva uklonjen. U vezi s tim, takva vrsta nemoralnosti javlja se i kada se nemoralni zakonski propisi jednako primenjuju u jednakim slučajevima – ona nije karakteristična samo za jednaku primenu nemoralnih precedenata. Međutim, postoji bitna

razlika. Loše, nepravedne i nemoralne precedente mnogo je lakše ukloniti nego iste takve zakonske propise. Na taj način, problem se ne rešava odbacivanjem principa jednakosti nego odbacivanjem samog precedentnog pravila. A mogućnost promene ili odbacivanja precedenta sastavni je deo doktrine *stare decisis.* O načinu i razlozima zbog kojih se jedan precedent može odbaciti biće reči u narednom odeljku.

Drugi prigovor se tiče „samostalnosti" argumenta jednakosti. Ako se princip jednakosti odvoji od supstantivnih razloga na osnovu kojih se ocenjuje da li su dva slučaja jednaka ili nisu, prigovor veli da on nema ozbiljnu „autonomnu" uverljivost jer se uvek može svesti na predvidljivost. Naime, ukoliko princip „jednake tretiraj jednako" kaže samo da u slučaju da smo prethodno na osnovu supstantivnih razloga utvrdili da su dva slučaja jednaka treba jednako i da ih tretiramo, onda doktrina precedenta nalaže ono što je već i rečeno: aktuelni slučaj će se rešiti isto kao i precedentni, čak i kada potonji sud smatra da je precedentni slučaj rešen pogrešno. Međutim, argument jednakosti tada gubi svu svoju moralnu vrednost i „rastvara" se u argumentu stabilnosti i predvidljivosti koji je Brendis izneo, a koji sam maločas spomenuo. Na osnovu svega toga, Šauer zaključuje da „it is not so much that the principle of treating like cases alike is wrong. Rather, it is simply that the principle is better understood as restating a conclusion rather than providing an independent argument for that conclusion" (Schauer 2012, 132).

Odgovor na taj prigovor se, čini mi se, može naći u odbrani principa jednakosti uopšte. Naime, uverenje da „jednake treba tretirati jednako" zasniva se na pripadnosti subjekata u sporu zajednici u kojoj postoje određeni principi i pravila koji povezuju ljude u zajednicu. Te principe i pravila sudije ne treba da zanemare ili zamene u svakoj situaciji u kojoj postoji prevaga drugih moralnih ili prudencijalnih razloga da se oni zanemare ili zamene. Šta to, u najkraćem, znači?

Primera radi, ako se od tuženog X zahteva da nadoknadi štetu tužiocu, a postavlja se pitanje da li je opravdano da plati štetu za koju on smatra da mu se bez osnova nameće ili da je osnov njegove odgovornosti nemoralan, odgovor se može naći u principu fer-pleja. To je dobro poznata Hartova ideja koju on, sažeto, formuliše na sledeći način: „Kada određeni broj ljudi preduzima neko zajedničko delanje u skladu s pravilima, koja ograničavaju njihovu slobodu, oni koji su se podvrgli tim ograničenjima kada se to od njih traži, imaju pravo na slično potčinjavanje onih koji su imali koristi od njihovog potčinjavanja" (Hart 1955, 185).

Međutim, taj argument će imati smisla, kako umesno primećuje Voldron, samo ukoliko princip na osnovu kojeg X odgovara u aktuelnom slučaju ostaje nepromenljiv u odnosu na prethodni slučaj u kojem je možda on bio tužilac ili je imao indirektnu korist od toga što je neki drugi tužilac imao korist (Waldron 2007, 203). Na taj način, doktrina precedenta postaje imperativ fer odnosa prema pojedincu kao članu zajednice.

Prema tome, naročit značaj principa „jednake tretiraj jednako" u odnosu na doktrinu precedenta treba posmatrati upravo iz tog ugla. Taj princip je bitan razlog zbog kojeg treba istrajati na njenom poštovanju, čak i kada je u pitanju precedent koji je, recimo, zbog retke primene izgubio značaj sa stanovišta *predvidljivosti*. Utoliko pre poštovanje precedenta ima smisla i u slučajevima u kojima se pitanje predvidljivosti ne može ni postaviti, budući da su slični ili istovrsni slučajevi koji se presuđuju nastali u isto ili približno isto vreme, ali u kojima se presude ne donose istovremeno. Primera radi, ako veliki broj klijenata koji su potpisivali iste ili slične ugovore o kreditu s bankama podnese tužbu u isto ili približno isto vreme zbog određenih (u svim ugovorima na isti način uređenih) naknada, koje tužioci smatraju nezakonitim, ne može se govoriti o tome da bi njihov potonji nejednak tretman pred sudovima, koji bi se ogledao u bitno različitim presudama, narušio načelo predvidljivosti. Ali bi, bez sumnje, povredio princip „jednake tretiraj jednako".

Dakle, precedent u obe pomenute situacije nema funkciju da garantuje stabilnost i izvesnost prava već da obezbedi jednak tretman konkretnih pojedinaca u konkretnom sporu. „Ako je tretman aktuelnog slučaja na način koji je u skladu sa ranijim slučajem pitanje poštovanja ličnosti, onda smo dužni prema aktuelnim strankama da... shvatimo šta znači jednako postupanje s njima [u odnosu na ranije stranke]" (Waldron 2007, 202–203).

2.3. Priroda sudske vlasti (i njen značaj za slobodu pojedinca)

Sledeći argument u prilog prihvatanja doktrine *stare decisis* nije toliko argument „za" (premda, delimično jeste i to) nego je više argument koji otklanja jedan kontraargument. O čemu je reč? U pravnoj i političkoj teoriji smatra se nespornim da je u prirodi svake vlasti sklonost da maksimizuje svoj politički i pravni uticaj. Tako bi trebalo da je „prirodna" i sklonost sudske vlasti da maksimizuje svoj uticaj na pravo. A sudska vlast koja, sledeći doktrinu *stare decisis*, pretvara delove obrazloženja presuda u (novo) pravo, to jest vrši regulativnu funkciju, takav uticaj ostvaruje u najvećoj zamislivoj meri (Claus 2005, 435; Lindquist, Cross 2005, 1165).

Nakon takvog nespornog zaključka, nameće se pitanje da li je pomenuta prirodna težnja nosilaca svake vlasti, pa prema tome i nosilaca sudske vlasti (ukoliko se oni zaista osećaju kao nosioci vlasti) opravdana? Ili ipak sistemom kontrole i ravnoteže treba ograničiti takve aspiracije sudija i sudova iz razloga iz kojih se takva vrsta ograničenja primenjuje i na druge dve grane vlasti, to jest radi očuvanja slobode pojedinca? Sledeći ono što je rečeno u prvom delu rasprave o podeli vlasti nije li neophodno „obuzdati" takve težnje za „širenjem" sudske vlasti i na funkciju koja joj nije osnovna? I za koju ona, kako se ističe, ne poseduje potrebnu legitimnost.

Na ovom mestu valja istaći dva momenta. Prvi je da zakonodavna vlast i inače zakonima ograničava sudsku vlast u većoj meri nego upravnu.[7] To se naročito odnosi na neke grane prava (procesno pravo, krivično pravo itd.). I premda se u tekstu sledi ideja da inherentna neodređenost zakona i njegova difizibilnost ostavljaju sudskoj vlasti prostor da vrši regulativnu funkciju, ona je najčešće dopunskog i ograničenog karaktera. I što je još važnije, kako je naglašeno u prvom delu, regulativna funkcija sudske vlasti različita je od regulativne funkcije zakonodavne vlasti. Uostalom, Herbert Hart je po tom pitanju izričit: „ne samo da su ovlašćenja sudija podvrgnuta mnogim ograničenjima koja sužavaju njihov izbor od kojih zakonodavstvo može da bude u potpunosti oslobođeno, već, pošto sudije vrše ovlašćenja samo da bi rešili konkretne slučajeve, oni ova ovlašćenja ne mogu da koriste da bi uveli široke reforme ili doneli nove zakone. Na taj način, njihova su ovlašćenja dopunska, a isto tako podložna drugim suštinskim ograničenjima" (Hart 1994, 273).

A među ta suštinska ograničenja (osim u slučaju sistema u kojima sudovi mogu svojim odlukama da menjaju i dopunjavaju ustav) ne spadaju samo ustavne i druge norme, nego i mogućnost koja uvek postoji da zakonodavac izmeni ili „poništi" dejstvo sudskih precedenata. Naime, izuzimajući precedente koji se odnose na kontrolu ustavnosti zakona i drugih opštih akata, precedenti koji predstavljaju vršenje regulativne funkcije (jer se odnose na dopunu ili „popunjavanje" zakona) mogu u svakom trenutku, ukoliko zakonodavno telo proceni da su oni, primera radi, suprotni volji zakonodavca, da budu novim zakonom „derogirani". Na taj način zakonodavac, kako to veli Solan, „ponovo zadobija kontrolu nad primenom zakona" (Solan 2016, 1171).

[7] U pitanju je krajnje načelna teza, koja proizilazi iz same prirode sudske vlasti, odnosno njene adjudikativne funkcije (Dajović 2022, 236 i.d.). Upravna funkcija je, po prirodi stvari, više orijentisana ka diskrecionom odlučivanju, koje se zakonodavstvom ne dâ uvek vezati. Ipak, kao što je poznato, i sudije (barem prema preovlađujućem teorijskom stavu) ponekad vrše diskrecionu vlast, tako da je, uprkos načelnoj ispravnosti iznete teze, ona u mnogim situacijama podložna izuzecima.

Drugi momenat je istakao još jedan od američkih „očeva osnivača“, Aleksander Hamilton, kada je ustvrdio da je sudska vlast „neuporedivo najslabija od tri vrste vlasti“ i da nikad ne može „uspešno da ugrozi druge dve vlasti“. S druge strane, iako je, prema njegovom mišljenju, tačno da sudovi u pojedinačnim slučajevima mogu da nanesu nepravdu, sloboda ljudi u celini uzev „ne može biti ugrožena od strane sudova ukoliko su sudovi istinski odvojeni od legislative i egzekutive“ (Federalist No. 78, nav. prema Ervin 1970, 121). Na osnovu toga se može zaključiti da sudska vlast, prilikom vršenja podjednako i adjudikativne i regulativne funkcije, ne predstavlja opasnost za slobodu pojedinca u meri u kojoj to mogu biti druge dve grane vlasti već je, naprotiv, ukupno uzev, najefikasnija institucionalna garancija te slobode. Stoga se čini da po slobodu pojedinca ne samo da nije opasno da sudska vlast maksimizuje svoj uticaj, vršeći i regulativnu vlast, već da je to, štaviše, poželjno.

2.4. Praksa Evropskog suda za ljudska prava

U slučajevima u kojima utvrdi da u državi-ugovornici postoji pravno-sistemski problem u kršenju ljudskih prava ESLJP će joj takozvanom pilot-presudom naložiti da izmeni problematičan nacionalni propis i tako ga uskladi s Konvencijom (Popović 2008, 117). Takvim presudama sud u Strazburu nesumnjivo utiče na stvaranje prava, odnosno takva presuda ne deluje samo *inter partes* nego ima opšte dejstvo. Na taj način ESLJP vrši jednu vrstu ustavnosudske funkcije, to jest njegove odluke se mogu uporediti s odlukama organa ustavnosudske kontrole na nacionalnom nivou. A budući da je taj sud na neki način postao važan autoritet za nacionalne sudove država-ugovornica, jasno je da je sistem u kojem je sudska presuda izvor prava bliži kontinentalnim pravnim sistemima nego ikada ranije.

Još važniji momenat u vezi s praksom ESLJP, koji je od značaja za poentu ove rasprave, jesu njegove presude koje se tiču potrebe za ujednačenom sudskom praksom. Naime, u skladu s doktrinom četvrte instance (up. Dajović, Spaić 2016, 22–24), ESLJP u principu ne upoređuje različite sudske presude na nacionalnom nivou, smatrajući da u svim pravnim sistemima postoji mogućnost razlika u presudama povodom sličnih ili istih slučajeva, čak i pred istim sudovima. Ipak, praksa najviših sudova u državi mora biti konzistentna u najvećoj mogućoj meri. Konzistentnost znači poštovanje principa pravne sigurnosti, što podrazumeva presuđivanje koje je pretežno u skladu s prethodnim odlukama najviših sudova u slučajevima koji su isti ili bitno slični. Stoga „sudovi ne treba da odstupaju, bez valjanog razloga, od presedana uspostavljenih u ranijim predmetima“ (*Demir and Baykara*

v Turkey, 34503/97, §153). Arbitrarna će biti svaka presuda pri čijem je donošenju sud, bez prihvatljivih ili bez ikakvih razloga, odstupio od ustaljene prakse. U takvim slučajevima sudska vlast će prekršiti pravo na pravično suđenje iz člana 6.1 evropske Konvencije o zaštiti ljudskih prava i osnovnih sloboda.[8]

Uobičajeni standard ESLJP za ocenu da li neujednačenosti u sudskoj praksi predstavljaju kršenje Konvencije jeste „postojanje dubokih i dugotrajnih razlika u presuđivanju". Uz to, za ujednačenu sudsku praksu je sa stanovišta nacionalnog pravnog sistema posebno značajno postojanje funkcionalnog mehanizma koji bi mogao obezbediti uniformnu primenu prava.[9] Stoga primena supstantivno sličnih pravnih normi na lica koja pripadaju skoro pa identičnim grupama mora biti ujednačena, kao što mora postojati mehanizam za rešavanje eventualnih neujednačenosti. Osim toga, taj mehanizam mora biti funkcionalan i upotrebljavan (*Nejdet Sahin and Perihan Sahin v Turkey*, 13279/05, § 53).

Konačno, budući da se praksa ESLJP „shvata ozbiljno" u državama-ugovornicama, tako jasan stav o obavezi ujednačavanja sudske prakse ukazuje na to da su države pod jurisdikcijom ESLJP dodatno podstaknute da sudska vlast u njima sledi doktrinu *stare decisis*, iako zbog različite prirode nacionalnih pravnih sistema pod njegovom „jurisdikcijom" ESLJP to izričito ne zahteva.

3. REGULATIVNA FUNKCIJA SUDSKE VLASTI

3.1. Obaveznost precedenta

Herbert Hart je verovao da u takozvanim „lakim" ili jednostavnim slučajevima, kada ne postoji spor oko toga koja je pravna norma primenljiva i šta ona znači u konkretnom slučaju, sudije treba da je primenjuju shodno njenom nespornom jezičkom značenju. Drugim rečima, oni u takvim slučajevima treba da rasuđuju na osnovu pravnih normi, kao autoritativnih razloga, bez upliva vlastitih ideoloških, moralnih ili političkih uverenja, čak i ako im se čini da će rezultat njihove odluke, s moralnog, političkog, ekonomskog ili drugog

[8] Opširnije o tom stavu Evropskog suda za ljudska prava up. Popović 2021.

[9] „Postojanje dveju kontradiktornih odluka Vrhovnog suda u istoj stvari nespojivo je s načelom pravne sigurnosti [...] uloga viših sudova upravo je u tome da razreše dileme oko različitih pravnih shvatanja, uklone dileme i osiguraju jedinstvenu primenu prava" (*Vusić v Croatia*, 48101/07, §45).

relevantnog aspekta biti nepoželjan (Hart 1958, 615).[10] Takav stav je u skladu s njegovim shvatanjem prirode prava, uloge zvaničnika u pravnom sistemu i najposle prirode pravnih normi kao autoritativnih razloga.

Takav Hartov stav se može „prevesti" i poopštiti stavom savremene pravne teorije prema kojem važeća pravna pravila (naročito za sudove, ali ne samo za njih) predstavljaju isključujuće (ili preemptivne) i sadržinski nezavisne razloge za delanje.[11] Ne ulazeći u konceptualnu preciznost takve karakterizacije pravnih pravila, ona se ipak može pokazati korisnom kada se utvrđuje obavezujući status precedenata, to jest odnos sudova prema opštim preskriptivnim iskazima koji su izneti u presudama u prethodnim sličnim slučajevima. Rečju, ukoliko takvi iskazi mogu biti (1) isključujući i (2) sadržinski nezavisni razlozi za sudove prilikom donošenja potonjih odluka u sličnim slučajevima, onda između njih i važećih pravnih pravila u drugim izvorima prava ne bi bilo značajne konceptualne razlike. I onda bismo, najkraće rečeno, precedentna pravila mogli smatrati opštim pravnim pravilima *simpliciter*.

Ovom prilikom ću se zadržati samo na drugoj karakteristici jer je, najpre, isključujuća priroda pravnih pravila kao razloga za delanje[12] odviše složena i kontroverzna[13] da bi joj se na ovom mestu posvetila potrebna dodatna pažnja i, drugo, zbog toga što se ona najčešće povezuje sa sadržinskom nezavisnošću pravila, kao razloga za delanje.

Koncept sadržinski nezavisnih razloga (SNR) uveo je u jurisprudenciju Hart (Hart1982, 252–255), a na njegovom tragu razradio ga je DŽozef Raz. On SNR definiše na sledeći način: „Razlog je sadržinski nezavisan ako ne postoji *direktna veza* između razloga i radnje za koju je taj razlog razlog" (Raz 1986, 35). Ipak, Razova definicija nije najpreciznija jer je izraz „direktna veza" neodređen, i u delu koji se odnosi na to šta je „direktno" a šta ne i u delu koji

[10] Kako Mekormik ističe, „courts should apply previously announced rules to present cases that fall within the rules' terms even when the courts' own best judgment, all things considered, points to a different result" (MacCormick 1994, 168).

[11] O prirodi pravnih pravila up. Alexander, Sherwin 2001, 26–35; Raz 1979, 21–22, 30–33.

[12] U najkraćem, autoritativno pravilo je isključujući razlog za delanje, ukoliko iskaz autoriteta predstavlja razlog prvog reda za H da učini radnju R, ali takođe i razlog drugog reda da H ne postupi prema razlozima prvog reda koji govore u prilog neizvršenja radnje R. Dakle, taj iskaz je u isto vreme i razlog prvog reda i razlog drugog reda. Kao razlog drugog reda, on je razlog da se ne dela iz (određenih) razloga prvog reda, to jest isključujući razlog (Raz 1979, 17).

[13] O debatama o prirodi precedenata u *common law*, kao isključujućim razlozima up. opširnije Perry 1987, 221 i.d.

se odnosi na izraz „veza“. Stoga Postema preciznije karakteriše sadržinski nezavisne razloge kada kaže da njihovo postojanje i prepoznavanje „ni na koji način ne zavisi od ocene poželjnosti ili moralnih vrednosti radnje za koju je taj razlog razlog“ (Postema 1987, 86). Slično misli i Grin kada „suštinu ideje“ sadržinske nezavisnosti vidi u tome da činjenica kako je neka radnja pravno obavezna ima normativne konsekvence „nezavisno od prirode i ispravnosti same te radnje“ (Green 1990, 225). Tako je, na primer, zapovest, kao razlog, nezavisna od sadržine zapoveđene radnje jer zapovest u principu može da bude razlog za bilo kakve radnje, uključujući i one sasvim suprotne sadržine.[14] Neki autoritet mi može izdati zapovest da ostanem u prostoriji ili da je napustim. U oba slučaja, njegova zapovest će predstavljati razlog za radnju, uprkos poželjnosti ili moralnosti same te radnje. Na sličan način, veli Raz, i obećanja se, primera radi, mogu posmatrati kao sadržinski nezavisni razlozi (Raz 1999, 70).

Kako u ovom smislu stoji stvar s „pravilima“ koja se nalaze u obrazloženjima sudskih presuda? Kao što je pokazano na primeru pravnog sistema SAD (Dajović 2022, 263 i.d.), izvor iz kojeg potiče ili status koji uživa u pravnom poretku od drugih aktera (a najvažnije, od samih sudija) precedentu daje njegovu obaveznu snagu. Rečju, precedent ne crpi autoritet iz svog *sadržaja* ili uverljivosti rezona kojim se „precedentni“ sud vodio.[15] Ukoliko bi, primera radi, moralna neispravnost ili utilitaristička nepoželjnost bile dovoljne za sud da u konkretnom sporu odbaci precedent, onda od obaveznosti precedenta, to jest od doktrine *stare decisis*, ne bi ostalo ništa (Waldron 2007, 201; Lindquist, Cross 2005, 1161). Stoga je, kako ističe Šauer, snaga precedenta najvidljivija u slučajevima u kojima se sudija iz aktuelnog slučaja ne slaže s odlukom koja je doneta u precedentnom slučaju. Kada sudija donosi odluku u aktuelnom slučaju zato što se slaže s ishodom precedentnog slučaja ili zato što je ubeđen u to valjanom argumentacijom precedentnog suda, tada doktrina *stare decisis* postaje suvišna (Schauer 2012, 124). Prema tome, *sadržina* samog precedenta nije odlučujuća za postojanje njegove obavezujuće prirode. Stoga su „i akti zakonodavca i presude sudova *pravno autoritativne* direktive i jednako su (važeće) pravo, premda u različitoj formi“ (Duxbury 2013, 20).

Pomenuti primer stomatologa koji se smatra „lekarom“, u smislu člana Krivičnog zakonika (Dajović 2022, 257–258) može, u tom smislu, biti ilustrativan i pokazati kako funkcioniše doktrina *stare decisis i u čemu se*

[14] „The reason is in the apparently ‘extraneous’ fact that someone ...has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones“ (Raz 1986, 35).

[15] Taj stav do izvesne mere ublažava i koriguje Lamond (up. Lamond 2005).

obavezujući precedenti razlikuju od persuazivnih. Prilikom rešavanja tog pravnog pitanja, neki potonji sud koji bi stomatologu sudio za krivično delo nesavesnog lečenja, mogao bi da pribegne jezičkom argumentu i da, na osnovu njega, zaključi da se u uobičajenoj jezičkoj komunikaciji stomatolozi nikad ili bezmalo nikad ne nazivaju lekarima. Uobičajeno je da ćemo zubara osloviti kao „doktora", kao što to činimo i sa lekarima i poznato je da oni tu titulu stiču, baš kao i lekari, na kraju fakultetskih studija. Ali jezička praksa svakako ne ide u korist jezičkog tumačenja da su stomatolozi „lekari". U prilog takvom jezičkom interpretativnom argumentu išao bi i jedan sistemski. Naime, već u članu dva važećeg Zakona o komorama zdravstvenih radnika[16] predviđa se da postoje različite komore za lekare i stomatologe, to jest Lekarska komora i Stomatološka komora i da je članstvo tih komora, respektivno, sastavljeno od lekara i stomatologa, čime se jasno ne ističe samo razlika između ta dva pojma već i razlika u prirodi njihove delatnosti. Najzad, prilikom pravne kvalifikacije u aktuelnom slučaju, potonji sud može u obzir da uzme i prvobitno, „precedentno" tumačenje, kao kontraargument, ali ono je tada samo jedan od argumenata (tzv. interpretativni argument precedenta), koji sud odmerava i koji ne mora u konačnoj odluci da odnese prevagu nad jezičkim ili sistemskim (ili bilo kojim drugim) argumentima. I tada bi u pitanju bio samo takozvani persuazivni precedent.

Međutim, suprotno ovom argumentativnom toku, sud koji bi rešavao potonji slučaj, držeći se doktrine *stare decisis*, ne bi razmatrao interpretativne argumente u prilog ovog ili onog značenja zakonskog termina „lekar" i da li ono denotira i stomatologe. On bi koristio interpretativni precedent koji je postavio precedentni sud u prethodnom sličnom slučaju i to ne kao argument u prilog značenja termina „lekar" koje obuhvata i stomatologe, već u smislu interpretativne „norme" koju je obavezan da primeni, ne ulazeći u njenu opravdanost niti argumentujući u prilog ili protiv njenog sadržaja i smisla.

3.2. Kanonizacija pravila u precedentu

Imajući na umu ono što je rečeno o praktičnom obnašanju regulativne vlasti u anglosaksonskom sistemu (Dajović 2022, 263 i.d.), *a naročito normativne razloge predvidljivosti i jednakosti*, čini se da je bitan faktor vršenja i domašaja regulativne funkcije sudske vlasti i način na koji je sudovi vrše. Tu prevashodno mislim na način *uobličavanja* precedenta u obrazloženjima sudskih presuda. Iz primera koji su navedeni u prvom delu

[16] Zakona o komorama zdravstvenih radnika, *Sl. glasnik RS*, 107/2005 i 99/2010.

rasprave (Dajović 2022, 252–260) i mogućnosti da kroz interpretativne precedente sudovi tumačenjem dopunjavaju pravo, a slično važi i za stvaranje prava, jasno proizilazi da je najpoželjniji oblik kreiranja precedenata takozvano kanonizovano opšte pravilo ili jasna norma-definicija.[17] Jer, kako Voldron veli: „(A)rgument (predvidljivosti) generiše argument da se precedent poštuje, samo u odnosu na onaj precedent čiji je uticaj na slučaj koji se trenutno razmatra *jasan i nesporan*" (Waldron 2007, 201). A da li je taj uticaj „jasan i nesporan" jednostavnije će se utvrditi ako je sam precedent formulisan kao jasno i određeno pravilo ili kao norma-definicija.

Ukoliko je, pak, precedent u formi „implicitnog pravila" (Dajović 2022, 270), često se, konstatuju teoretičari, pojavljuje problem razlikovanja između *ratio* i *dictum*-a, koji ostavlja prostor da se od implicitnog pravila lako odstupa u potonjim slučajevima (Merrill 1993, 63). Kao primer te „nepouzdanosti" Meril navodi poznatu presudu Vrhovnog suda SAD o abortusu, *Roe v. Wade*.[18] „Šta je *holding* u slučaju *Roe v. Wade*? Da su državni zakoni koji inkriminišu abortus neustavni (kao što sugeriše mišljenje predsednika suda, Renkvista u slučaju *Webster v. Reprod. Health Servs*., 492 U.S. 490, 521 (1989))? Da se abortus mora dopustiti sve dok plod ne oživi (kao što se sugeriše u zajedničkom mišljenju u slučaju *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992))? Da je (pravo na) abortus temeljno ljudsko pravo, koje se može regulisati samo ako treba ostvariti neki uverljiv društveni interes (kao što je označeno u većini odluka nakon *Roe v. Wade*)?" (Merrill 1993, 63, fus. 89).

Dakle, jasna je prednost precedenta u formi kanonizovanog pravila ili norme-definicije u odnosu na precedent u formi „implicitnog pravila" ili standarda. Uprkos tome, valja naglasiti sledeće. I kada je precedent u formi kanonizovanog pravila ili norme-definicije, to ne znači da se on ne može, potonjim presudama, na izvestan način graduelno razvijati. Iako uobličavanje precedenta u formi kanonizovanog pravila ima značajne prednosti, poteškoća je u tome što sudovi nisu idealna mesta za stvaranje pravila koja će, da tako kažem, biti opšteobavezujuća linearno. Drugim rečima, i kanonizovana precedentna pravila i norme-definicije podložni su korekcijama ili izuzecima. Uostalom, primarna funkcija sudske vlasti

[17] Podsećam da te norme-definicije Buligin naziva definicionim sentencama (Dajović 2022, 258). On izričito kaže: „[T]he contribution of the judge to the creation of law is not restricted to the creation of norms; equally important, and perhaps even more important, are the judge's definitions of legal concepts." I zbog toga je „case law... a source of law in the sense that judges contribute to the creation of legal norms and to the definition of legal concepts" (Bulygin 2015, 86, slično i 87).

[18] *Roe v. Wade*, 410 U.S. 113 (1973).

je adjudikativna. Sudovi su fokusirani, pre svega, na činjenice konkretnog slučaja, onako kako su one predstavljene od učesnika u sporu. To znači da subjekti prava koji bi u budućim slučajevima bili podložni precedentnom pravilu ni na koji način ne mogu da utiču na njegovo donošenje i izvan su vidokruga suda u precedentnom slučaju (Sherwin 1999, 1188). Stoga je u anglosaksonskoj teoriji opšteprihvaćena teza da svi potonji sudovi, iako vezani precedentom, imaju ovlašćenje da „prave razliku". To, zapravo, znači da mogu da „dopunjuju" precedent ili da u odnosu na njega uspostavljaju izuzetke, imajući u vidu razlike između činjeničnog stanja u precedentnom i aktuelnom slučaju.[19] Na taj način se precedentno pravilo „pročišćava" i grana kroz čitav niz slučajeva i pokazuje se njegova (ne)ispravnost u različitim, iako srodnim, činjeničnim kontekstima (Sherwin 1999, 1189).

Istovremno, u tome leži možda najveća prednost primene doktrine precedenata – precedenti se mogu finim podešavanjima prilagođavati najrazličitijim društvenim okolnostima. Precedentno pravo se na taj način razvija postepeno i u skladu s potrebama i prilikama okruženja na koje treba da deluje. Ono je, poput krošnje drveta, koja u povoljnim uslovima stalno buja, terajući nove izdanke, „grane" i „grančice". I dok, zakonodavac može celo „drvo" zakona ili čitavog dela pravnog sistema jednim reformskim potezom da „poseče" i posadi novo, sudska vlast, putem precedenata, deluje upravo suprotno.

U tom svetlu, korisno je podsetiti se, na primer, odluke Apelacionog suda (Dajović 2022, 256) o tome da se zabrana nošenja oružja ne odnosi samo na javni prostor nego i na privatno dvorište vlasnika oružja. Prvo, ta formulacija se, bez sumnje, može tretirati kao jedna vrsta interpretativne norme. Drugo, ona dopunjuje, razrađuje ili precizira „izvornu" pravnu normu iz zakona – iako se njeno značenje može zasnovati na značenju zakonske norme, ona ipak predstavlja njeno preciziranje ili dopunu te, u tom smislu, i „stvaranje" prava. I treće, sve to ne znači da takvo pravilo ne može budućim sudskim odlukama graduelno da se „razvija", odnosno da trpi izuzetke, da bude difizibilno. Zamislimo, na primer, slučaj u kojem je optuženi oružje nosio kroz dvorište, da bi ga odložio u ormarić za čuvanje oružja koji se nalazi u garaži, pored kuće. Ili slučaj domaćinstva u planinskom kraju, u kojem se često događa da opasne divlje životinje upadaju na imanja, pa vlasnik

[19] „Pravljenje razlike (*distinguishing*) je praksa u kojoj kasniji sudovi navode neke razlike između činjenica precedentnog slučaja i činjenica iz kasnijeg slučaja kako bi objasnili zašto ne slede precedent. Kasniji slučaj može jasno da potpada pod opseg ranijeg *ratio*... ali kasniji sud može odbiti da utvrdi (isti) konačan ishod C na osnovu toga što postoji neka karakteristika u potonjem slučaju koja nije prisutna u precedentnom slučaju koja pruža dobar razlog da se ne utvrdi rezultat C" (Lamond 2005, 9).

upotrebi oružje u dvorištu kako bi otklonio opasnost koja preti njegovoj stoci. U svakoj od tih situacija, i u nizu drugih, koje se mogu zamisliti kao realne, moguće je da će sud, prilikom primene precedentnog pravila, imajući na umu *ratio* precedenta i činjenice aktuelnog slučaja, doći do zaključka da je precedentno pravilo nepodesno da bi se primenilo u datim okolnostima, to jest da ga treba „dopuniti", „razviti" ili u odnosu na njega uspostaviti izuzetak.

Zbog toga je moguće, čak i kada je u pitanju precedent u obliku kanonizovanog pravila ili norme-definicije, da sud u potonjem slučaju oceni kako ga ne treba primeniti u aktuelnom slučaju jer su činjenični sklopovi precedentnog i aktuelnog slučaja, premda srodni, ipak različiti u relevantnom smislu. Međutim, takvim postupanjem suda ne oslabljuje se obaveza koju diktira doktrina *stare decisis.* Sudije u takvim slučajevima ne poriču obaveznost precedenta (jer im se on ne „dopada", jer ga smatraju „pogrešnim" itd.) već samo rezonuju da su činjenice u aktuelnom slučaju *bitno* drugačije nego u precedentnom slučaju (Lindquist, Cross 2005, 1163).[20]

[20] „Distinguishing is certainly subject to some constraints; the later court must point to some difference between the facts of the two cases that it regards as providing a good reason for not following the result in the precedent. This can be represented as follows. If the *ratio* is:

R = If {J,K,L}, then C

Then (1) the later court must alter R only by adding a new element to {J, K, L} (or by substituting a subcategory of J, or K, or L, for that element), thereby narrowing the scope of R; and (2) the amended rule must not be inconsistent with the result in the precedent case" (Lamond 2005, 10).

Međutim, valja istaći da je to pitanje u teoriji i praksi doktrine precedenata jedno od najsloženijih. Ovlašćenje sudova na „pravljenje razlike" (*distinguishing*) prirodna je posledica činjenice da je doktrina precedenta nastala kao derivat specifične prakse u sistemima *common law*, a to je praksa sudskog odlučivanja *case-by-case*. Fundamentalna razlika između sudova koji odlučuju kazuistički i sudova koji odlučuju na osnovu unapred postavljenih (obično zakonskih) pravila je to što su u prvom sistemu sudovi upućeni da opšte pravilo ili princip (ili *ratio*) na kojem će zasnovati presudu izvlače iz konkretnog činjeničnog konteksta. Stoga se i sistem pravila i principa *common law* razvija graduelno, postepeno i organski se grana, kao što je upravo i opisano. On je veoma uslovljen činjeničnim kontekstima konkretnih slučajeva. To, naravno, nije slučaj u kontinentalnim sistemima u kojima su opšta zakonska pravila nezavisna od konkretnih činjeničnih konteksta, već su činjenice opisane u hipotezi pravila na apstraktan način. U ovoj raspravi, koja je sasvim načelne prirode, nemoguće je podrobnije razmotriti to važno pitanje. Ipak, meni se čini da primena doktrine precedenta i na tumačenje pisanih, zakonskih pravila veoma dobrodošla upravo stoga što ublažava krutost apstraktnih formulacija u praksi, čineći sudove senzibilnijim na konkretne činjenične kontekste. I to je jedan od ključnih razloga zbog kojih smatram da sudska vlast regulativnu funkciju može i

3.3. Promena precedenta

Na izvestan način, izlaganjem na kraju prethodnog pododeljka, prišao sam još jednom bitnom pitanju u vezi s doktrinom *stare decisis* – pitanju promene precedenta. Kažem, „na izvestan način", jer tom prilikom nije opisano odbacivanje ili promena precedenta već karakteristično svojstvo primene doktrine *stare decisis* u sistemima *common law* da postojeći precedent potonji sud može da dopunjava ili razvija. A kada je reč o samoj *izmeni* precedenta, prema toj doktrini, drugi (po pravilu, najviši) sudovi u sličnim slučajevima ne treba da menjaju precedentna pravila, osim da bi se eliminisali precedenti, koji su od početka bili loši ili koji su takvi postali zbog promenjenih društvenih prilika.[21] Stoga je korisno ustanoviti razloge zbog kojih se može izmeniti ili ukinuti postojeći precedent jer se, u krajnjoj liniji, i zakoni menjaju ili ukidaju pa je društveno i pravno opravdano da se menjaju i ukidaju i precedenti. Ipak, razlozi za tu promenu moraju biti restriktivni – razlozi za promenu zakona su stvar političke volje zakonodavca, razlozi za promenu precedenta ne smeju da budu stvar puke volje trenutnih sudija.[22]

Ključan restriktivni razlog bi mogao da bude standard koji polazi od pretpostavke u korist održanja precedenta na snazi, što znači da se precedent može „oboriti" samo ako je *očigledno i ozbiljno neopravdan* (Alexander, Sherwin 2001, 26). Standard očiglednog i ozbiljnog nedostatka opravdanja je standard sveukupne procene pravila, a ne standard kojim se ocenjuje opravdanost primene precedentnog pravila u konkretnom slučaju. Sud mora primeniti pravila na slučajeve u kojima odlučuje, čak i ako je uveren da odluka u konkretnom slučaju dovodi do nepoželjnog ishoda, uzimajući sve razloge u obzir. Jer i dobar precedent može u konkretnom slučaju dovesti do lošeg ishoda. No, to ne opravdava njegovo odbacivanje u svakom takvom slučaju. Samo ako je sud uveren da će precedentno pravilo, ako se dosledno poštuje, u budućnosti proizvesti mnogo više grešaka nego što će ih sprečiti,

treba da vrši samo kroz konkretne, pojedinačne presude, a ne, recimo, kroz načelne pravne stavove, kojima nedostaje ta povezanost s konkretnim činjenicama slučaja (Dajović 2022, 259 fn. 43).

[21] Pomenuo sam na početku prethodnog odeljka da je Holms govorio da doktrina precedenta može biti „odbojna". Tom prilikom, on je istakao i da „je još odbojnije ako su osnovi na kojima počiva (precedentno pravilo) već odavno iščezli, a to pravilo prosto nastavlja da perzistira na slepoj imitaciji prošlosti" (Holmes 1897, 469).

[22] Ipak, pojedini autori primećuju da nije uvek tako. Ili, bolje rečeno, da je tako kada je sud relativno nezainteresovan za prirodu spornog pitanja u aktuelnom slučaju. Međutim, kada su, sa stanovišta moralnih, političkih ili drugih ličnih preferencija sudija, „ulozi" visoki, one su sklone detalnijoj analizi precedentnih odluka i odlučnije da uspostave novi precedent (Lindquist, Cross 2005, 1165–1166).

sud ne mora održati precedent na snazi. Drugim rečima, precedent je opravdano promeniti ili ukinuti samo ako će ta promena univerzalno voditi do pravednijih ili moralnijih ishoda.[23]

Drugi, dopunski i objektivniji standard, kada je u pitanju pristajanje suda uz precedentno pravilo, oslanja se, na nama dobro poznat, koncept sudske prakse. Naime, precedentno pravilo, prema tom standardu, neće biti obavezujuće za sud koji nije „sklon" njegovoj primeni u konkretnom sporu ukoliko ono nije primenjivano i od drugih sudova, tokom izvesnog perioda vremena. Tek kada je višekratno preispitano u procesu sudijskog rasuđivanja i odlučivanja u različitim konkretnim slučajevima, precedentno pravilo stiče potvrdu da je pomenuti kriterijum kako će ono pre sprečiti nego što će proizvesti nepoželjne posledice u celini zadovoljen. Može se, u izvesnom smislu, reći da je kriterijum sudske prakse u stvari samo multiplikovana ili „ojačana" verzija doktrine precedenta. Jer, u krajnjoj liniji, i ta sudska praksa je morala da započne od neke precedentne presude. Ipak, valja naglasiti da se primenom tog dopunskog kriterijuma „koriguje" poreklo obaveznosti precedentnog pravila. Autoritet na osnovu kojeg ga potonji sudovi prihvataju kao obavezujuće više nije *samo* sud koji je prvi kreirao pravilo već niz sudova koji su ga kasnije usvojili i primenjivali (Alexander, Sherwin 2001, 22).[24]

Najzad, postoje i neki specifični standardi, kontekstualno prilagođeni konkretnoj jurisdikciji. Primera radi, Evropski sud za ljudska prava odstupa od ranijih precedenata kada se društvene okolnosti i shvatanja promene tako da izmenjena shvatanja i prakse prihvata najveći broj država-ugovornica. Kada je, recimo, ESLJP u slučaju *Riz protiv Ujedinjenog Kraljevstva*[25] prvi put odlučivao o tome da li je odsustvo pravnog priznanja izvršene promene pola u skladu s Konvencijom, jasno je zauzeo stav da odlučivanje o tome spada u domen slobodne procene (*margin of appreciation*) države članice. Tog „precedenta" ESLJP se držao narednih petnaestak godina.[26] Međutim,

[23] Sličan princip, uostalom, važi i za primenu pisanih, zakonskih pravila (Feteris 1999, 81).

[24] Naravno, uvođenje sudske prakse, kao nadogradnje doktrine precedenata, „postavlja" dodatna pitanja, koja se tiču kriterijuma *postojanja* precedenta. Koliko puta neka odluka treba da se potvrdi? Ili koliko dugo treba da se potvrđuje? Da li mora da se potvrdi samo od istog suda ili sudova istog ranga? (Alexander, Sherwin 2001, 23). O sudskoj praksi kao „izvoru prava" up. Košutić 1974.

[25] *Rees v. The United Kingdom*, no. 9532/81 od 17. oktobra 1986.

[26] Up., na primer, slučaj *Cossey v. The United Kingdom*, no. 10843/84 od 27. septembra 1990 i slučaj *Sheffield and Horsham v. The United Kingdom*, no 31–32/1997/815–816/1018–1019 od 30. jula 1998.

u slučaju *Godvin protiv Ujedinjenog Kraljevstva*[27] ESLJP je, dajući za pravo podnositelju predstavke, istakao da je „precedentna" presuda u slučaju Riz doneta u drugačijim okolnostima jer u to vreme nije postojao ni približno zajednički stav država-članica o pravnom priznanju promene pola. I budući da se taj kontekst vremenom promenio i da su mnoge države propisima uredile priznanje novostečenog polnog identiteta transseksualaca, ESLJP je u slučaju Godvin utvrdio povredu prava na privatni život iz Konvencije.

4. ZAKLJUČAK

I prvi i drugi deo rasprave dominantno su bili posvećeni izlaganju dobro poznatih, nekontroverznih i jednostavnih tvrdnji o podeli vlasti, sudskoj vlasti, prirodi prava, primeni prava te opšteprihvaćenim vrednostima koje pravo treba da promiče. Iako su te tvrdnje mahom nesporne, njihovo iznošenje na videlo određenim redosledom poslužilo je da se dođe do zaključka koji nije nesporan. I pogotovo nije ni praktično ni teorijski nesporan u kontinentalnoj pravnoj kulturi. A taj zaključak se može sumirati rečima Entonija Kronmena: „Poštovanje prošlih odluka, precedenta, nije karakteristika samo nekih pravnih sistema. To je pre karakteristika prava uopšte. I gde god postoji skup praksi i institucija za koje verujemo da se osnovano mogu nazvati 'pravom', doktrina precedenata će biti na delu, utičući u manjoj ili većoj meri, na ponašanje onih koji su odgovorni da upravljaju tim institucijama i praksama" (Kronman 1990, 1032, nav. prema Spaić 2018, 28).

Već na prvi pogled je jasno da tako univerzalno postavljena teza znači da se u njenom zasnivanju i izvođenju zanemaruju mnogi partikularni, ali ne manje važni momenti. Dolazak do tako opšteg zaključka podrazumeva da se ti momenti samo ovlaš predstave, ali ne i da se detaljnije analiziraju. Čini mi se da su među njima najvažnija pitanja, koja su spominjana, ali ne i detaljno razrađena, formulisanje odnosno izdvajanje precedenta iz presude, kao i dopune i izmene precedenta. Bez potpunijeg odgovora na ta pitanja i osnovna ideja ove rasprave, premda, čini mi se, u osnovi ispravna, ostaje nedovršena ili nepotpuna.

[27] *Christine Goodwin v. the United Kingdom*, no. 28957/95 od 11. jula 2002. Zahvaljujem se Sofiji Kovačević, koja mi je skrenula pažnju na te slučajeve.

* * *

Na samom početku prvog dela rasprave pomenuo sam da je jedan od povoda za njen nastanak bio pokušaj da se promenama Ustava Srbije deo sudske „vlasti“[28] izmesti izvan sudova (Dajović 2022, 234). Ipak, intencija nije bila da se bavim pravnim sistemom Srbije. Iako pretpostavljam da obavešteni čitalac može da se zapita „kako bi doktrina *stare decisis* funkcionisala u sudovima u Srbiji?“, nameravao sam samo da pokažem dokle (mogu da) se prostiru granice sudske vlasti redovnih sudova u *bilo kom* razvijenom pravnom sistemu u kojem sudske presude nisu priznate kao formalan izvor prava. Zaključak je da te granice *mogu* i *treba da* obuhvataju uobičajenu adjudikativnu funkciju, ali, i na njoj zasnovanu, regulativnu funkciju. Prema tome, *mogućnost* i *poželjnost* da sudska vlast vrši regulativnu funkciju ispitivao sam generalno, a ne kako bi ona mogla da se vrši u konkretnom pravosudnom sistemu. Otuda nisam zalazio u pitanje konkretnog ustrojstva sudske vlasti (pa ni domaćeg) i njegovog uticaja na efikasnost i modalitet izvršavanja tih funkcija. Primera radi, jedan jedinstven i strogo hijerarhijski ustrojen sistem sudske vlasti verovatno bi olakšao efikasnije uspostavljanje njene regulativne funkcije. Ipak, i u takvom sistemu ostaje, među ostalim, otvoreno pitanje obaveznosti *horizontalnih* precedenata. I to nije samo pitanje organizaciono-sudske već i pravnoteorijske prirode. Stoga je ovaj tekst, metodološki posmatrano, prilog iz konceptualne i aksiološke, a ne iz empirijske analize institucija.

Najzad, sudsku vlast vrše sudovi, odnosno sudije, ali ukoliko treba da dosegne svoje krajnje granice i iskoristi sve kapacitete vlasti koje ima, sudstvo treba da se samorazumeva kao celina. To znači da svaki pojedinačni sudija ostaje nezavisan u odnosu na druge grane vlasti, kao i na druge sudije. Ali ne treba da bude nezavisan u odnosu na prethodne sudske odluke, baš kao što nije nezavisan u odnosu na zakone. Ukoliko ne govori jednim glasom kada su u pitanju precedenti, sudska vlast ne može da vrši regulativnu

[28] Termin „vlast“ se koristi pod navodnicima jer u Srbiji sudovi formalno nemaju onaj „komad“ vlasti koji u članku nazivam regulativnom funkcijom vlasti, a koju bi imala konstitucionalizovana sudska praksa, kao formalni izvor prava. Osim toga, kontekstualno uslovljen problem je to što se sudstvo u Srbiji ne percipira kao vlast, što su predstavnici sudske vlasti slabo vidljivi i neprepoznati u javnosti kao predstavnici vlasti, napokon, što same sudije u javnosti ne odaju utisak da sami sebe prepoznaju kao nosioce vlasti (Jovanović 2020, 7–8). Ipak, to nije značajno za raspravu čija je poenta da objasni i normativno opravda kapacitet savremene sudske vlasti, *kao takve*, da vrši regulativnu funkciju.

funkciju, slično sudskom veću koje ne bi vršilo adjudikativnu funkciju ako ne bi postojala jedinstvena presuda u konkretnom slučaju nego bi svaki član veća mogao da donosi presudu kakvu želi.[29]

Stoga je vršenje regulativne funkcije sudske vlasti i pitanje pravnopolitičke, ideološke i socijalne prirode. I tako se dolazi do jednog drugačijeg, ali tesno povezanog problema koji je u vezi s temom ove rasprave: *da li će i koliko vlasti sudska vlast u jednom pravnom poretku zaista imati nije pitanje za pravnu teoriju ili za pravnu filozofiju već je pitanje kulturnih, političkih, ekonomskih i socijalnih okolnosti u kojima sudije i sudstvo u celini deluju.* Jer samo ako pripadnici sudske vlasti razviju osobenu kulturu i ideologiju koja im je relativno zajednička i koju solidarno podržavaju, moguće je da sudsku vlast zaista vrše onako *kako mogu i kako bi trebalo da je vrše*. A da li će i na koji način takvu kulturu i ideologiju razviti, to je empirijsko pitanje. Zato je odgovor na pitanje *o uslovima* koji su potrebni da bi sudska vlast postala grana vlasti koja autonomno vrši adjudikativnu i regulativnu funkciju stvar empirijskih, a ne konceptualnih i normativnih istraživanja.

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[29] „Kako bi osigurali da njihovi vlastiti precedenti ostanu na snazi, sudije moraju razviti norme reciprociteta u pogledu poštovanja odluka jednih prema drugima" (Lindquist, Cross 2005, 1165). O jednoj vrsti „zajedničkog" prihvatanja pravila priznanja, kao nužnom uslovu za njegovo postojanje i obaveznost, opširnije sam pisao u Dajović 2010, 255.

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DESIRABILITY OF REGULATIVE FUNCTION OF JUDICIAL POWER

Summary

The article presents the follow–up to a previous article which expounds the thesis that in all developed legal systems court judgments *can be* sources of general rules and standards that will constraint the courts, as decision–makers, and then, consequently, other legal subjects, even if they are not formally recognized as sources of law.

In this article, the normative reasons in favor of performing the regulative function of the judiciary are first presented, with the most important ones being predictability and equality. It is then shown in which direction the regulative function could be performed by the judicial power of a typical continental system, if the judiciary, as a whole, accepts to perform it.

Key words: *Predictability*. – *Equality*. – *Judicial power*. – *Regulative function*. – *Precedent*.

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HUTMANI SRPSKOG SREDNJOVEKOVNOG PRAVA

Tema rada je ustanova hutmana u srpskom srednjovekovnom rudarskom pravu. Prvo pitanje na koje se daje odgovor jeste u kojoj meri je ona plod transplantacije saskih običaja u srpsko pravo. Drugi cilj rada je da se odrede ovlašćenja i dužnosti hutmana, kao i način njihovog izbora ili postavljenja.

Kako rezultati pokazuju, Zakonik o rudnicima despota Stefana poznaje dva instituta hutmana. Prvi je pomoćni organ urbarara, koji sa njim meri zemlju i postavlja granice eksploatacionih polja prilikom dodeljivanja koncesije i prilikom proboja, za šta naplaćuje takse. Verovatno je da ga je postavljao carinik zakupac regalnih prava. Druga ustanova je nadzornik pojedinačnog rudnika, koji evidentira članove rudarskog ortačkog društva, prima njihove uplate troškova, verovatno vodi računa i o pravičnom, urednom i ugovorenom obavljanju ostalih poslova u rudniku, a angažuju ga ortaci.

U radu su primenjeni jezičko, sistemsko i istorijsko tumačenje, uporedni metod i regresivna analiza.

Ključne reči: *Hutman. – Rudarsko pravo. –Zakonik o rudnicima. – Zakonik despota Stefana. – Novo Brdo.*

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1. UVOD

Rudnici srebra i zlata u srpskim zemljama srednjeg veka javljaju se u XIII veku kada su se u te oblasti doselili Sasi. Nemački saski rudarski stručnjaci su u tom ili nešto ranijem periodu bili aktivni i u drugim evropskim zemljama. Osim u Srbiji i u svojoj postojbini Saksoniji, oni su radili i u Češkoj, Ugarskoj, a nešto kasnije u Bosni. U svojim seobama ne donose samo naprednu tehnologiju iskopavanja i obrade rude, već i svoje pravo. Tim normama su regulisani odnosi i instituti koji do tada nisu postojali na našim prostorima. Recipirano rudarsko pravo je u naredna dva veka u Srbiji doživelo značajan razvoj. Na primer, urbarari, zakupci rudnih regalija i sakupljači urbora u češkom pravu, u Srbiji su bili organi vlasti *sui generis* (Katančević 2020a), dok su zakupci rudnika bili carinici (Katančević 2020a, 265–266; o carinicima Katančević 2020b). Izgrađena su posebna pravila ugovora o lemšatu (Katančević 2021, 122–123). Izgleda da je specifičnost srpskog prava i u tome što feudalni gospodari nisu imali pravo na deo iskopane rude sa svoje baštine (Katančević 2020v, 1074–1075). Posle pada srpske države, rudarsko pravo je recipirano u Otomanskom carstvu i primenjivano do gašenja rudarstva na ovim prostorima.

Hutman je jedan od instituta preuzetih iz saskog običajnog u srednjovekovno srpsko pravo. Prema Fajtovom rečniku, „*hutmann*“ znači 1) „*Grubenaufseher*“, „nadzornik rudnika, koji treba da nadzire materijale i stvari“ i 2) „*Steiger*“, „nadzornik“ (Veith 1871, 280).

2. SRPSKI I OTOMANSKI IZVORI

Srpska država je dobila svoju kodifikaciju rudarskog prava na prelazu iz XIV u XV vek (Katančević 2016, 221–234). To je bio Zakonik o rudnicima despota Stefana Lazarevića. Nastao je kao partikularno pravo Novog Brda, tada najrazvijenijeg rudarskog centra Balkana. Zakonik je sačuvan u dva srpska prepisa, koji su otkriveni u HH veku. Ćirilički je stariji i potiče iz XVI stoleća (Radojčić 1962). Latinični je nastao vek kasnije (Ćirković 2005). Posle pada srednjovekovne srpske države, mnoge njegove norme su recipirane i u kasnije otomanske propise (Spaho 1913; Beldiceanu 1964, 243–254, 257–268, 316–323, 354–363; Rizaj 1968, 199–256).

U uvodu Zakonika, među članovima kolegijuma od „dvadeset četvorice dobrih ljudi“ koji su ga napisali, na četvrtom mestu se navodi ime Matka hutmana („матѕка хвтмана“, Radojčić 1962, 37–38; „Matka Hutmana“, Ćirković 2005, 20; u prevodu Zakonika na turski odmah posle njega je i

„Dminko Hutman“, Rizaj 1965, 209). Hutmani su pomenuti i u pet članova Zakonika. Sledi njihov uporedni pregled u ćiriličkom i latiničkom prepisu, prema numeraciji Nikole Radojčića i Sime Ćirkovića:

10. ... Гдѣ сє роупѣ пробїю с рвпами• и срєтоу сє тоуи да стоє доклє погю оурьбарари, и хоутьманы• зарвчивˢшим сє пєчатми цариничьскыми• по ωглєданˢю оурˢбарарˢскємˢ• да нє волна єдна дроугє чтєтоу оучинити, доклє мєра погю•[1] (Радојчић 1962, 40)	Glava 4. ... gde se rupa s’ rupom probie i srětu se, tuy da stoe dokle pojdu vrbarari i hutmani, a zapeçativßi se peçati carinskymi. Po oglědanju vrbararskom da ne volna jeda(n) drugomu ßtetu uçiniti dokle měra pogje.[2] (Ćirković 2005, 21)
14. ... Роупа шоурфь да сє залага закономˢ до срѣдѣ вєчєрь, и да сє личи• а оу срѣдѣ вєчєрь сь оурˢбараровєм ωтрокомь ако залогоу постави оу оурбарара що є жамˢкощь врѣдна• ако моу сє види нєкои кривь жамˢкощь• доклє оучини разлогь сь хоутманом, и сь дїакомь и оу чєтврьтькь до пладнє ако нє би разˢлогь оучинили, и нєплатили• тоуи сє дѣловѣ гоубѣ: ~ [3] (Radojčić 1962, 41)	Glava 8. A rupa ßurf da se zalaga i da liçe po zakonu do srěde veçr a u srědu s’ urbararevem otrokom. Ako zalogu postavi vrbrara ßto ě vrědna zamkoßt, dokle uçini razlog z’ diakom i s hutmanom u çertvr’t’k do pladně. Ako ne bi razlog uçinili i ne platili toy se dělovy gube.[4] (Ćirković 2005, 22)

[1] Prevod: „Gde se rupe probiju s rupama i sretnu se, tu da stoje dokle dođu urbarari i hutmani sa pečatima cariničkim; po pregledanju urbararskom da ne može jedna drugoj štetu učiniti dok mera ne dođe“ (Marković 1985, 15).

[2] Prevod: „...gde se rupa s rupom probije i sretnu se, tu da stoje dokle ne pođu urbarari i hutmani ovlašćeni pečatima cariničkim. Posle urbararskog ogledanja nije dozvoljeno da jedna čini štetu drugoj dok mera ne pođe“ (Ćirković 2005, 42).

[3] Prevod: „Rupa šurf da se zalaže po zakonu do srede uveče, i da se liči, a u sredu uveče sa urbararovim otrokom ako zalogu postavi kod urbarara koliko žamkošt vredi, ako mu se čini da je žamkošt kriv, dok se raspravi sa hutmanom i dijakom i u četvrtak do podne ako se ne bi raspravili i ako ne bi platili, ti se delovi gube“ (Marković 1985, 15).

[4] Prevod: „A rupa šurf da se zalaže po zakonu i javno oglašava do srede uveče, a u sredu s urburarevim otrokom. Ako ostavi kod ubarara zalogu što je vredna koliko žamkošt, dok ne napravi obračun s dijakom i s hutmanom u četvrtak do podne. Ako ne bi napravili obračun i platili, ti delovi se gube“ (Ćirković 2005, 42–43).

17. ... Роупоу мѣрноу или шоурˢфь• кою соу паѵнали гварци• тєрє є была ѡстала, пакє соу почєли ѡпєть ѡны гварци паоунати• или дрѵзѣхь кь сєбѣ припоустили• кто би на що платїа прьвы жамˢкощь, хоутманоу и дїакоу• толико дѣловѣ да има• ако є прьво и много дѣлова има а послѣ да є и мало дѣлова прихватиль• тєрѣ да сє нагє и голѣма роуда• да нє волˢнь рєкїи прьво сьмь има вєкю дѣловѣ• нєхо да сє оупраша, хоутˢмань или оуцєнникь• на що є пръво платїа наипослѣднїи жамˢкощь на оузˢбою• толико и да има дѣловє вєкю на тои дроуга свєдожˢба да сє нє води•[5] (Radojčić 1962, 41–42)	Glava 12. Rupu měrnu koju su paunali guarciy tere byla ostala i pak ju su poçeli opet ony gvarci paunat ili druzěh k' sěbě pripustili, tko bi naßto! platil prwy xam'koßt hutmanu, toy da ima. Ako bi pr'wo i mnogo imali i poslě da e malo poçea, tere da se nagjě golema ruda da ne voln rěky pr'wo s'm wěke ima dělov, neho da se upita hutman ili učnik na ßto e platia naposlědny uzboy toliko i da ima. Vekje na toj druga swědoçba da se ne vodi.[6] (Ćirković 2005, 22)
40. ... Законь є оурˢбарароу коѡм хокю роупомь сваком ˢ да мѣри• коѡм можє болю правдоу показати• за тои да моу нє можє нитко забранить• а да моу сє платєт нємоу, б́• литрѣ динара• а хоутˢманомь, а́• литра а ѡсталї є харˢчь вьс гварˢчки а комоу мѣра ѡда• тьи мѣроу да плати• ...[7] (Radojčić 1962, 48)	[VIII] Zakon' e vrbararom koom hokje rupom svakom da měri koom moxe boljě pravdu pokazati, za toy da mu ne moxe nitko ubraniti, a da mu se plakja: njemu 2. litre dinar i hutmanom litra i ostala spenza gvarka, i komu měru pristupi t'y da plati meru. ...[8] (Ćirković 2005, 26)

[5] Prevod: „Za rupu mernu ili šurf koju su paunali gvarci, te je bila ostala, pa su je počeli opet oni gvarci paunati ili druge k sebi pustili, ko bi na što platio prvi žamkošt hutmanu i dijaku, toliko delova da ima; ako je pre i mnogo delova imao, a posle da je i malo delova prihvatio, pa se nađe bogata ruda, da ne može reći: pre sam imao više delova, nego da se upita hutman ili ucenik — na što je prvo platio poslednji žamkošt na uzboju, toliko i da ima delova; više o tome druga svedodžba da se ne vodi“ (Marković 1985, 16).

[6] Prevod: „Rupu koja ima meru ili šurf, koju su paunali gvarci, pa je bila napuštena, a onda su je ti gvarci počeli ponovo paunati, ili su druge sebi pripustili, da ima to, na što bi ko platio prvi žamkošt hutmanu. Ako bi prethodno i mnogo imao i posle da je malo počeo, pa se nađe velika ruda, ne sme da kaže: prije sam imao više delova, nego da se pita hutmana ili ucenika na što je platio kod poslednjeg uzboja, toliko i da ima. Drugo svedočenje o tome da se ne traži“ (Ćirković 2005, 43).

41. ... Роупє є за, и́• сєжˢнь платє • и́ • оунˢчь• и ωбѣдˢ хоутманомь• а за вєкıє вѣрованиє• а за поновлıєнїє ωсмицоу по днѣвє• законˢ моу є, ѕ҃д• динарє и ωбѣд хоутманом• ...[9] (Radojčić 1962, 48)	[IX] I za vĕnçanje rupe za 8 sexan', zakon mu e 8 unç i oběd hutmanom za vekje věrovanie. A za ponovljenje osmice pod d'nevi ѕ҃D (64) dinar i oběd hutmanom ...[10] (Ćirković 2005, 27)

Kako se može videti, u delovima u kojima se govori o hutmanu postoji veliko podudaranje dva prepisa, što nije uvek slučaj (npr. Katančević 2021, 121). To ukazuje na autentičnost pravila u sačuvanim tekstovima. U članu 10 ćiriličkog, odnosno glavi 4 latiničkog prepisa, reč je o susretanju van polja koja su im dodeljena, što nedvosmisleno proističe iz prethodnog teksta (Radojčić 1962, 40; prevod Marković 1985, 15; Ćirković 2005, 22; prevod Ćirković 2005, 42). Naime, svaki rudnik bi dobijao koncesiju odnosno isključivo pravo da otkopava rudu na određenoj izmerenoj i obeleženoj površini. Mogao je da je otkopava i na susednom zemljištu, na kome ne postoji takva koncesija. U citiranom delu Zakonika propisuje se postupanje u slučaju „proboja rupa" na zemljištu na kome pravo otkopavanja i eksploatacije nije dodeljeno.

Osim u Zakoniku o rudnicima, hutmani su pomenuti i na drugim mestima. Prema Diniću, tridesetih godina XV veka, među 120 dužnika Mihaila Lukarevića u Novom Brdu zabeleženo je i deset hutmana (Dinić 1955, 12–13; Dinić 1962, 84). Iako ne govori mnogo o položaju i nadležnosti, to ukazuje na njihovu brojnost. Na primer, na istom mestu se pominje samo jedan dužnik urbarar (Dinić 1955, 12–13). Izvor potvrđuje i da je hutman bilo posebno zanimanje jer se pominje uz druga, koja su bila povezana sa rudarskom proizvodnjom, a kojima se su bavili ostali Lukarevićevi debitori.

[7] Prevod: „Zakon je urbararu – kojom hoće rupom, svakom da meri, kojom može bolju pravdu pokazati, to da mu ne može niko zabraniti, a da mu se plate 2 litre dinara, a hutmanu 1 litra, a ostali je harč sav gvarački, a kome mera da – taj meru da plati..." (Marković 1985, 19).

[8] Prevod: „Zakon o urbararima. Kojom god hoće rupom svakom da meri, gde može bolje pravdu pokazati, za to da mu ne može niko zabraniti, a da mu se plaća 2 litre dinara, i hutmanima litra i ostali trošak gvarka, kome meru utvrdi taj da plati meru..." (Ćirković 2005, 48).

[9] Prevod: „Rupi je za 8 sežanja, plate 8 unči i obed hutmanu a za veće verovanje, a za ponovljenje osmice po danu zakon mu je 24 dinara i obed hutmanu..." (Marković 1985, 19).

[10] Prevod: „I za venčanje, rupe za 8 sežanja, zakon mu je 8 unča i obed hutmanima za bolje verovanje. A za ponavljanje osmice po danu 64 dinara i obed hutmanima i da ima u godištu 2 haišta, ni da mu se ništa od njih ne uzme" (Ćirković 2005, 48).

Tema ovog rada nisu recepcija i razvoj instituta hutmana u otomanskom pravu. Uprkos tome, zbog regresivne analize, koristiće se i dva izvora iz otomanskog perioda.

Prvi od njih je deo dokumenta, verovatno iz 1536. godine (Begović 1971, 4 fn. 6) koji sadrži objašnjenje pojedinih rudarskih termina. Ovde je dat prevod Fehima Spaha:

Kanuni i majdansko nazivlje... „*Glavara svih radnika u rovu i izvan rova zovu hutman. On dođe i od dioničara rudnika uzme, što spada na njih prema dijelovima i svake sedmice dade radnicima. Njihova je služba pravičnost i povjerenje. ...Kada bude dosta rude i treba je dijeliti, onda hutman obavjesti emina i ćatiba, kao i dioničare u rovu. Onda oni svi zajedno dođu i dijele*“ (Spaho 1913, 167–168).

Drugi izvor je znatno kasniji. Reč je prepisu svojevrsnog rečnika rudarske terminologije na otomanskom turskom jeziku (Skarić 1936), koji je za potrebe nadležnih kadija nastao 1751. ili 1752. godine (Skarić 1936, 5). Tu se termin „hutman“, u Skarićevom prevodu, objašnjava na sledeći način:

„...ovo je čovjek, koga rudari izaberu i šalju ga, kada nastane kakav spor, pa se ne može pouzdati u šafara i izaslanika. On (hutman) dođe k rupi i upozna se sa sporom, pa prema nahođaju napravi izvještaj. On je sudija svih rudara, pa se oni obraćaju njemu, kada se dogodi što, što se odnosi na rudnik“ (Skarić 1936, 19).

3. UPOREDNO PRAVO

Jedan od najstarijih zakonskih spomenika saskog rudarskog prava jeste povelja ugarskog kralja Bele IV Arpadovića (1235–1270) Banskoj Šćavnici (*Schemnitz, Schebnitz, Selmecbánya, Banská Štiavnica*) u današnjoj Slovačkoj. U tom izvoru se ne pominju hutmani, ali postoji donekle sličan institut. U članu 15 šćavničkog prava propisuje se da, ako se dva rudnika sretnu, posao treba da stane dok ne dođu zakleti i starešina rudnika („*die geschworenn, vnd Perckmaister*“, *Codex diplomaticus Arpadianus continuatus* 1862, 225), koji dalje postupaju. Osim toga, čini se da zakleti imaju određene nadležnosti prilikom „venčanja rupe“, odnosno postavljanja međa rudnika („maršana“, „*Marscheid*“, „*marschayd*“). Tako se u članu 2 kaže da se ne može osporiti ono što dodele zakleti i starešina rudnika pod pečatom grada (u prepisu u *Codex diplomaticus Arpadianus continuatus* 1862, 220, ne pominju se zakleti i starešina, ali se to čini u onome koji je objavljen u Kachelmann 1855, 187), a u članu 12 se propisuje da zakleti i starešina rudnika postavljaju međe (*Codex diplomaticus Arpadianus continuatus* 1862, 224).

Međutim, postoje i razlike između ugarskih zakletih i srpskih hutmana. Tako, prema prvom članu šćavničkog prava, starešina rudnika („*Perckmaister*“) mora da postavi „jednog zakletog delitelja, za potrebe grada“ („*einen gesworen tailer, noch der Statt nwcz*“, *Codex diplomaticus Arpadianus continuatus* 1862, 220). U srpskom pravu nema starešine rudnika koji bi mogao da imenuje hutmane. Njih su u XVIII veku na našim prostorima birali rudari, a nema podataka kako je to činjeno u srednjem veku. Osim toga, prema povelji Bele IV, zakleti u ugarskom pravu ne sakupljaju žamkošt (trošak rudarskog društva) od ortaka niti vode evidenciju o njihovim udelima.

Hutmani se pominju u frajberškom pravu. U članu 11 starijeg rudarskog prava za Frajberg piše da ukoliko neko od rudara pronađe rudu, gvarci „mogu postaviti hutmane“ („*mogen hutluthe seczen*“), koji bi vodili računa o udelima gvaraka i o tome davali obaveštenja starešini rudnika pod zakletvom (A 11, *Urkundenbuch der Stadt Freiburg in Sachsen* 1886, 270). U mlađem frajberškom pravu propisuje se zabrana najvišem starešini rudnika, davaocu koncesije ili službeniku da na štolni ili izmerenom odnosno ograničenom eksploatacionom polju postavlja nadzornika („*styger*“) ili hutmana, protiv volje gvaraka (V 13, *Urkundenbuch der Stadt Freiburg in Sachsen* 1886, 289). Istim pravnim spomenikom je predviđeno da, u slučaju da se obeležavaju polja dva susedna rudnika, gvarci, ako tako žele, mogu uzeti nadzornika („*styger*“), „koji je častan čovek“ (V 18, *Urkundenbuch der Stadt Freiburg in Sachsen* 1886, 293). U članu 40, gde se pominju delikti i novčana kazna, kao učinioci se još jednom pominju i hutmani i štajgeri (V 40, *Urkundenbuch der Stadt Freiburg in Sachsen* 1886, 293). Iako bi se obe reči prevele na srpski kao „nadzornik“, izgeda da u Frajbergu hutmani i štajgeri nisu bili isto. Hutmani su, kao i u srpskom pravu, vodili računa o svojini nad delovima rudnika. Razlika je u tome što postavljanje hutmana nije bilo obavezno i oni nisu imali nikakvu ulogu u merenju i dodeljivanju određene parcele za eksploataciju. Nisu imali nadležnosti u vezi sa „probojem rupa“ niti im se plaćao žamkošt. Tako se čini da nisu imali nikakva javna ovlašćenja.

Iako je povelja Vaclava I Pšemislovića (1230–1253) češkom rudarskom mestu Jihlavi (*Iglau*, *Jihlava*) iz sredine XIII veka takođe nastala pod uticajem saskog prava, u njoj nema pomena hutmana. Govori se o zakletima („*gesworn*“, „*scheppfen*“, „*schhephen*“, „*jurati*“), koji sa urbararima dodeljuju pravo na kopanje rude na određenoj površini (A I 1, B I 1, Zycha 1900, 3, 8) i u napuštenom rudniku (A III 7, Zycha 1900, 4), sa čijim znanjem urbarari[11] donose propise (A IX 17, Zycha 1900, 7) i čija izjava ima apsolutnu dokaznu

[11] Treba imati u vidu da su u oba izvora nastala u Češkoj urbarari ono što su u Srbiji tog vremena bili carinici, odnosno zakupci urbora i njegovi sakupljači.

snagu (B XI 19, Zycha 1900, 17). Za razliku od srpskih hutmana, njima se ne plaća žamkošt niti o njemu vode evidenciju, kao ni o udelima ortaka. Na mestu na kome se uređuje postupanje prilikom proboja (B IX 26, Zycha 1900, 16) kaže se da ih rešavaju četvorica časnih ljudi, za koje se ne upotrebljavaju termini koji se koriste za zaklete. Dok se problem ne reši, rudnike koji su se sreli treba držati pod nadzorom („*reservari debet sub custodia*“, „*mit der heute pehalten*“, B IX 26, Zycha 1900, 16). Međutim, ne kaže se ništa o onome ko nadzor vrši.

Jus regale montanorum, povelja Vaclava II Pšemislovića (1278–1305) Kutnoj Hori (*Kuttenberg, Kutná Hora*), izdata oko 1300. godine, najdetaljnije uređuje institut hutmana (I 12, Zycha 1900, 100–103) od svih pomenutih kodifikacija. U stilu klasičnih rimskih jurisprudenata, prvo se daje definicija i etimologija termina „*custodes*“, odnosno „*hutleuten*“ (I 12 I 1, Zycha 1900, 100–101). Biraju ih ortaci od sposobnih i uglednih ljudi. Hutmani su polagali zakletvu, bili predstavljani urbararu i imali pravo na trideset drugi deo dobijene rude u rudniku u kome su radili. Taj deo bi gubili ukoliko bi „prestupili pravo ili svoju dužnost obavljali nemarno“ (I 12 I 2, Zycha 1900, 100–101). Postoji više vrsta kustosa, nadzemni (na ulazu u rudnik), podzemni (u rudniku) i oni koji nadgledaju topionice. (I 12 I 4, Zycha 1900, 100–101). Dužnost nadzornika je da vodi računa o tome da radnici u rudniku ispravno i kvalitetno obavljaju svoj posao, da ne kradu rudu, da dolaze na posao, da rade određeni broj sati i da optužuje one koji krše pravila s tim u vezi (I 12 I 5–9, Zycha 1900, 100–103). Sličan zadatak imaju i hutmani topionica (I 12 I 10–12, Zycha 1900, 102–103).

U istom izvoru pominje se posebna služba štajgera („*scansor*“, „*steiger*“, I 9, Zycha 1900, 92–96). Postavljali su ih urbarari u ime kralja, radi koristi grada (I 9 I 1, Zycha 1900, 92–93). Dužnost im je bila da danonoćno nadziru sve rudnike u mestu (I 9 I 2, Zycha 1900, 92–93, 95). Kako je njihova služba zahtevna, za štajgere se postavljaju sposobne i stručne ličnosti, koje polažu zakletvu (I 9 IV 7, Zycha 1900, 96–97). Po nalogu urbarara, postupaju prilikom otkopavanja rude između granica dva susedna rudnika (I 9 III 4, Zycha 1900, 94–95).

Hutmane Kutne Hore su birali članovi rudarskog društva, imali su pravo na udeo u dobiti i vodili su računa o kvalitetu i tačnosti obavljanja poslova u rudniku i topionici. Nema direktnih potvrda da je to važilo za njih u Srbiji srednjeg veka. Štajgere je u tom češkom mestu postavljao urbarar i oni su polagali zakletvu, a nadležnost im je bila da nadziru sve rudnike u okolini grada. Ni hutmani ni štajgeri nisu, kao srpski hutmani, učestovali u merenju eksploatacionog polja niti su vodili evidenciju o udelima ortaka. S druge strane, kutnohorski štajgeri su, slično novobrdskim hutmanima, razgraničavali rudnike kada kopaju rudu van svog polja.

4. INTERPRETACIJE

U literaturi koja se bavi srpskim srednjovekovnim rudarstvom nailazi se na nekoliko stavova o nadležnosti i položaju hutmana.

Vladislav Skarić je institut definisao kao „družinski činovnik, koji nadzire rad u rudniku; bio je ujedno i varak u družini, a, čini se, i njen pretsjednik; njega biraju varkovi; u nekim sporovima je on i sudija; podložan je urbareru; novijeg vremena bila su u Kreševu 2 hutmana: veliki nad više rudnika, a mali u jednom rudniku" (Skarić 1939, 106; slično Skarić 1939, 34). Zaključak je izveo samo na osnovu turskih izvora jer u to vreme još uvek nisu bili otkriveni prepisi Zakonika o rudnicima na srpskom jeziku. Prema citiranom tekstu tog pravnog spomenika, teško bi se moglo zaključiti da je hutman ortak (varak), činovnik ili upravnik društva o čijim interesima odlučuje prilikom merenja i ograničavanja eksploatacionog polja i kome naplaćuje taksu. Osim toga, u srpskim izvorima nema pomena ni o tome da hutman rešava bilo kakve sporove. Pre će biti da novobrdski hutman prilikom „proboja" razgraničava rudnike koji su se sreli „ni na čijoj zemlji", zajedno sa urbararom, onako kako im odmerava parcelu prilikom davanja koncesije. Teško je i da bi jedan od ortaka imao nadležnost da vodi evidenciju o udelima ostalih. Nema podataka o tome da ga biraju ortaci, ali izgleda da jeste bio pomoćni organ urbararu. Čini se da ono što Skarić tvrdi pre odgovara otomanskom ili češkom nego srpskom pravu. Da hutmani nisu bili „pretsjednici" rudarskih ortakluka niti mogli da odlučuju o organizaciji posla u rudniku, već samo da ga nadziru, govore i norme o lemšatu sa lenhavarima (Radojčić 1962, 42, 45–46; prevod Marković 1985, 16, 18; Ćirković 2005, 22, 25; prevod Ćirković 2005, 43, 46), u kojima se hutmani ne pominju. Ipak, vredno je Skarićevo svedočanstvo (navedeno i u Skarić 1939, 36) da su postojala dva hutmana, te da je jedan nadzirao celo rudarsko područje, a drugi samo pojedini rudnik.

Dinić je hutmana definisao kao „nastojnika nad ceove", kako je u njegovo vreme moglo da se čuje od stanovnika okoline Novog Brda (Dinić 1962, 84). Iako šturo, to je lepo svedočanstvo da se u narodu sačuvala uspomena na njih i da predanje nije iskoračilo van istorijske istine.

Radojčić ne definiše termin „hutman" već citira rečnik braće Grim, u kojem se ta reč objašnjava kao „*einer der hütet, die aufsicht führt, hüter im allgemeinen sinne...; im bergwerk der steiger oder aufseher einer bergwerksgrube*" („onaj koji nadzire, koji vodi nadzor, nadzornik u opštem značenju...; u rudarstvu štajger ili nadzornik rudnika") (Grimm, Grimm 1877, 1992–1993), te dalje upućuje na propise kutnohorskog prava o hutmanima (Radojčić 1962, 87).

Za Begovića je hutman bio „predstavnik družine“ (Begović 1971, 8), njen službenik (Begović 1971, 14), on „učestvuje u odmeravanju rudnog polja, u rešavanju sporova o proboju jednog rova u tuđi rov. Brine se o pribiranju žamkošta i preduzimanju potrebnih mera protiv onih udrugara koji tu obavezu nisu na vreme ispunili“ (Begović 1971, 16). Begović je svakako u pravu u pogledu nadležnosti odmeravanja polja i skupljanja troškova ortakluka. Međutim, u srpskim izvorima ne piše da hutman treba da preduzima mere protiv ortaka koji neuredno plaćaju žamkošt. Prema slovu Zakonika, on o tome samo vodi evidenciju. Tezi o rešavanju sporova mogu se suprotstaviti isti argumenti kao i Skariću.

Biljana Marković taj institut objašnjava kao „predstavnik rudarske družine, ujedno i njen član, gvark“ (Marković 1985, 15). Ona posebno naglašava da su hutmani „predstavnici gvaračkih družina“ (Marković 1985, 49) u rešavanju sporova o „proboju“. Stavovi podležu istim prigovorima kao i Skarićevi.

Ćirković daje sledeće tumačenje: „Hutmann, označava stručno lice, nadzornika, u službi vlasnika delova. Njegova je dužnost ograničena na rudnik, evidentira i obračunava troškove, zastupa družinu za koju radi. Hutmani se javljaju kad treba rešavati sporove i nalaziti tehnička rešenja“ (Ćirković 2005, 36; slično Ćirković 2002, 89–90), oni su „stručni rukovodioci pojedinih cehova, nadzornici u službi gvarkova“ (Ćirković 2002, 89). On veruje da se prilikom proboja hutmani javljaju kao „predstavnici zainteresovanih strana“ (Ćirković 2005, 55; slično Ćirković 2002, 89). On ispravno primećuje da je reč o stručnoj osobi, koja nadzire i evidentira trošak. Međutim, nigde u izvorima ne stoji da hutman zastupa ortakluk niti da rešava sporove. Takođe, ne dovodi se u vezu sa pronalaženjem tehničkih rešenja.

Prema Zakoniku o rudnicima, hutmani imaju tri nadležnosti: evidencija ortačkih delova i primanje uplata žamkošta; merenje i obeležavanje parcele prilikom dodele koncesije; isto to kod proširenja rudnika prilikom „proboja“. Osim u prvom slučaju, izgleda da deluju kao pomoćni organi urbarara, a za obavljanje nadležnosti naplaćuju taksu. Samo su prilikom postavljanja međa posle „proboja“ morali da budu „zaručeni pečatima carinika“, što Ćirković tumači kao „imajući pečat kao znak ovlašćenja carinika“ (Ćirković 2005, 55). Da hutmani nisu rešavli sporove govori i to da nisu navedeni u članu VI ćiriličkog prepisa Zakonika o rudnicima (Radojčić 1962, 52; prevod Marković 1985, 21), kojim se uređuje sudska nadležnost u Novom Brdu. Kako se vidi u uporednom pravu, tamo gde su postojali posebni organi za merenje i obeležavanje zemlje prilikom davanja koncesije ili „proboja“, oni bi polagali zakletve i ne bi ih birali članovi ortakluka već viši organi vlasti. Kako je vladar prenosio deo vlasti u rudnicima na carinike zakupce regalija,

a hutmani vršili deo nadležnosti uz ovlašćenje poslednjih, odnosno uz njihov pečat, moglo bi se pretpostaviti da su hutmane u Novom Brdu postavljali carinici.

Nema dikretnih dokaza da su hutmani vršili nadzor nad radom u rudniku. Međutim, iz Zakonika sledi da su ortaci njima plaćali ukupan trošak i da su hutmani vodili evidenciju o udelima pojedinih vlasnika. Prema slovu Zakonika, nju nisu vodili urbarari, iako su beležili različita druga prava i pravne činjenice (Katančević 2020a, 271–274). U tom segmentu, hutmani teško da su mogli biti pomoćni organi urbarara. Pre bi bilo da je reč o drugoj vrsti nadzornika koji su vodili računa pre svega o uplatama, isplatama i finansijskim interesima ortaka u neposrednoj rudarskoj proizvodnji, slično hutmanima kutnohorskog prava. Takvog hutmana bi birali ortaci, iako on ne bi bio član društva. Kako se iz uporednog prava vidi, moguća je razlika između javnih nadzornika, organa vlasti i privatnih nadzornika, službenika u rudniku ili topionici. Prvi su imali nadležnost u premeru eksploatacionog polja prilikom davanja koncesije i „proboja", polagali su zakletvu i postavljali su ih viši organi vlasti. To su bili zakleti u šćavničkom („*die geschworenn*") i jihlavskom („*gesworn*", „*scheppfen*", „*schhephen*", „*jurati*") i štajgeri u kutnohorskom pravu („*scansor*", „*steiger*"). Drugi su bili uposlenici rudarskog društva, koji su vodili računa o njegovom interesu. To su bili kustosi ili hutmani Kutne Hore. Čini se da je tako bilo i u srpskom srednjovekovnom pravu, te da su to različiti pojmovi za koje se upotrebljavao isti termin, koji, po svoj prilici, nije imao tehničko značenje u vreme seobe Sasa, pošto njegova upotreba oscilira u uporednim izvorima. U prilog tezi o dva instituta sa istim imenom govori i činjenica koju ističe Skarić o dva kreševska hutmana – „veliki nad više rudnika, a mali u jednom rudniku" (Skarić 1939, 106).

5. ZAKLJUČAK

Sasi su u XIII veku doneli u srednjovekovnu Srbiju rudarsku terminologiju i rudarske institute, koji su bili uređeni običajima. Izgleda da ustanova hutmana – nadzornika nije bila dovoljno uobličena jer postoje razlike između kodifikacija rudarskih prava nastalih na osnovu saskih običaja. Hutmani su imali svoj *sui generis* razvoj u srednjovekovnoj Srbiji. U Zakoniku o rudnicima despota Stefana, donetom za Novo Brdo, sreću se dva instituta hutmana, odnosno različite ustanove označene homonimima, što se može potvrditi i regresivnom analizom kasnijeg uređenja rudnika pod otomanskom vlašću. Prvi od njih je nadzornik, pomoćni organ urbarara, koji zajedno sa njim meri zemlju i postavlja granice parcele prilikom dodeljivanja koncesije i

„proboja“, za šta naplaćuje takse. Verovatno ga je postavljao carinik, odnosno zakupac regalnih prava. Druga ustanova je nadzornik pojedinačnog rudnika, koji prema slovu Zakonika vodi računa o evidentiranju udela u rudarskom ortačkom društvu i o troškovima eksploatacije, koje mu plaćaju ortaci. Iako za to nema izvora, uporednopravnom metodom se može zaključiti da se on starao i o pravičnom, urednom i ugovorenom obavljanju ostalih poslova u rudniku, a da su ga postavljali ortaci.

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HUTMAN OF SERBIAN MEDIEVAL LAW

Summary

The subject of the paper is the institute of hutman in Serbian medieval mining law. The first question to be answered is related to the extent of transplantation of the institute from Saxon customs to Serbian written law. The second aim is the definition of the competence of hutman and the way he was appointed.

The results indicate the Despot Stefan's Mining Code recognized two different institutes of hutman. The first was auxiliary service to urbarar, measuring and marking the land in the procedure of granting mining concessions and after breaking one mine into another, charging a fee. He was probably appointed by tax collectors. The second one is the supervisor of a mine, entitled to collect the payment from the owners of its shares, to record it and presumably to take care of correct conducting all kind of activities in the mine. Most likely he was employed by the shareholders of the mine partnership.

The linguistic, systemic, and historical interpretation is applied as well as the comparative method and regressive analysis.

Key words: *Hutmann. – Mining law. – Despot Stefan's Code. – Novo Brdo Code. – Mining Codification*.

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*IZBORI ZA NARODNU SKUPŠTINU KRALJEVINE JUGOSLAVIJE, ODRŽANI 5. MAJA 1935. GODINE***

U radu se analiziraju političke prilike u Kraljevini Jugoslaviji koje su prethodile izborima za Narodnu skupštinu koji su održani 5. maja 1935. godine, kao i rezultati tih izbora. Na osnovu dostupnih istorijskih izvora, autor daje egzaktne podatke o rezultatima izbora i analizira širi kontekst u kome su deluovale političke stranke. Na osnovu sprovedenog istraživanja, autor zaključuje da vođstvo udružene opozicije u Kraljevini Jugoslaviji, demokratsko bez sumnje, nije shvatilo svoj zadatak i ulogu u izgradnji demokratije.

Ključne reči: *Kraljevina Jugoslavija – Narodna skupština – Izbori – 1935. godina – Udružena opozicija – Demokratija.*

1. UVOD

Izbori koji su u Kraljevini Jugoslaviji sprovedeni 5. maja 1935. godine bili su veoma značajan i indikativan događaj u istoriji naših naroda. U njima su došli do izražaja političko buđenje i izuzetna hrabrost u iskazivanju visokog stepena ljudskog dostojanstva ukupnog potencijala birača koji su nastojali da se izbore za pozitivne društvene promene. Ogroman broj birača tada

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se, i pored javnog načina glasanja, dajući svoj glas zemaljskoj kandidatskoj listi udružene opozicije, faktički izjasnio protiv vladajućeg političkog režima, mada oni kojima su dati glasovi nisu znali šta da rade sa osvojenim mandatima.

O značaju tog političkog događaja, i za Jugoslaviju i za zemlje Jugoistočne Evrope (V. Z. 1935), pisali su mnogi listovi tog vremena. Na primer, *Imanite* 11. maja 1935. godine, u članku pod naslovom „Uprkos terora opozicija je dobila blizu milion glasova", objavljuje: „Potpuni rezultati izbora potvrđuju veliki uspeh opozicije. I pored svih sredstava ugnjetavanja srpske vlade, opozicija je uspela da dobije 983.248 glasova. Vlada je izgubila bitku u Hrvatskoj i Dalmaciji. Ovaj uspeh nije lično uspeh g. Mačeka. Glasanje za opoziciju dokazuje da je veliki deo jugoslovenskog naroda rešen da razbije vojnu diktaturu. Izbori od 5. maja prvorazrednog su značaja jer dokazuju da obruč terora postepeno popušta i narod ustaje i protestuje protiv ugnjetavanja. Jugoslovenski fašizam je pretrpeo potpuni poraz na privrednom polju. U isto vreme jugoslovenski izbori su i poraz fašizma u Jugoslaviji. Ovakav događaj imaće ozbiljnih posledica u balkanskim zemljama, on će dati podstreka radnicima i ugnjetenim narodima Balkana u njihovoj borbi za oslobođenje."[2]

Elefreton Vima, od 16. maja iste godine, objavila je dopis iz Beča u kome piše: „Rezultati jugoslovenskih izbora, kada su ovde bili poznati, pojačali su optimizam izvesnih balkanskih krugova odnosno evolucije situacije u Jugoistočnoj Evropi i stavili su na dnevni red probleme za koje se smatralo da su rešeni. Jedan od tih problema je sudbina diktatorskog režima u Jugoslaviji. Diktatura od 1929. godine sahranjena je moralno, jer nije uspela da dobije potpuno poverenje jugoslovenskih naroda. Sahranjena je neodobravanjem velikog dela jugoslovenskih glasača koje se ispoljilo na izborima od 5. maja, uprkos nemogućnosti manifestovanja slobodne volje naroda. Uprkos svih mera koje je vlada preduzela, 983.390 birača imalo je dovoljno moralne hrabrosti da osudi režim i kaže da oni ostaju verni svojim političkim idealima, a koje je diktatura htela da uništi. Moralna vrednost tih glasova je odista bez presedana u izbornim analima. Zaključak tih izbora je vrlo jasan. Jugoslovenski narod, u svojoj velikoj većini, izjasnio se protiv diktatorskog režima i on bi ga svojim glasovima i oborio da su slobode, koje je g. Jevtić dao, bile malo veće ili da je odobreno tajno glasanje. Petogodišnji napori za konsolidovanje toga poretka ostali su bezuspešni."[3]

[2] Arhiv Državnog sekretarijata inostranih poslova, Odeljenje za štampu, A-200.

[3] *Ibid*., A-194.

Imanite od 22. juna 1935. godine konstatuje: „Danas se u Jugoslaviji vodi borba između narodnih snaga i vlastodržaca koji žele da održe apsolutizam."[1]

Popiler od 15. maja iste godine u članku „Posle izbora u Jugoslaviji" piše: „Izbori su dokazali da je zemlja sa opozicijom. Da bi se ona uništila potrebno bi bilo, u najmanju ruku, ukloniti polovinu jugoslovenskog naroda. Ovakav jedan postupak izgleda čak i beogradskim diktatorima smeo. Pošto je nemoguće potpuno uništiti opoziciju, jedino ostaje da se dođe sa njom do kompromisa. Posle izbora od 5. maja ovaj kompromis je postao veoma težak za ostvarenje i ne izgleda ni u kom slučaju da je g. Jevtić dorastao da ga ostvari. Mi se pitamo koji će beogradski vlastodržac moći na sebe da uzme takav jedan zadatak od kojega zavisi budućnost Jugoslavije."[2]

Popiler od 22. juna 1935. godine objavio je komentar A. Lerua: „Izbori od 5. maja, koji su trebalo da konsoliduju sistem koji je proizašao iz državnog udara od 6. januara 1929. godine, naneli su mu, naprotiv, smrtni udar. Beogradska birokratija pokušala je da se spase pooštravajući teror kako nad širokim slojevima tako i nad intelektualnom elitom."[3]

Ob od 21. juna iste godine u članku L. Ternoara zaključuje da je diktatura u Jugoslaviji uvek remetila stabilnost Balkana i da će vlada koja će doći posle g. Jevtića trebati da sprovede likvidaciju starog režima. Na izborima od 5. maja velike mase naroda manifestovale su svoje nestrpljenje, uprkos terora. Manifestovale su svoju volju za popuštanjem režimskih stega.

List *Slovak*, iz Bratislave, 8. juna 1935. godine, u dopisu iz Beograda piše: „Dogodilo se ono što je svako očekivao. Jevtićev izborni teror doneo je plod, koji bratskoj državi Jugoslaviji svakako neće biti od koristi. Državnička nesposobnost Jevtića i njegovog bloka, koji su samo radi toga da bi ostali na vlasti, postavili partijske interese iznad državnih, skrenula je sada pažnju već i diplomatskog sveta na ono što se događa u Jugoslaviji. Opozicija u Jugoslaviji ne sastoji se samo od Hrvata, nego i od Srba u Srbiji, dakle, od najkonzervativnije srpske grupe."

Realnu političku procenu vremena u kome su se ovi izbori sprovodili dao je i vođa Zemljoradničke stranke Jovan Jovanović saradniku rumunskog lista *Adeverul*:

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1 *Ibid.*, A-195.

4 *Ibid.*, A-192.

3 *Ibid.*, A-192, A-194.

„Široki slojevi su se proletarizovali. Za sada se radi o pacifističkoj revoluciji koja treba da se manifestuje u izbornim rezultatima. Ako masama bude omogućeno da se izjasne, može ova legalna revolucija da pređe u nelegalnu.“[1]

2. IZBORI ZA NARODNU SKUPŠTINU

A evo i samog toka izbora. U Jugoslaviiji, posle ubistva kralja Aleksandra Karađorđevića 9. novembra 1934. godine od tada najreakcionarnijih snaga u svetu i u nas, sveprisutan zahtev je bio: sloboda, demokratija. Zvanična državna Jugoslovenska nacionalna stranka izgubila je veći značaj u javnom životu, a režim je bio primoran da ustupa pred aktiviranjem vođa buržoaskih stranaka, koje su bile zabranjene uvođenjem šestojanuarskog režima.

Vlada Bogoljuba Jevtića, koju su kraljevski namesnici postavili 20. decembra 1934. godine, nastojala je da se predstavi kao vlada kompromisa i pomirljivosti. U njenom sastavu našle su se i ličnosti iz redova vanparlamentarne i nacionalnosporazumaške opozicije. Ona je, uskoro po formiranju, želela da raspiše nove parlamentarne izbore da bi potvrdila svoju politiku dobijanjem narodnog poverenja. U svojoj Deklaraciji, koju je 3. januara 1935. godine na III redovnom sastanku Narodne skupštine pročitao predsednik Ministarskog saveta, vlada je naglasila da želi da prihvati saradnju svih onih koji budu „istim duhom vođeni“, bez obzira na to na kojoj su se strani nalazili u ranijoj političkoj prošlosti. Deklaracijom je obećavala da će se banovine bolje organizovati kao upravne i samoupravne jedinice, da će se ekonomsko-finansijskim pitanjima, a posebno poljoprivredi, posvetiti pažnja i da će se nastojati da se poresko opterećenje dovede u srazmeru sa poresko-platežnim mogućnostima građana.[2] Tako je vlada, raspisivanjem parlamentarnih izbora 6. februara 1935. godine i raspuštanjem Narodne skupštine izabrane 8. novembra 1931. godine, želela da označi kraj jednog i početak novog, otvorenijeg političkog perioda.

Princ Pavle Karađorđević, prva ličnost Namesništva, izjavio je povodom raspisanih izbora: „Ako narod bude imao samo strpljenja i pričeka do 5. maja, ja sam uveren da će imati svi podjednaku priliku da učestvuju u predstojećim poslaničkim izborima. Upravljanje zemljom ne zavisi više od volje i kaprisa dvojice ili trojice ljudi. U jednoj zemlji koja je sastavljena od toliko raznorodnih elemenata kao što je Jugoslavija moramo imati podjednako pravo u vođenju

[1] *Ibid.*, A-200.

[2] Stenografske beleške Narodne skupštine Kraljevine Jugoslavije, knj. 1, Beograd 1935, 90.

državnih poslova ako se želi da zemlja ostane složna i ujedinjena. To je razlog zbog kojeg je Namesništvo sankcionisalo izbore za maj. Ja sam uveren da će Hrvati i Slovenci uvideti mudru potrebu o tome da ostanu ujedinjeni sa Srbima radije nego da pokušaju da se odvoje i prihvate neku tuđinsku vlast. Iznad svega ja se nadam da će oni uvideti da je besmisleno prolevati krv i upotrebljavati oružje u cilju ostvarenja svojih težnji."[3]

Deputacija građana prestonice, koju je predvodio predsednik beogradske opštine Vlada Ilić sa gradskim većnicima, predložila je, 13. februara, predsedniku Ministarskog saveta Bogoljubu Jevtiću da bude nosilac vladine zemaljske kandidatske liste.[4] Od tada su B. Jevtiću dolazili da se predstave budući poslanički kandidati, a bivši su se vraćali u svoje srezove radi izborne agitacije.

Izbornim proglasom, koji je vlada 25. februara konačno utvrdila, a ministar poljoprivrede dr Dragutin Janković 26. februara pročitao u radijskom obraćanju, Vlada je pozvala jugoslovenski narod da odlučno i jasno kaže svoju reč o budućnosti Jugoslavije i napretku cele nacije. U Proglasu je dalje stajalo da Kraljevina Jugoslavija predstavlja ostvareni jugoslovenski nacionalni ideal, da su narodno jedinstvo i državna celina neprikosnovena načela unutardržavnog života, a da svako organizovanje javnog života na plemenskoj, pokrajinskoj ili verskoj osnovi predstavlja opasnost po zemlju, pošto bivše političke partije, rastrojene i pokrajinski razdvojene, ne mogu obezbediti zdrav i konstruktivan javni život. Naglašeno je, takođe, da su nosilac liste B. Jevtić i kandidati na njegovoj listi odlučni protivnici separatističkih i prevratničkih težnji.

Vlada je, u borbi za birače, obećavala da će smanjiti zemljarinu za 20%, poreze, takse, železničke tarife, koncentraciju velikih državnih i poludržavnih novčanih ustanova, što bi trebalo da dovede do bolje podele kredita i jačeg opticaja kapitala, da će smanjiti kamatne stope državnih i privatnih banaka, odgoditi plaćanja i smanjiti kamate za zemljoradničke dugove. Vlada je obećala i jednu milijardu dinara kredita za javne radove.[5]

Neki listovi, kao *Jugoslovenski glas Splita*, angažovali su se za uspešnu akciju B. Jevtića, ističući parole, kao što su: „Ko hoće da služi Jugoslaviji, taj će glasati za listu g. Bogoljuba Jevtića!"[6]

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[3] Državni arhiv SFRJ, Fond M. Stojadinovića. Izjava princa Pavla data 21. februara 1935. g. američkom predstavniku *Associated Press*-a, g. *James Mills*-u, *San Baltimore.*

[4] Politika, 14. februar 1935, 1.

[5] *Politika*, 27. februar 1935, 1.

[6] *Jugoslovenski glas Splita*, god. I, 21. april 1935.

Potvrda da je narod malo verovao takvim vladinim obećanjima može se naći u mnogim izveštajima sreskih načelnika predizbornog vremena.[7]

Uskoro po objavljivanju vladinog izbornog proglasa, Velimir Popović, ministar unutrašnjih poslova, izjavio je da vlada neće zabraniti ma koju listu koja bi bila u skladu sa propisima izbornog zakona.

A za te izbore je važio Zakon o izboru narodnih poslanika za Narodnu skupštinu, donet 10. septembra 1931. godine, dopunjen i izmenjen 26. septembra te godine Zakonom o izmenama i dopunama Zakona o izboru narodnih poslanika za Narodnu skupštinu od 10. septembra 1931. godine[8] i Zakonom o izmenama i dopunama Zakona o izboru narodnih poslanika za Narodnu skupštinu od 10. septembra 1931. godine i izmenama i dopunama od 26. septembra, donetog 24. marta 1935. godine,[9] i na osnovu Zakona o biračkim spiskovima od 6. septembra 1931. godine,[10] koji je dopunjen Zakonom o izmenama Zakona o biračkim spiskovima od 20. jula 1934. godine.[11]

Tim izbornim zakonom uvedeno je javno glasanje, koje je, po pravilu, zavođeno kao nedemokratska mera. U javnom glasanju sadržan je element prinude i kontrole izbornog opredeljenja građana (Đorđević 1962, 283–285).

Po izmenjenom izbornom zakonu, zemaljsku kandidatsku listu trebalo je da predloži najmanje 30 predlagača (pravnih birača) iz svakog administrativnog sreza od polovine ukupnog broja srezova u zemlji, pod uslovom da se ti srezovi rasprostiru na teritoriji bar dve trećine banovina. Uz zemaljsku kandidatsku listu predlagači bi morali podnositi sudu pismenu izjavu nosioca liste, svakog sreskog kandidata i njegovog zamenika, koja je glasila: „Potpisani /.../ izjavljujem da pristajem na ovu kandidaciju i obavezujem se da ću u svome političkom radu čuvati državnu celinu i raditi za narodno jedinstvo i da neću pristupati verskim, plemenskim i regionalnim partijsko-političkim udruženjima.“[12] Sreski kandidati su se mogli kandidovati u najviše tri izborne jedinice, pod uslovom da su bili vezani za jednu zemaljsku kandidatsku listu. Zemaljska kandidatska lista morala je biti potvrđena od

[7] Arhiv za historiju radničkog pokreta SR Hrvatske, Zagreb, Tromjesečni izveštaj Sreskog načelstva u Rabu, 5. maj 1935.

[8] *Službene novine Kraljevine Jugoslavije* 224, Beograd 27. septembar 1931.

[9] *Ibid.*, 85 – XXVI, 15. april 1933.

[10] *Ibid.*, 207 – LXVI, 9. septembar 1931.

[11] *Ibid.*, 169 – XVIII, 25. jul 1934.

[12] Zakon o izboru narodnih poslanika za Narodnu skupštinu sa izmenama i dopunama od 26. septembra 1931. godine i 24. marta 1933. i Zakon o biračkim spiskovima sa izmenama od 20. jula 1934, Beograd 1935, 12, 13.

Kasacionog suda u Beogradu najkasnije 15 dana pre izbora, odnosno sve zemaljske kandidatske liste u petomajskim izborima morale su biti predate Kasacionom sudu u Beogradu do 19. aprila.

Ukupna izborna aktivnost, tako, mogla se podeliti na dva dela – na period do 19. aprila i na period od 19. aprila, to jest od potvrđivanja zemaljskih kandidatskih lista pa do samih izbora. U drugom periodu pojačana je aktivnost političkih grupa koje su dobile zakonsko pravo da izađu na izbore, a birači su se tada konačno mogli odlučiti za koju će listu glasati.

U toku izborne kampanje mnogi društveni i politički subjekti iznosili su svoje stavove o učestvovanju ili neučestvovanju u izborima, a oni koji su odlučili da u izborima učestvuju intenzivno su se pripremali.

Predsedništvo Glavnog odbora Jugoslovenske nacionalne stranke (JNS), na sastanku održanom u Beogradu od 10. do 15. februara 1935. godine, razmatrajući političku situaciju u zemlji, iznelo je i svoj stav o izborima i zaključilo „da je, posle stupanja na vlast vlade od 21. decembra 1934. godine, JNS u svom radu i držanju pokazala jednu uzdržljivost koja se je naopako ocenjivala kao pasivnost, ali je bila, ustvari, diktirana od osećaja patriotske dužnosti i želje da Stranka ne ometa novoj vladi u teškoj situaciji sprovođenja jedne konsekventne i nacionalne državne politike. Iz istog patriotskog osećaja koji interes države smatra za najviši zakon, JNS je odustala da samostalno nastupi na izborima 5. maja, jer je znala da bi podvojenost nacionalnih snaga sigurno dovela do izbornog rezultata koji bi mogao da baci državu u politički haos. Nije krivica JNS ako su te njezine žrtve ostale uzaludne. Nije bilo u njezinoj moći da spreči sistemsko razbijanje nacionalnih redova i time jedno kobno slabljenje konsolidacionih snaga u narodu. Nije JNS odgovorna da je najzad moglo doći do obnove starog partijskog plemenskog života, do reakcije koja preti da upropasti istorijsko delo politike kralja Aleksandra.“[13] Tada je Glavni odbor Jugoslovenske nacionalne stranke odobrio svojim članovima da se mogu kandidovati na listi koja nije „protivnička partijska“ i koja bi im najviše pružila garantija da stoji na politici beskompromisnog državnog i narodnog jedinstva.[14]

Jedan deo članova JNS nije se pokorio odluci Glavnog odbora i izašao je sa samostalnom zemaljskom kandidatskom listom, čiji je nosilac bio Božidar Maksimović.[15] Neke mesne i sreske organizacije JNS ispoljile su znake osipanja pred izbore, ali se ipak njen veći deo izjasnio da će glasati za listu B. Jevtića.

[13] Državni arhiv SFRJ, F. M. Stojadinovića, G-13, Kominike JNS, 15. februar 1935.

[14] *Ibid*., F-3.

[15] *Ibid.*

Svoju aktivnost su pred izbore pojačale i antikomunističke organizacije: „Borbaši", „Zbor", „Patriotski omladinski front". Njihove vođe su isticale sebe kao najveće neprijatelje korupcije. Svetislav Hodjera je, od osnivanja Jugoslovenske narodne stranke, početkom 1934. godine, okupljao pristalice za borbu protiv komunizma. U svom programu zalagao se za socijalnu pravdu, spasavanje sela i malog poljoprivrednika, za istinski parlamentarizam, za političke slobode, pravdu i demokratiju. Pošto im zemaljska kandidatska lista nije bila potvrđena, Izvršni odbor Jugoslovenske narodne stranke, na vanrednoj sednici, 24. aprila, doneo je odluku da pripadnici stranke daju svoje glasove jedinoj opozicionoj listi, čiji je nosilac bio V. Maček.[16]

Jugoslovenski narodni pokret „Zbor" Dimitrija Ljotića izašao je na izbore sa svojom samostalnom zemljskom kandidatskom listom jer je smatrao da svoj program može ostvariti samo neposrednim i odlučnim učestvovanjem u izbornoj borbi.

Jugoslovenska akcija (klerikalna) obavestila je svoje odbore i članove da će o stavu Jugoslovenske akcije u izborima rešavati njen Centralni odbor u duhu ideologije i u skladu sa interesima pokreta.[17]

Zagrebački nadbiskup Bauer izdao je raspis, 12. februara 1935. godine, kojim je celokupnom kleru saopštio da ne dozvoljava da se i jedan sveštenik kandiduje na bilo čijoj listi.[18]

Socijaldemokratska partija, mada formalno nije delovala kao legalna partija,[19] smatrala je da se ona nalazi negde između buržoaskih partija i Komunističke partije i da je njen praktični politički program prihvatljiv za većinu birača.[20] Odlučila je da izađe na izbore bez namere da istakne jednu partijsku listu već da bi tom prilikom iznela idejnu osnovu na uskom broju praktičnih političkih, ekonomskih i socijalnih zahteva koje bi mogli da prihvate ljudi različitih političkih gledišta. Bila je uverena da je učešće u izborima i dobijanje predstavničkih mesta u Narodnoj skupštini jedini put kojim se može doći do željenih političkih, ekonomskih, socijalnih, finansijskih i kulturnih promena. Isticala je da nije za promenu državnog

16 *Klasna borba*, teoretski časopis CK KPJ 3/1934; DA SFRJ, F. M. Stojadinovića, F-3.

17 *Politika*, 17. jul 1935.

18 *Ibid*., 17. februar 1935, 2.

19 Živko Topalović je 1934. godine pokušao da kod vlasti legalizuje pokret na čijem se čelu nalazio, ali bez uspeha.

20 *Radničke novine*, Beograd 3. maj 1935.

sistema, a pogotovu ne za njegovu revolucionarnu promenu. Učestvovanjem u radu Skupštine želela bi da utiče na izvesne promene u državi i zato joj je važno da dobije 50.000 glasova i poslanički mandat.[21]

Živko Topalović, vođa socijaldemokrata, sa svojim pristalicama je javno i nesmetano agitovao i držao zborove. Velimir Popović, ministar unutrašnjih poslova, u svom govoru na III prethodnom sastanku Narodne skupštine, 14. juna 1935. godine, istakao je da je Vlada istu toleranciju ispoljila prema nosiocu neodobrene zemaljske kandidatske liste dr Živku Topaloviću kao i prema nosiocu neodobrene zemaljske kandidatske liste – Svetislavu Hodjeri.[22]

Dr Anton Korošec, sa Slovenskom ljudskom strankom, bio je za apstiniranje izbora.

Ti petomajski izbori su bili direktan povod za stvaranje opštenarodnog opozicionog bloka – udružene opozicije.

Bivše građanske stranke, Hrvatska seljačka stranka, Samostalna demokratska stranka, Demokratska stranka Ljube Davidovića, Zemljoradnička stranka – oba njena krila, oko Jovana Jovanovića i Dragoljuba Jovanovića, i bivša Muslimanska organizacija dr Mehmeda Spahe, koja se naknadno priključila, odlučile su da zajednički učestvuju u tim skupštinskim izborima. Inače, V. Popović je ponudio Spahi da sarađuje u izborima sa vladinom državnom listom, na šta on nije pristao.[23] Spaho je, posle neuspelog dogovaranja sa radikalom Acom Stanojevićem o eventualnom samostalnom istupanju na izborima, poslao pismo iz Sarajeva, 12. marta 1935. godine, kojim je izvestio Jovanovića da prihvata poziv njegov i njegovih prijatelja da se pridruži zajedničkoj opozicionoj listi, na koju će postaviti svoju i kandidature svojih prijatelja.[24]

Vođe buržoaskih stranaka želele su da iskoriste te izbore za oživljavanje svog stranačkog rada, za jačanje uticaja u narodu. A, s druge strane, sâm narod više nije hteo da se miri sa postojećim stanjem u zemlji i svojom pozicijom, tražio je akciju po svaku cenu, neodložno. Osiromašen i upropašćen, izdržavši

[21] *Ibid*., 5. jul 1935.

[22] *Stenografske beleške Narodne skupštine Kraljevine Jugoslavije*, knj. 1, Beograd 1935, 34.

[23] *Ibid*.

[24] DA SFRJ, F. M. Stojadinovića, F-3.

tešku ekonomsku krizu, više nije imao šta da izgubi i nije se plašio ni javnog glasanja, ni otpuštanja s posla, iako su znali da će ono zadesiti mnoge koji ne glasaju za vladinu listu, ni pretnji i tortura svake vrste od vlasti.[25]

I, kako su vođe građanskih stranaka bile istog mišljenja da na izbore treba izaći, pristupile su rešavanju nosioca zemaljske kandidatske liste. Vođe srpskog dela udružene opozicije ponudile su dr Vlatku Mačeku da bude nosilac zemaljske kandidatske liste,[26] a prihvatanjem kandidature Maček bi pokazao da je za državno jedinstvo. Predlagači su, u tom smislu, želeli da se on pokloni seni kralja Aleksandra na Oplencu.[27] Maček je prihvatio da bude nosilac zajedničke zemaljske kandidatske liste, izjavivši da izborna akcija može biti veliki korak uzajamnom zbliženju, a time i konačnom rešenju hrvatskog pitanja u granicama Jugoslavije.[28] Maček je tog trenutka bio najpogodniji kandidat za nosioca zemaljske kandidatske liste jer je, posle njegovog amnestiranja i izlaska iz zatvora, poprimio atribute mučenika i nacionalnog heroja, te je mogao imati još veći uticaj na hrvatske mase.

Udružena opozicija je još u februaru razvila živu delatnost uvođenja birača u biračke spiskove. U Zagrebu su svakom ko je želeo da bude uveden u birački spisak bile na raspolaganju besplatne usluge pojedinih advokata. Između vođstva i nekadašnjih organizacija na terenu uspostavljan je kontakt posredstvom partijskih poverenika i kurira. Pristalice Hrvatske seljačke stranke svim snagama su nastojale da obnove aktivnost kako bi što uspešnije obavile izborni posao.[29]

I srpski deo udružene opozicije poveo je živu predizbornu aktivnost. Ljuba Davidović je, pismom od 3. marta 1935. godine, obavestio sve partijske prijatelje da je odluka za isticanje zemaljske kandidatske liste konačna i da je njen nosilac Maček,[30] a u pismu iz aprila ističe da „za akciju i to za udruženu zajedničku akciju nekoliko grupa odlučili su nas isto tako krupni interesi zemaljski. Jedan od njih je prihvatanje saradnje sa Hrvatima, čija je apstinencija od naših spoljnih neprijatelja tumačena ne samo kao protest prema režimu, nego kao izdvajanje i neinteresovanje o sudbini ove države kao celine".

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25 DA SFRJ, F. M. Stojadinovića, F-3, Dragi prijatelju.

26 *Ibid*. Isto pismo V. Mačeka donela je i *Borba* iz Toronta, *Ch.* 56/1935, 2, a sadržaj pisma *Politika*, 13. februara 1935.

27 *Arhiv RPJ*, Beograd, 1878/XIII, 2–4/35.

28 *Ibid.*

29 *Politika*, 17. februar 1935, 2.

30 DA SFRJ, F. M. Stojadinovića, F-3, Dragi prijatelju.

Akcioni odbor Jugoslovenske demokratske omladine, letkom – *Glasajte za ujedinjenu opoziciju*, istakao je značaj koji bi ti izbori mogli imati: „Peti maj jeste dan koji treba da donese: POBEDU, demokratiju, učvrsti temelje narodne i državne zajednice, obezbedi narodnu vladavinu, građanske i političke slobode. Peti maj je dan kada će narod uprkos svih nezgoda javnog glasanja muški i otvoreno dati svoje poverenje nosiocima narodnog sporazuma, dati glas za politiku iskrene saradnje svih naprednih i zdravih snaga naše zemlje.“[31]

Na predizbornim zborovima u mnogim mestima Srbije i Vojvodine govorili su istaknuti predstavnici udružene opozicije. Zborovi u Šumadiji pokazali su da je narod raspoložen da se suprotstavi režimu. Lecima udružene opozicije pozivani su birači da glasaju za ujedinjenu opoziciju čiji su nosioci Davidović, Maček, Jovanović, Spaho, jer „oni čuvaju državno i narodno jedinstvo i traže osnovna prava naroda: slobodu zbora, štampe i dogovora“. Srpski deo udružene opozicije isticao je da će se hrvatsko pitanje moći rešavati kada se uvede demokratija za sve.

Međutim, udružena opozicija nije imala zajednički program na kome bi počivala saradnja tih heterogenih buržoaskih stranaka, mada postoje indicije da se na njemu radilo. U prilog tome govori i beleška na poleđini Spahinog pisma, kojim se pridružuje udruženoj opoziciji, a koja glasi: „Manifest, odnosno, program udružene opozicije ne može da izađe i zbog zahteva V. Mačeka da se, pored ostalog, doda – i sloboda napaćenog hrvatskog naroda.“[32] [33]

Ipak se može zaključiti da je blok udružene opozicije nastao više zbog tehnike izbornog procesa, a ne radi zajedničke opozicione političke akcije, kojom bi se ostvarivala demokratska vizija zajedničkog života. U prilog tome govori i činjenica da je saradnja između vođa hrvatskog i srpskog dela udružene opozicije prestala još pre samih izbora.

Centralni komitet Komunističke partije Jugoslavije, koji se nalazio van Jugoslavije, kao i komunisti u zemlji (kojih je bilo oko tri hiljade) odlučno su bili za učestvovanje u skupštinskim izborima, kako bi i tim putem dali svoj doprinos ostvarenju demokratskih prava. Na neophodnost učestvovanja na tim izborima upozoravali su i negativni rezultati aktivnog bojkota opštinskih izbora 1933. godine.

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31 *Ibid*. Letak – *Glasajte za ujedinjenu opoziciju*.

32 DA SFRJ, F. M. Stojadinovića, F-3, Pismo M. Spahe od 12. marta 1935.

33 *Ibid.*

Od samog početka raspisivanja izbora Centralni komitet Komunističke partije Jugoslavije nije zauzeo određen stav kako će ići na izbore. U predlaganju različitih mogućnosti za izlazak na izbore prohujalo je vreme do datuma izbora, pa prava mogućnost nije iskorišćena na najbolji način. Prvo se želelo da radnička klasa i seljaštvo, kao treći blok, izađe sa samostalnom zemaljskom kandidatskom listom, čiji bi nosilac bio predstavnik radničke klase, to jest komunista; zatim, ako to ne uspe, da se, donekle, ostvari ravnopravna saradnja u izborima ili sa socijaldemokratima ili sa vođama udružene građanske opozicije, s tim da i komunisti na njihovim zemaljskim kandidatskim listama imaju svoje sreske kandidate.

Triša Kaclerović, veteran komunističkog pokreta, realno razmatrajući političku situaciju uoči izbora i mogućnosti komunista, koji su delovali u ilegalnosti, procenio je da ne treba ni pokušavati izaći samostalno, pogotovu posle odbijanja građanske štampe da štampa komunističku izbornu platformu, već da komunisti učestvuju svim svojim snagama treba da u stvaranju opozicionog bloka sa buržoaskim opozicionim partijama. Prema njegovom mišljenju, na izborima je trebalo da budu uspostavljena dva fronta – front demokratije i front diktature, a svako drobljenje tih demokratskih snaga, pa i samostalni istup komunista, slabilo bi šanse opozicije, odnosno demokratije, i ne bi koristilo opštoj borbi protiv režima.[34]

U izbornoj direktivi Centralnog komiteta Komunističke partije Jugoslavije, od 14. aprila 1935. godine, koju su izmenili i dopunili partijski instruktori Karl Hudomal i Adolf Muk, diktatorski režim je označen kao glavni neprijatelj, a komunisti i svi ostali birači pozvani su da svoj glas daju jedinoj opozicionoj listi – listi udružene opozicije.[35]

Rezultat izbora u pojedinim delovima Jugoslavije bio je različit zbog delovanja mnogih činilaca. Opredeljenje komunista i njihova angažovanost u lokalnim razmerama dali su svojevrsno obeležje izbornom rezultatu. Tako, i pored svih problema, komunisti Dalmacije ostvarili su dobru saradnju u izbornoj agitaciji sa predstavnicima Hrvatske seljačke stranke i time doprineli izvrsnom izbornom rezultatu u korist opozicije. Birači Vojvodine, a među njima i komunisti, do kojih su veoma kasno stigle izborne direktive CK KPJ, masovno su glasali za listu udružene opozicije. Nedoumica crnogorskih komunisti zbog protivrečnih direktiva i izborne situacije uzrokovala je bojkot izbora, a time i umanjen opozicioni izborni rezultat. Izuzetnu volju za

[34] ARPJ, Bgd, F. KI, MK 46/258/125–130/. Izveštaj Smita, MK 46//258/537–538/. Pismo Stojana iz Beograda, 28. mart 1935.

[35] *Ibid*. ARPJ, Bgd, F. KI, MK 46/258/614–615/. Pismo Manojla br. 4/23, 23. april 1935.

rad i oduševljenje u izbornim pripremama komunista pokazali su omladinci Zagreba i Ljubljane. Inače, nezavidan je bio položaj komunista u Sloveniji. Posle odbijanja zemaljske kandidatske liste socijaldemokrata, sa kojima su komunisti Slovenije uspostavili dobru izbornu saradnju, u uslovima bojkota izbora od A. Korošeca i Slovenske ljudske stranke, komunisti su, ulažući velike napore, veoma mnogo doprineli da lista udružene opozicije uz Sloveniji ne doživi potpunu izbornu katastrofu.

3. REZULTATI I POSLEDICE IZBORA ZA NARODNU SKUPŠTINU

Skupštinski izbori u celoj zemlji održani su 5. maja 1935. godine. Po službenim izveštajima rezultat izbora bio je sledeći: od ukupnog broja upisanih birača po stalnim biračkim spiskovima, kojih je u celoj zemlji bilo 3.908.313, na izborima je glasalo 2.880.964 birača. Lista Bogoljuba Jevtića dobila je 1.746.982 glasa, lista Vlatka Mačeka 1.076.345, lista Dimitrija Ljotića 24.088 i lista Božidara Maksimovića 33.549 glasova.[36]

Broj dobijenih glasova i mandata vidi se u Prilogu na karju rada.

U raspodeli poslaničkih mandata učestvovale su samo vladina i lista udružene opozicije. Od 370 mogućih mandata, lista B. Jevtića dobila je 303, a lista udružene opozicije 67.

Tačan rezultat glasanja se nije znao. Na mnogim biračkim mestima rezultati glasanja bili su falsifikovani prilikom prebrojavanja glasova za pojedine kandidate, tako što je vlast dopisivala i otpisivala (po potrebi) glasače, a na nekim izbornim mestima glasali su i oni koji više nisu bili među živima.

Vlada je za sprovođenje izbora upotrebila ukupan činovnički, policijski i žandarmerijski aparat. Svim višim državnim službenicima bilo je naređeno da vrše pritisak i utiču na svoje potčinjene da u izborima glasaju za vladinu listu jer bi, u protivnom, odmah bio pravljen predlog za isključivanje iz državne službe.[37] Mnoge osobe u koje vlast nije imala poverenja, državni službenici – nepouzdanici režima, bili su uklanjani sa svojih radnih mesta i premeštani u druge službe, nižeg ranga, ili druga mesta.[38] Vlada je za izbore

[36] *Službene novine Kraljevine Jugoslavije* 124, 30. maj 1935.

[37] DA SFRJ, F. M. Stojadinovića, F-2, Načelnik sreza u Podgorici, str. pov., 6. april 1935.

[38] Arhiv Vojnoistorijskog instituta, popisnik 17, K. 55, br. reg. 20/8. Pismo Agice Lakića M. Stojadinoviću, od 23. avgusta 1935.

upotrebila ogromna novčana sredstva. *Borba* iz Toronta je pisala da je vlada iz državne kase za izbornu propagandu utrošila 53 miliona dinara.[39] Bogoljub Jevtić je svakom svom poslaničkom kandidatu davao po 50.000 do 60.000 dinara za izborne troškove (Smiljanić 1960, 98). U izborima su dejstvovale i Jevtićeve udarne grupe, organizovane u Patriotskom omladinskom frontu (Ribar 1949, 82). Obaveštajna služba je bila maksimalno iskorišćena. Žandarmerijske patrole su bile neprekidno u pokretu. Sve komunikacije, a posebno železničke pruge, važni državni objekti i pojedine istaknute ličnosti, bili su specijalno obezbeđeni. Po gradovima i naseljenim mestima vršene su racije sa ciljem čišćenja terena od sumnjivih i nepoželjnih lica. Prilikom čina izbora biračima se nije dozvoljavalo da u grupama dolaze na biralište, kako bi se obezbedili red i mir. Na mnogim izbornim mestima intervenisala je žandarmerija. Kakav je teror vršen nad biračima, kako su vršena hapšenja i kažnjavanja za sve vreme izborne kampanje može se videti i po amnestijama koje su učinili kraljevski namesnici svojim ukazima iz jula 1935. godine.[40]

Međutim, iako je opozicija trijumfovala na izborima, vođe Udružene opozicije nisu želele da učestvuju u radu novoizabrane Narodne skupštine. Trinaestog maja, Lj. Davidović, J. Jovanović, V. Maček i V. Vilder, posle razmene mišljenja o svom daljem radu, a posebno zbog početka rada Narodne skupštine, doneli su rezoluciju, u kojoj su izneli svoj stav da ne žele da učestvuju u njenom radu. U rezoluciji se kaže da, zbog načina na koji su sprovedeni izbori, zbog zloupotrebe i falsifikovanja rezultata izbora, zbog toga što su izbori od početka do kraja bili jedno otvoreno nasilje i neprikrivena laž, u Skupštini, koja je potekla iz tih i takvih izbora, pravim narodnim predstavnicima sa liste udružene opozicije nema mesta. „Udružena opozicija nastaviće započeto delo do konačne pobede, jer je uverena da se sva pitanja naše države: politička, privredna i socijalna mogu rešiti samo u slobodi i samo u sporazumu Srba, Hrvata i Slovenaca“, pisalo je u toj rezoluciji.[41]

Rezoluciju slične sadržine donela je, 2. juna 1935. godine, bivša Samostalnodemokratska koalicija.[42]

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39 *Borba*, Toronto, 68/1935, avgust, 3.

40 *Službene novine Kraljevine Jugoslavije* 151, 3. jul 1935, i 175, 31. jul 1935.

41 *Politika*, 5. jun 1935, 1, Rezolucija Udružene opozicije.

42 *Ibid*.

Drugog juna u Zagrebu je, kod Mačeka, održan sastanak narodnih poslanika izabranih na listi udružene opozicije. I tom prilikom potvrđen je stav da neće učestvovati u radu novoformirane Skupštine. Tom sastanku nisu prisustvovali članovi Jugoslovenske muslimanske organizacije ni neki drugi izabrani poslanici koji su bili raspoloženi da uđu u Narodnu skupštinu.[43]

I tako, na prvom sazivu novoizabrane Narodne skupštine, 3. juna 1935. godine, nisu prisustvovali poslanici sa liste udružene opozicije, sem Abdulaha Ibrahimpašića, izabranog u srezu Bihać.

Kao posledica izbornih rezultata i antivladinog raspoloženja, iako je Jevtić izjavljivao da ne postoji kriza vlade, usledila je njena ostavka. Kraljevsko namesništvo je formiralo novu vladajuću garnituru, na čelu sa Milanom Stojadinovićem.[44]

Posle pada Jevtićeve vlade, Maček je ponovo održao konferenciju sa svojim pristalicama, u svom stanu u Zagrebu. Tom prilikom je razmotreno pitanje – šta dalje da radi Seljačko-demokratska koalicija te je rešeno da se do deklaracije Stojadinovićeve vlade ostane u iščekivanju, a tek po njenom objavljivanju treba zauzeti određeni stav.[45]

Izabrani poslanici sa liste udružene opozicije ignorisali su rezultate i želje birača ne želeći da odu u Narodnu skupštinu, mada se sa takvim njihovim stavom birači nisu slagali. Tada su se mogli čuti glasovi da bi opozicioni poslanici ipak morali ući u Narodnu skupštinu.

Veselin Masleša, aktivni učesnik tih događaja, u svom članku objavljenom u septembarskom broju *Naše stvarnosti*, iz 1937. godine, izneo je svoju ocenu političke situacije izbornog perioda 1935. godine: „Konkretno, to nezadovoljstvo kod naših narodnih masa politički se ispoljilo 5. maja i vezalo za dr Mačeka i udruženu opoziciju. Iako po razlozima postanka različito u raznim pokrajinama, ono je našlo jednu zajedničku komponentu u onoj političkoj grupaciji koju je 5. maja predstavljala lista dr Mačeka, i to baš na osnovu svog zajedničkog negativnog stava, pošto svako nezadovoljstvo u prvom redu traži da se nešto izmeni.

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[43] *Ibid.*, 4. jun 1935, 1; Arhiv Instituta za historiju radničkog pokreta SR Hrvatske, kut. 1935, Zagreb. Sresko načelstvo Novi 30. juna 1935, pov. br. 1168–1935. Predmet: Trimjesečni izveštaj o radu Opće uprave za tromesječje april–juni 1935. Kr. banskoj upravi Savske banovine.

[44] *Politika*, 21. jun 1935.

[45] *Ibid.*, 28. jun 1935.

To jedinstvo nezadovoljstva masa i njihova želja da povede borbu pod vođstvom i parolama udružene opozicije, da aktivno učestvuje u jednoj velikoj bici za demokratiju, pokazalo je da bi se vrlo brzo mogla ona neodređenost ideologije ukloniti, i da bi se umesto toga, u neprestanoj zajedničkoj akciji masa i vođstva mogla izgraditi jedna određena socijalna i politička ideologija.

To se, međutim, nije dogodilo. Vođstvo udružene opozicije, demokratsko bez sumnje, nije shvatilo svoj zadatak i ulogu u izgradnji jedne borbene demokratije. Ono je, nažalost, smatralo da je dosta što je ono demokratsko i što se u jednoj nedemokratskoj igri vrhova, koja je počela da se vidi posle 5. maja, prikazuje kao demokratsko."

U Beogradu 1961. godine

Prilog

IZBORI ZA NARODNU SKUPŠTINU 5. maja 1935. godine

BANOVINE	Pojedine zemaljske kandidatske liste dobile su glasova								Pojedine zemlj. kand. liste dobile su poslanika		
	B. Jevtić		V. Maček		D. Ljotić		B. Maksimović		B. Jevtić	V. Maček	Ukupno
	broj	%	broj	%	broj	%	broj	%			
Dravska	125.160	83,5	22.220	14,8	47	0,0	2.530	1,7	27	2	29
Drinska	215.177	65,8	106.557	32,6	3.640	0,1	1.482	0,5	34	5	39
Dunavska	348.076	69,2	132.119	26,2	9.572	1,9	13.597	2,7	45	7	52
Moravska	255.075	80,0	54.652	17,1	8.194	2,6	805	0,3	39	2	41
Primorska	68.380	33,7	133.308	65,6	366	0,2	1.048	0,5	14	10	24
Savska	173.496	28,1	440.383	71,4	795	0,1	2.351	0,4	48	29	77
Vardarska	255.528	84,1	44.092	14,5	3.303	1,1	968	0,3	44	1	45
Vrbaska	119.429	54,5	97.543	44,5	1.891	0,9	128	0,1	17	8	25
Zetska	154.701	79,1	35.738	18,3	4.255	2,2	792	0,4	30	3	33
Beograd	31.957	73,4	9.733	22,3	1.486	3,4	387	0,9	5	–	5
									303	67	370

Izvor: *Statistički godišnjak Kraljevine Jugoslavije br. 124*, Beograd, 30. maj. 1935.

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ELECTIONS FOR THE NATIONAL ASSEMBLY OF THE KINGDOM OF YUGOSLAVIA, HELD ON MAY 5, 1935

Summary

The paper analyzes the political situation in the Kingdom of Yugoslavia that preceded the elections for the National Assembly held on May 5, 1935, as well as the results of those elections. Based on available historical sources, the author provides exact data on the election results and analyzes the broader context in which political parties operated. Based on the conducted research, the author concludes that the leadership of the united opposition in the Kingdom of Yugoslavia, democratic without a doubt, did not understand its task and role in building democracy.

Key words: *Kingdom of Yugoslavia – National Assembly – Elections 1935 – United Opposition – Democracy*.

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ROČIŠTA NA DALJINU U PARNIČNOM POSTUPKU

U članku koji se bavi posledicama pandemije korona virusa na parnični postupak, autorka analizira institut ročišta na daljinu u Republici Srbiji. Najpre je dat kritički osvrt na važeći Zakon o parničnom postupku i njegove odredbe o izvođenju dokaza na daljinu, a zatim su analizirane mogućnosti za izmene i dopune u toj oblasti. Sagledano je nekoliko aspekata uređenja ročišta na daljinu da bi se formirali elementi buduće norme. Povodom pitanja usklađenost pravila postupka sa tehnološkim razvojem društva u stručnoj javnosti se javila sumnja da li je taj institut usklađen sa načelima parničnog postupka i pravom na pravično suđenje. Autorka je analizirala uporednopravna rešenja i praksu Evropskog suda za ljudska prava kako bi došla do zaključaka o usklađenosti ročišta na daljinu sa načelima parničnog postupka i pravom na pravično suđenje.

Ključne reči: *Pandemija. – Videokonferencijska veza. – Ročište na daljinu. – Načelo neposrednosti. – Načelo javnosti.*

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1. DIGITALIZACIJA KAO REŠENJE ZA PROBLEME UZROKOVANE PANDEMIJOM

Tradicionalno, ročište se odvija uživo u zgradi suda. Međutim, razvoj interneta je doneo brojna olakšanja i pogodnosti, između ostalog, i u održavanju ročišta na daljinu. Nije, dakle, novo da zakoni kojima se reguliše parnični postupak sadrže odredbe o izvođenju pojedinih parničnih radnji, uključujući i one na ročištu, na daljinu. Pred engleskim sudom je još 1991. godine putem videokonferencijske veze saslušan svedok koji se nalazio u Njujorku u slučaju *Garsin protiv Amerinda* iz 1991. godine (prema Schack 2014, 303–304). Novo je to što se videokonferencijske veze, od 2020. godine, primenjuju u većem obimu nego ikada ranije i što se odredbe kojima se reguliše korišćenje videokonferencijske veze u parničnom postupku menjaju i dopunjuju širom sveta. Zanimljivo je da je i ranije bilo prognoza da će od 2020. godine doći do ubrzanog razvoja ročišta na daljinu (Susskind 2013, 110). Ipak, to se nije dogodilo kao rezultat razvoja digitalizacije u parničnom postupku, već usled okolnosti prouzrokovanih pandemijom kovida 19.

Širom sveta su, naime, nakon izbijanja pandemije uvođene mere fizičkog distanciranja, u koje je trebalo uklopiti aktivnosti parničnih sudova. Pred pravosuđe svake zemlje koja je merama socijalne odnosno fizičke distance pokušala da spreči dalje širenje virusa postavilo se pitanje da li prekinuti rad ili se prilagoditi postojećim okolnostima. Pravosudni sistemi su, uglavnom, nastavili da rade, makar samo u „hitnim" stvarima, a u velikom broju predmeta koji nisu potpali pod tu kategoriju je došlo do odlaganja[1]. Mere koje su preduzete širom sveta se uglavnom mogu grupisati u tri kategorije: mere koje se odnose na prekid postupaka i prekid rada u sudovima, mere koje se tiču postupanja u određenim vrstama hitnih predmeta, mere koje se odnose na digitalizaciju parničnog postupka jer su neke države iskoristile pandemiju kao katalizator u toj oblasti (Uzelac 2020, 17).

Među državama koje su pandemiju iskoristile kao katalizator promena pravi se razlika zavisno od toga u kojoj fazi digitalizacije je izbila pandemija. Neki pravni sistemi koji su već imali pravila o korišćenju elektronske komunikacije u parničnom postupku, u okviru pravila o dostavljanju i pravila o održavanju ročišta putem videokonferencijske veze, iskoristili su pandemiju

[1] Zaključkom Visokog saveta sudstva od 18. marta 2020. godine u Republici Srbiji su kao hitni predmetni određeni: odlučivanje o privremenoj meri, odlučivanje o merama zaštite od nasilja u porodici, o zabrani rasturanja štampe i širenja informacija u sredstvima javnog informisanja, o zadržavanju u zdravstvenoj ustanovi koja obavlja delatnost u oblasti neuropsihijatrije, izvršenja izvršnih isprava u vezi sa porodičnim odnosima. Ročišta u svim ostalim predmetima su odložena počev od 19. marta 2020. godine.

da ubrzaju proces primene postojećih normi koje se odnose na digitalizaciju u parničnom postupku. U našem okruženju takva zakonska pravila je imala Republika Hrvatska, ali su tek u pandemiji doneti podzakonski akti kojima je omogućena primena normi o elektronskom dostavljanju pred svim prvostepenim sudovima, dok su norme o ročištima na daljinu počele polako da se primenjuju. Naime, hrvatski zakonodavac je 2019. godine izmenio i dopunio Zakon o parničnom postupku setom odredaba o digitalizaciji na osnovu kojih je za određeni krug subjekata postalo obavezno i dostavljanje elektronskim putem. Međutim, podzakonski akti od kojih je zavisila potpuna primena tih odredaba i u prvostepenim sudovima opšte nadležnosti doneti su tek u pandemiji (Uzelac 2020, 17–19). Neke države su nakon stupanja na snagu strogih mera fizičkog distanciranja donele posebne zakone kojima je regulisano održavanje ročišta na daljinu u parničnom postupku dok traje pandemija. Takav slučaj je bio u Engleskoj i Velsu (Sorabji 2020, 16– 19). U doba pandemije je liberalizovano održavanje ročišta na daljinu jer je služilo da se prevaziđe problem potencijalnog zatvaranja sudova za građane. Tako su sudovi počeli da koriste širok dijapazon programa za komunikaciju na ročištima. U nekim zemljama je saslušanje moglo da se obavi i putem telefona[2], eventualno uz slanje dokaza mejlom.

Kako je srpski Zakon o parničnom postupku samo u određenoj meri sadržao pravila o izvođenju dokaza na daljinu, dok je reakcija na pandemiju u vidu posebnih zakona koji bi se primenjivali na digitalizaciju u postupku u okolnostima primene pravila o fizičkoj distanci izostala, Ministarstvo pravde Republike Srbije se opredelilo za izmene i dopune Zakona o parničnom postupku na kojima je rađeno u prvoj polovini 2021. godine kako bi se njima obuhvatila i digitalizacija postupka.[3] Zakon je pisan tako da modernizuje parnični postupak i za potrebe funkcionisanja u uslovima fizičke distance i u redovnim okolnostima. U ovom radu će biti analizirane samo odredbe o ročištima na daljinu, ne i druga pitanja digitalizacije u parničnom postupku.

2. ROČIŠTA NA DALJINU PRE 2020. GODINE

Pravosuđa širom sveta uvažavaju činjenicu da je komunikacija putem interneta postala uobičajena. Neki pravni sistemi su u svojim zakonima o parničnom postupku sadržavali odredbe koje omogućavaju izvođenje

[2] Tako u državi Njujork, vid. Hearing by Phone – OATH (nyc.gov). Telekonferencijska veza je termin koji se koristi odranije.

[3] Rešenje o obrazovanju radne grupe za izradu radnog teksta Zakona o izmenama i dopunama Zakona o parničnom postupku Republike Srbije od 23. februara 2021. godine.

dokaza na daljinu, a drugi mogućnost održavanja bilo kog ročišta putem videokonferencijske veze. Međutim, čak i u pravnim sistemima u kojima je bila predviđena najširа mogućnost korišćenja modernih tehnologija u parničnom postupku, praksa je bila vrlo oskudna (Susskind 2013, 110). Čini se da obim primene pravila o održavanju ročišta na daljinu nije zavisio ni od tehničke opremljenosti sudova ni od obučenosti kadrova (Hau 2020, 29). U sudovima najrazvijenijih zemalja, koje imaju zakonske,[4] tehničke i kadrovske preduslove za primenu interneta u parničnom postupku, ona je ostajala retka, „gotovo misteriozna, od sudija smatrana nepouzdanom i komplikovanom" (Hau 2020, 29).

Srpski Zakon o parničnom postupku[5] (ZPP) već sadrži pojedine odredbe o izvođenju dokaza na daljinu u delu o svedoku i o saslušanju stranaka. To pitanje, dakle, nije regulisano na sistematski način i to nije učinjeno ni nakon izbijanja pandemije.

U čl. 245, st. 3 ZPP, naime, predviđeno je da sud, u slučaju iz st. 2 (pisana izjava svedoka), rešenjem može da odluči, po službenoj dužnosti ili na predlog stranaka, da se svedok sasluša putem konferencijske veze, korišćenjem uređaja za tonsko ili optičko snimanje. Slična odredba je sadržana u delu kojim se reguliše saslušanje stranaka. U čl. 277, st. 2 predviđeno je da sud može, po službenoj dužnosti ili na predlog stranke, da odluči da se stranka sasluša putem konferencijske veze, korišćenjem uređaja za tonsko ili optičko snimanje, u skladu sa čl. 245. Protiv tog rešenja nije dozvoljena posebna žalba, a po slovu zakona stranke imaju pravo na kopiju snimka.

3. IZMENE I DOPUNE ZAKONA O PARNIČNOM POSTUPKU

U ovom radu se kritički sagledavaju pomenute odredbe Zakona o parničnom postupku kako bi se odredili elementi za njegove izmene i dopune. Postavljaju se pitanja da li se važećim odredbama ostvaruju ciljevi zbog kojih su ročišta na daljinu uvedena u parnični postupak, da li je opseg primene odgovarajući, odnosno kakav treba da bude, kakav je način prenosa zvuka i slike, odnosno kako ga treba unaprediti, i da li postoji saglasnost sa načelima parničnog procesnog prava.

[4] Tako je u nemačko pravo u kome je retko primenjivana ta odredba video-konferencijska veza uvedena još 2001. godine (Schack 2014, 303–304).

[5] Zakon o parničnom postupku – ZPP, *Sl. glasnik RS* 72/2011, 49/2013 – odl. US, 74/2013 – odl. US, 55/2014, 87/2018 i 18/2020.

3.1. Ciljevi održavanja ročišta na daljinu putem videokonferencijske veze

Ročišta na daljinu se, naime, održavaju kako bi se poboljšala efikasnost i smanjili troškovi postupka. Osim toga, ročišta putem videokonferencijske veze su dobar način da se smanji stres osetljivih svedoka kao što su deca (Preporuke ES 2015, 7; Rosenberg, Schwab, Gottwald 2010, 420). Videokonferencije se primenjuju u uporednom pravu već duže vreme ukoliko se lice koje treba saslušati nalazi u inostranstvu (Andrews 2013, 383) jer je tada ušteda resursa očigledna. Izbijanjem pandemije, korišćenje video-konferencije je postalo ne samo pogodnost radi ostvarivanja pomenutih ciljeva, već i potreba. Tako je u nekim jurisdikcijama, kao što je Austrija,[6] donet poseban zakon da bi se proširila mogućnost upotrebe videokonferencijske veze u parničnom postupku jer je pravosuđe u doba pandemije našlo izlaz u održavanju tih ročišta.

Da se ti ciljevi ostvaruju primenom odredaba o ročištima na daljinu, potvrđuju nam i sekundarni izvori prava Evropske unije jer se održavanje ročišta na daljinu predviđa u postupku pružanja pravne pomoći kako je predviđeno Uredbom Saveta (EC) br. 861/2007 od 28. maja 2001. godine o saradnji između sudova država članica u izvođenju dokaza u građanskim i privrednim stvarima, koja je izmenjena i dopunjena Uredbom Evropskog parlamenta i Saveta (ES) br. 1103/2008 od 22. oktobra 2008. godine. Prvi put je predviđeno kao obavezno Uredbom Evropskog parlamenta i Saveta (EC) br. 861/2007 od 11. jula 2007. godine o ustanovljenju evropskog postupka u sporovima male vrednosti (*Službeni list EU* 199/1 od 31. jula 2007) za prekogranične sporove male vrednosti, imajući u vidu da bi troškovi pristupa ročištu bili nesrazmerno veći od vrednosti predmeta spora.

Ta dva osnovna cilja, efikasnost u postupku i ušteda troškova, mogu se ostvariti i u drugim fazama postupka, a ne samo prilikom saslušanja svedoka u smislu čl. 245 i stranaka, kako je to predviđeno važećim zakonom Republike Srbije. Neopravdano je potpuno izostala komunikacija na daljinu sa veštakom, posebno ako veštaka treba saslušati. Takvo rešenje bi imalo opravdanja s obzirom na to da su u pitanju profesionalni učesnici u postupku za koje se sa više verovatnoće može pretpostaviti da imaju veštine potrebne da bi bili saslušani putem konferencijske veze. Dakle, postojeće zakonsko rešenje ne odgovara sasvim ostvarivanju ciljeva ročišta na daljinu jer suviše sužava opseg primene čak i prilikom izvođenja dokaza u opštem

[6] U Austriji je 21. marta 2020. godine donet poseban Drugi zakon o kovidu 19, kojim su uređene najrazličitije oblasti za vreme pandemije. Tako je članom 21, para. 3 uređena mogućnost održavanja ročišta na daljinu.

parničnom postupku. Osim toga, nisu uzete u obzir specifičnosti posebnih parničnih postupaka, kao što je postupak u sporu male vrednosti, u kojem ima prostora za širu upotrebu interneta u parničnom postupku. S tim u vezi se postavlja pitanje kako treba proširiti opseg primene da bi ciljevi video-konferencija bili ostvareni.

3.2. Opseg primene video-konferencije u parničnom postupku

Usled pandemije je ubrzan proces digitalizacije parničnog postupka, zbog čega je opseg primene u mnogim zemljama proširen. Takva primena je često bila utemeljena na posebnim zakonima koji su donošeni da važe u doba pandemije, a to je slučaj ne samo u Austriji već i u zemljama anglosaksonskog prava, kao što je Engleska.[7] U nekim drugim zemljama pandemija je bila okidač šire primene postojećih odredaba o videokonferencijskoj vezi. S tim u vezi, treba napraviti razliku između situacija koje su specifične za uslove ograničenog rada sudova u doba pandemije i onih kada postoji potreba za ročištima na daljinu i u redovnim okolnostima. Postavlja se, dakle, pitanje da li zakonom treba ograničiti opseg primene videokonferencijske veze na pojedine radnje i pojedine faze postupka i ako da – na koje, ili je bolje opštom odredbom predvideti mogućnost održavanja ročišta putem videokonferencijske veze pa ostaviti sudovima da grade praksu.

U Evropskoj uniji se korišćenje videokonferencijske veze ustalilo u prekograničnim sporovima male vrednosti. Osim toga, realno je očekivati da se održavanje ročišta na daljinu smatra poželjnim među privrednicima za postupanje na ročištima u postupcima o privrednim sporovima. Ročište na daljinu je, zatim, podobno za ubrzanje nekih faza u postupku, kao što je pripremno ročište. Ipak, teško je predvideti u kojim sve fazama postupka i za izvođenje kojih radnji održavanje ročišta na daljinu može imati prednosti u odnosu na ročišta uživo, a tu procenu ne treba da ograničava zakonodavac. Kako bi u svakom konkretnom slučaju procenili da li ima mesta održavanju ročišta na daljinu, svrsishodnije je propisati mogućnost održavanja ročišta na daljinu u opštem delu, uzdržati se od propisivanja obaveznosti održavanja ročišta na daljinu u bilo kojem od tih slučajeva.[8] Na taj način ostaje na

[7] Zakon kojim se regulišu situacije izazvane pandemijom (*Coronavirusact*). Coronavirus Act 2020. *legislation.gov.uk*.

[8] U evropskom postupku povodom spora male vrednosti predviđeno je da se ročišta, kada se održavaju, održavaju na daljinu.

sudovima da formiraju praksu bilo u prethodno pomenutim fazama postupka i vrstama sporova, bilo u nekim drugim. Da bi se praksa valjano formirala, potrebno je organizovati obuke sudija u toj novoj oblasti.

Sledeće pitanje koje se postavlja jeste – ko će odlučivati o tome da li će se ročište održati uživo ili putem videokonferencijske veze – da li je potrebna saglasnost stranaka ili ne.

3.3. Saglasnost za održavanje ročišta na daljinu

Jedan deo stručne javnosti napominje da za održavanje ročišta na daljinu obe stranke treba da daju saglasnost da se ročište ne održi uživo već putem interneta. S druge strane, uočava se da bi takav uslov osujetio mogućnost održavanja ročišta putem videokonferencijske veze jer bi protivljenje često vodilo odugovlačenja postupka. Taj uslov je u nekim nama srodnim pravim sistemima prevaziđen. Na primer, ranije se u nemačkom pravu tražilo da bude ispunjen uslov saglasnosti obeju stranaka za održavanje ročišta na daljinu, ali je taj uslov ukinut (Baumbach, Lauterbach, Albers, Hartmann 2014, 660). Slovenački zakon je jedan od retkih koji sadrži odredbu da „uz saglasnost stranaka, sud strankama, njihovim punomoćnicima... može dozvoliti“ da se u vreme održavanja ročišta nalaze na drugom mestu.[9] S druge strane, taj uslov se ne traži ni u mađarskom[10] ni u hrvatskom zakonu. Ne samo da je u uporednom pravu često da sud (diskreciono ili na osnovu zakonom propisanih kriterijuma[11]) odlučuje o održavanju ročišta već je to rešenje suštinski opravdano time što se odnosi samo na korišćenje jednog tehničkog pomagala u postupku. Sličan zaključak je usvojen i na okruglom stolu u organizaciji Saveta Evrope (Savet Evrope 2020, 6).

3.4. Način prenosa zvuka i slike

3.4.1. Videokonferencijska veza i mesto izdvojene veze

Ročište na daljinu se može odvijati u celini putem konferencijske veze ili hibridno, u kom slučaju je mesto na kome se nalazi lice koje treba saslušati mesto izdvojene veze. Takva komunikacija se može odvijati pomoću nekog

[9] Zakon o parničnom postupku Republike Slovenije (nezvanično prečišćen tekst br. 27), čl. 114a, st. 1.

[10] Mađarski Zakon o parničnom postupku, Odeljak 624.

[11] Mađarski Zakona o parničnom postupku, Odeljak 622.

od čitavog niza uređaja i programa za prenos slike i zvuka. Zbog pandemije 2020. godine, upotreba tih uređaja i programa je proširena, čime nam je pružena mogućnost da na osnovu uporednopravnih iskustava pronađemo najbolje rešenje.

Konferencijska veza može biti organizovana tako da se prenose i slika i zvuk ili samo zvuk. Prema aktuelnom zakonskom rešenju, u parničnom postupku Republike Srbije predviđeno je tonsko ili optičko snimanje kumulativno, sa uslovom da se dokazi izvode putem konferencijske veze. U sekundarnim izvorima prava EU predviđeno je da se takva ročišta odvijaju putem videokonferencijske ili telekonferencijske veze. Tako je i Uredbom Saveta (EC) br. 861/2007 od 28. maja 2001. godine o saradnji između sudova država članica u izvođenju dokaza u građanskim i privrednim stvarima, koja je izmenjena i dopunjena Uredbom Evropskog Parlamenta i Saveta (ES) br. 1103/2008 od 22. oktobra 2008. godine, predviđeno da se od zamoljenog suda može tražiti da koristi elektronsku komunikaciju za izvođenje dokaza, i to posebno videokonferencijske ili telekonferencijske veze. Istom uredbom je predviđeno da će centralni organi država članica u postupku pravne pomoći podsticati korišćenje elektronskih sredstava komunikacije. Slično je i sa regulativom o sporovima male vrednosti, kojom je predviđeno da će se ročišta, kada se održavaju, održati putem videokonferencijske ili telekonferencijske veze. Evropski zakonodavac je time obuhvatio širok dijapazon modaliteta komunikacije na daljinu. Naime, u pojedinim zemljama se ročišta održavaju i putem telekonferencijske veze.[12] Međutim, ta vrsta ročišta nije šire zaživela Srbiji i u zemljama koje imaju istu pravnu tradiciju u oblasti parničnog procesnog prava.

U autonomnom parničnom procesnom pravu država članica uobičajeno je korišćenje videokonferencijskih veza. Prema hrvatskom Zakonu o parničnom postupku, ročište na daljinu se može održati korišćenjem „odgovarajućih audiovizuelnih uređaja".[13] I u slovenačkom Zakonu o parničnom postupku, u članu 114a, predviđeno je da, uz saglasnost strana, sud strankama i njihovim punomoćnicima može dozvoliti da se u vreme ročišta nalaze na drugom mestu i tamo obavljaju procesne radnje, ako je obezbeđen zvučni i slikovni

[12] Takav je slučaj u Estoniji u kojoj je Zakonom o parničnom postupku, para. 350 (3), predviđena mogućnost saslušavanja telefonom pod uslovom saglasnosti svedoka i parničnih stranaka. Vid. *Code of Civil Procedure – Riigi Teataja*.

[13] Zakon o parničnom postupku Republike Hrvatske, *Narodne novine* 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, čl. 115, st. 3.

prenos sa mesta na kome se obavlja ročište na mesto/mesta na kojima se nalazi/nalaze stranke i punomoćnici i obratno (videokonferencija). Dakle, u oba slučaja se traži istovremeni prenos slike i zvuka.

Mađarski zakon sadrži nešto širu formulaciju pošto propisuje da se saslušanje vrši „uz korišćenje mreže za elektronsku komunikaciju". Širi izraz koji je upotrebio mađarski zakonodavac posledica je konzervativnijeg pristupa korišćenju novih tehnologija u parničnom postupku. U Mađarskoj se, naime, zahteva da lice koje treba saslušati putem interneta dođe u neki bliži sud ili kod drugog organa u za to namenjenu prostoriju, dok u Hrvatskoj i Sloveniji lice koje se saslušava može biti kod kuće ili u svojoj kancelariji ili bilo gde drugo.

Pristup sličan mađarskom imaju i druge zemlje, na primer, Narodna Republika Kina[14] i Ruska Federacija (World Bank 2021, 45). Održavanje ročišta putem videokonferencijske veze sa licem koje treba saslušati iz drugog, njemu bližeg suda najvernije preslikava uobičajeno ročište koje se odvija uživo. U toj situaciji, sudija tog suda upozorava svedoka o njegovim pravima i obavezama, a javnost se može obezbediti i u sudnici i na mestu izdvojene videokonferencijske veze. Međutim, takav način je skup i možda više prilagođen pravosudnim sistemima prostorno velikih zemalja, kao što su Kina ili Ruska Federacija.

Prilikom regulisanja ročišta na daljinu u parničnom postupku Republike Srbije treba imati u vidu potrebe našeg pravosudnog sistema. Ročišta na daljinu se u našem parničnom postupku mogu primeniti onda kada je to potrebno zbog efikasnosti i ekonomičnosti postupka i uštede troškova i onda kada treba saslušati lice koje pripada osetljivoj kategoriji, kao što je dete. U perspektivi bi bilo najkorisnije kada bi se, kao u EU, ročišta na daljinu zakazivala u slučajevima kada se neko od stranaka ili drugih učesnika nalazi preko granica naše zemlje. Za državu koja je emigraciona i čija se privreda velikim delom oslanja na strane investicije time bi se svakako ubrzao postupak i smanjili troškovi.

Zakonom, s druge strane, treba eksplicitno predvideti da se video-konferencijska veza odvija istovremenim prenosom slike i zvuka i u sudnici i na mestu izdvojene veze. Takav uslov je detaljno opisan u para. 128a nemačkog Zakona o parničnom postupku, čiji model u ovoj oblasti

[14] U Kini je ponuđena jaka infrastruktura koja obuhvata mnogo prostorija pri sudovima iz kojih je moguće putem videokonferencijske veze učestvovati na ročištu pred drugim sudom (izlaganje prof. Uzelca na obuci sudija BiH 23. februara 2021. godine), iako se ročištima može pristupiti i iz privatnih prostorija (World Bank 2021, 45).

treba slediti. Takvom detaljnijom regulacijom bi se prevazišle nedoumice u tumačenju sadašnje alternativno postavljene formulacije iz čl. 245, st. 3 – „optičko ili tonsko snimanje", iako je predviđeno da do snimanja dolazi putem konferencijske veze. Takođe, za različito tumačenje je podobna formulacija iz čl. 245, st. 6 – „snimljena izjava" jer može ukazati na naknadno pregledan snimak izjave svedoka što se ne može poistovetiti sa saslušanjem putem konferencijske veze.

3.4.2. Izbor kompjuterskih programa

Preporuke Saveta „Promovisanje upotrebe i razmene najbolje prakse prekograničnih konferencija u oblasti pravosuđa u državama članicama i na nivou EU" (2015/C 250/01) sadrže i preporuku da se prilikom održavanja ročišta putem videokonferencijske veze koristi nova tehnologija jer ona može da osigura najbezbedniji pristup stranaka i drugih učesnika u postupku i ostvarivanje prava na pravično suđenje.

Istovremeno sa radom na Nacrtu zakona o parničnom postupku, Ministarstvo pravde je započelo rad na razvoju programa koji su potrebni kako bi parnični postupak bio digitalizovan. Nije u svim državama tako – negde se koriste i komercijalno dostupni programi za komunikaciju u formi videokonferencijske veze.[15] Oba rešenja imaju prednosti i mane. Najčešće navođena mana komercijalnih programa je potencijalna zloupotreba u vidu virtuelnog bombardovanja konferencijske veze – *Zoom bombing* (Krstić et al. 2021, 73), kao najmarkantniji primer zloupotrebe programa za komunikaciju prenosom slike i zvuka u formi videokonferencijske veze u vreme pandemije. Taj konkretan tehnički problem je otklonjen odavno, ali je stvorena nesigurnost da se može ponoviti. Međutim, zloupotrebu može pretrpeti svaki softver, pa i onaj koji je posebno, pod okriljem države, razvijen za potrebe pravosuđa. U izboru softvera treba imati u vidu da je važno da program bude održavan na odgovarajući način kako bi moglo pravovremeno da se reaguje na sve potencijalne zloupotrebe i kako bi platforma bila redovno administrirana i unapređivana. Kada država može da obezbedi takvu tehničku podršku, dobro je da postoji posebna platforma koja će se koristiti posebno za održavanje ročišta na daljinu. U oba slučaja, a posebno u slučaju korišćenja komercijalnih platformi, neophodna je standardizacija korišćenja

[15] Tako je u Republici Hrvatskoj korišćen i program *Jitsi* OBAVIJEST – održavanje ročišta na daljinu na Trgovačkom sudu u Varaždinu! | Sudovi Republike Hrvatske, dok su najčešće korišćeni programi *WebEx*, *ZOOM* i *Skype for Business*, (izlaganje prof. Uzelca na obuci sudija BiH 23. februara 2021. godine).

u sudskom postupku kako bi se obezbedilo da se one koriste na način koji je u skladu sa svim načelima parničnog postupka, posebno sa načelom javnosti. Ta standardizacija se može postići obukama sudija i drugih zaposlenih u sudu, ali i drugih zainteresovanih korisnika.

Korisnici takvih programa, stranke i drugi učesnici treba da budu što manje opterećeni tehničkim zahtevima prilikom pristupa internetu u sudskom postupku. Dovoljno je da imaju mikrofon i kameru na svom računaru povezanom na internet, a softverski zahtevi treba da budu minimalni tako da klikom na link koji sud učini dostupnim učestvuju u punom kapacitetu.

4. SAGLASNOST SA NAČELIMA PARNIČNOG POSTUPKA

U pravničkoj javnosti se neretko mogu čuti skeptične izjave o tome da li je održavanje ročišta na daljinu u skladu sa načelima parničnog postupka i pravom na pravično suđenje. Preporuke Saveta „Promovisanje upotrebe i razmene najbolje prakse kod prekograničnih konferencija u oblasti pravosuđa u državama članicama i na nivou EU“ (2015/C 250/01) sadrže i uklopljenost u procesna načela (preporuka br. 20).

4.1. Načelo neposrednosti

Načelo neposrednosti je naglašeno problematizovano u srpskom pravu odredbama važećeg ZPP. U čl. 245, st. 3 ZPP, naime, predviđeno je da, u slučaju iz st. 2 tog člana (pisana izjava svedoka), sud rešenjem može da odluči, po službenoj dužnosti ili na predlog stranaka, da se svedok sasluša putem konferencijske veze, korišćenjem uređaja za tonsko ili optičko snimanje. Stavom 6 istog člana predviđeno je da sud uvek može da pozove svedoka čija je izjava snimljena ili onog koji je dao pisanu izjavu da svoje svedočenje potvrdi pred sudom na ročištu. Prema st. 5 istog člana, izjavu iz st. 3 može da podnese stranka. Time sam zakonodavac jasno tretira izjavu svedoka datu putem tehničkih uređaja kao odstupanje od načela neposrednosti, najpre jer zbog toga što je, u stavu 5, reč o snimku izjave. Nije opravdano da taj način izvođenja dokaza ne bude odvojen od izvođenja dokaza putem konferencijske veze istovremenim prenosom slike i zvuka, jer čl. 277 ZPP, kojim se predviđa mogućnost saslušanja stranaka putem konferencijske veze korišćenjem uređaja za tonsko ili optičko snimanje, upućuje na čl. 245.

Nejasno je i na koji način zakonodavac predviđa izvođenje tog dokaza. Prema samom tekstu zakona, svedok može da se sasluša „putem konferencijske veze, korišćenjem uređaja za tonsko ili optičko snimanje". Prema *Velikom rečniku stranih reči i izraza* Ivana Klajna i Milana Šipke, „optički" je onaj „koji se odnosi na optiku, svetlosni, očni, vidni".[16] U obrazloženju uz Predlog zakona o parničnom postupku iz 2011. godine napisano je da je tim predlogom zakona predviđeno saslušanje svedoka putem „video– linka".[17] Ako tu reč potražimo u pomenutom rečniku, jasno je da se misli na vezu koja podrazumeva prenos i slike i zvuka.[18] Ipak, zakonodavac je propisao da prenos može biti „tonski ili optički". Time se nameće zaključak da je kao alternativa postavljen i prenos koji je samo tonski, verovatno po ugledu na pomenute regulative EU. Nema podataka da je tonski snimak korišćen u parničnom postupku za važenja zakona iz 2011. godine. Saslušanje koje bi se odvijalo tonski, opet, uskraćuje onaj vid neposrednosti u postupanju kakva je moguća kada se konferencijskom vezom istovremeno prenose i slika i zvuk. Otud i odredbe prema kojima sud može pozvati svedoka čija je izjava snimljena da svoj iskaz potvrdi pred sudom na ročištu.

Dakle, ne treba smatrati da je izvođenje dokaza saslušanjem svedoka na daljinu nepomirljivosuprotstavljeno načelu neposrednosti samo po sebi (Jakšić 2012, 163), ali odredbe ZPP treba prilagoditi ostvarivanju tog načela u što većoj meri. Dovoljno je propisati da se saslušanje može obaviti konferencijskom vezom, istovremenim prenosom slike i zvuka jer bi takvo rešenje pratilo rešenja u uporednom pravu i potrebe sudske prakse. Takva formulacija svakako ne treba da bude sadržana u čl. 245 već treba da obuhvati širu mogućnost izvođenja dokaza.

Ne treba zaboraviti da je ostvarivanje načela neposrednosti i podloga za pravilnu ocenu dokaza (Dika 2008, 904). Istovremeni prenos slike i zvuka putem videokonferencijske veze u bitnim elementima obezbeđuje utisak kakav se može steći i uživo. U nekim situacijama može čak i da olakša komunikaciju na ročištu. U vreme pandemije, kada je nošenje maski obavezno, facijalna ekspresija se može pratiti samo pomoću tehničkih pomagala. Istina je da sud u tom slučaju ne može da stekne utisak o celokupnoj fizičkoj pojavi lica koje saslušava, ali je već široko prihvaćeno da može steći utisak o svemu što je potrebno. U krajnjoj liniji, prema mišljenju nekih autora, reč

[16] Ivan Klajn, Milan Šipka. 2010. *Veliki rečnik stranih reči i izraza*. Novi Sad: Prometej, 867.

[17] Obrazloženje uz Predlog zakona o parničnom postupku 2011, 113.

[18] Pod rečju video se podrazumeva „tehnika elektronskog snimanja, obrade i reprodukovanja pokretnih slika i pratećeg zvuka". *Ibid*., 267.

je o izuzetku od načela neposrednosti (Zöller 2014, 641) koji je ustaljen i opšteprihvaćen. Uostalom, o načelu elektronske neposrednosti je pisano i u našem regionu još 2008. godine (Dika, *ibid*.).[19]

4.2. Načelo javnosti

Korišćenje videokonferencijske veze u parničnom postupku, međutim, dovodi u pitanje ostvarivanje načela javnosti. Sud je, naime, dužan da omogući prisustvo javnosti (Poznić, Rakić Vodinelić 2015, 360–361). Načelo javnosti, iako značajnije u krivičnom nego u parničnom postupku, služi tome da se obezbedi poverenje u pravosuđe i da se parnične stranke zaštite od donošenja odluka u tajnosti (Jauering, Hess 2011, 112). U parničnom postupku javnost podrazumeva pravo na transparentan postupak i predstavlja element prava na pravično suđenje (Jauering, Hess 2011, 113). Transparentnost mora biti obezbeđena u svakoj fazi postupka, i prilikom odlučivanja o tome da se ročište održi putem videokonferencijske veze i na samom ročištu.

U situaciji kada se ročište održava na daljinu, postavlja se nekoliko dilema u vezi sa primenom načela javnosti u parničnom postupku. Najpre se postavlja pitanje da li se ročište održava potpuno na daljinu ili hibridno, u sudnici i na daljinu. U prvoj varijanti, učesnici se nalaze na različitim mestima. U drugoj varijanti sudija je u sudnici koja je otvorena za učesnike i javnost, a pojedini učesnici su na drugoj lokaciji i uključuju se putem videokonferencijske veze. U prvom slučaju se javnost može obezbediti samo prenosom ročišta uživo putem interneta, dok se u drugom slučaju javnost može obezbediti i u samoj sudnici, dok fizičko prisustvo javnosti može, zapravo, izostati na mestu izdvojene veze. Upravo zbog mogućnosti prenosa ročišta uživo putem interneta može se obezbediti da ročište prati širi krug lica,[20] ali, s druge strane, svi učesnici komuniciraju na daljinu, što onemogućava ostvarivanje svih prednosti stranačke, ali i opšte javnosti, koje podrazumeva ljudski kontakt uživo i celokupno sagledavanje prostorije u kojoj se učesnici nalaze. Međutim, za hibridna ročišta u kojima se samo neki od učesnika uključuju na daljinu javnost se obezbeđuje na tradicionalniji način jer je sudnica otvorena za javnost iako ostaje nerešen problem javnosti na mestu izdvojene veze. U nemačkom pravu je primenjen taj model (nemački Zakon o parničnom postupku, para. 128a). Prenos ročišta putem interneta omogućio bi šire

[19] Dika (2008) nije detaljno analizirao neposrednost prilikom saslušavanja svedoka pomoću elektronskih sredstava.

[20] U tom slučaju je potrebna detaljnije regulacija kojom će biti utvrđeno da nisu dozvoljeni snimanje i reprodukovanje snimka ročišta, odnosno slikanje. Takva pravila su prisutna u zemljama u kojima se ročište prenosi na daljinu.

učešće javnosti, ali procena svih aspekata ostvarivanja načela parničnog postupka i osnovnih garancija u postupku u slučaju takvog ostvarivanja načela javnosti (ako se izuzmu pandemijski uslovi) prevazilazi okvire ovog rada.

4.3. Načelo kontradiktornosti

Održavanje ročišta na daljinu mora biti i u skladu sa načelom kontradiktornosti. Sud je, u drugim zemljama, obično taj koji odlučuje da li će se ročište zakazati putem videokonferencijske veze ili uživo. odnosno to pitanje se tretira kao pitanje upravljanja postupkom.[21] Pritom, sud treba da vodi računa o jednakosti oružja među strankama i da zakazuje ročište tako da obe stranke imaju ravnopravan položaj i prilikom samog zakazivanja ročišta na daljinu i prilikom održavanja ročišta.

5. PRAVO NA PRAVIČNO SUĐENJE I ODRŽAVANJE ROČIŠTA NA DALJINU

Sud je dužan da se stara o tome da se prilikom održavanja ročišta na daljinu poštuje garancija prava na pravično suđenje. Da bi se sprečilo kršenje prava na pravično suđenje prilikom korišćenja videokonferencijske veze, Komitet ministara Saveta Evrope je sačinio Smernice za rešavanje sporova na daljinu u građanskim i upravnim sudskim postupcima,[22] u kojima je ukazano na to da države treba da obezbede jednostavan pristup suđenju na daljinu, ali i pouzdanost i bezbednost tog procesa. Evropski sud za ljudska prava je našao da održavanje ročišta putem videokonferencijske veze nije samo po sebi neusklađeno sa ostvarivanjem prava na pravično suđenje iz čl. 6 Evropske konvencije o ljudskim pravima. To je samo tehničko sredstvo koje se koristi u postupku, ali mora biti omogućeno da se koristi bez tehničkih smetnji.[23] Upravo je u tome suština – uz sve pomenute modalitete i nedoumice

[21] To je u skladu i sa zaključcima sa Okruglog stola o iskustvima u korišćenju video-konferencija, koji je održan u organizaciji Saveta Evrope (Savet Evrope 2020, 6).

[22] Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution machanisms in civil and administrative court proceedings, June 2021. vid. (Krstić et al. 2021)

[23] Odluka ESLJP 21272/03 u predmetu *Sakhnovski protiv Rusije* od 2. novembra 2010. godine, 97. Više o praksi ESLJP vid. (Krstić et al. 2021)

– korišćenje videokonfrencijske veze je deo tehnološkog progresa koji mora da nađe zasluženo mesto i u parničnom postupku. Zbog toga treba izmeniti Zakon o parničnom postupku, imajući u vidu sve u ovom radu navedene razloge za izmenu i elemente buduće norme.

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VIRTUAL LITIGATION HEARINGS

Summary

In a paper dealing with the ramifications of the COVID-19 pandemic to the litigation proceeding, the author analyses the institution of remote hearings in the Republic of Serbia. A critical reflection was given to the current Law on Civil Litigation and its provisions on presenting evidence from a distance. Afterwards, suggestions were provided for changing and amending these provisions. Several ways for regulating distant hearings were analysed to form the elements of the future norm. When it comes to the actual issue of harmonising the proceeding with the society's technological advancements, there is scepticism in the expertly public on how to harmonise this institution with the principles of litigation proceedings and the right to the fair trial. The author analysed arrangements from the comparative law and the ECHR practice to reach a conclusion on harmonising remote hearings with the principles of litigation proceedings and the right to a fair trial.

Key words: *Pandemics. – Videoconference. – Remote hearing. – Principle of immediacy. – Principle of publicity.*

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NIHIL OBSTAT – *SREDNJOVEKOVNE STRANPUTICE VISOKOG OBRAZOVANJA U SRBIJI*

Ovaj rad je osvrt na tri tematska okvira razmatrana u tekstu Dušana Rakitića (Anali Pravnog fakulteta u Beogradu 1/2022) koja su relevantna za raspravu o spornom pitanju odobrenja Sinoda Srpske pravoslavne crkve za izbor u nastavnička zvanja na Pravoslavnom bogoslovskom fakultetu Univerziteta u Beogradu (PBFUB): zakonodavstvo Kraljevine Jugoslavije; odredbe srpskog Zakona o crkvama i verskim zajednicama iz 2006. godine; prepoznavanje ustavnog načela kooperativne odvojenosti crkve i države u Ustavu iz 2006. godine. Osim toga, ukazuje se na to da novi Zakon o izmenama i dopunama Zakona o visokom obrazovanju iz 2021. nije u saglasnosti s Ustavom, jer se

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tu predviđa saglasnost nadležnih crkvenih organa za upis studija, učešće u konkursu, zasnivanje radnog odnosa i gubitak zvanja na PBFUB. Ustav je, naime, povređen u onim odredbama kojima se jemče svetovnost države, autonomija univerziteta i sloboda naučnog i umetničkog stvaranja.

Ključne reči: *Missio canonica. – Pravoslavni bogoslovski fakultet. – Autonomija univerziteta. – Svetovnost države. – Zakon o visokom obrazovanju.*

1. UVOD

U prošlom broju *Anala Pravnog fakulteta u Beogradu* (1/2022) objavljen je tekst Dušana S. Rakitića „O poreklu obaveznog blagoslova za izbor profesora bogoslovskih fakulteta – nacionalni i uporedni plan" (Rakitić 2022). U tom svom prilogu autor polazi od stava da je u akademskoj zajednici Srbije proteklih godina bila izražena suprotstavljenost mišljenja o opravdanosti instituta obaveznog crkvenog blagoslova za univerzitetske profesore teologije. Prema rečima samog Rakitića, njegov rad predstavlja pokušaj da se osvetli poreklo tog instituta, njegove uporedne primene, pre svega u evropskom akademskom nasleđu, kao i u nacionalnoj pravnoj tradiciji. Zbog toga su u njegovom eseju najpre razmatrani nastanak univerziteta u Evropi u srednjem veku i značaj koji su za tu pojavu imali podrška, zaštita i priznanje crkve. Posebna pažnja je, razumljivo, posvećena odredbama prava Rimokatoličke crkve (RKC) u istorijskoj perspektivi, a analizirani su i primeri nekih nacionalnih pravnih tradicija u pogledu današnjeg uređenja tog pitanja. Rakitić je potom pružio uvid u osnovne aspekte savremenog teološkog stava RKC o odnosu crkvenog blagoslova za izbor profesora teologije sa verskom slobodom, kao i akademskom slobodom, to jest autonomijom univerziteta. U poslednjem delu rada su, najzad, razmotreni i neki aspekti nacionalnog istorijskopravnog konteksta instituta obaveznog blagoslova u skladu s pravnom tradicijom Srbije. Ako se uzme u obzir ukupan tematski obim spomenutog rada, jasno je da je čak oko 80 procenata Rakitićevog teksta posvećeno razmatranju istorijske i uporednopravne građe o povesti evropskih univerziteta, dok je znatno manji deo rada odvojen za osvetljavanje i analizu nacionalnog konteksta primene instituta obaveznog blagoslova, koji je u poslednje nekolike godine (osobito od 2019. godine) postao predmet ozbiljnih kontroverzi u akademskoj zajednici Srbije, a naročito Univerziteta u Beogradu (UB). Naime, na osnovu odredaba u vezi sa davanjem blagoslova za službu učenja u statutu Pravoslavnog bogoslovskog fakulteta Univerziteta u Beogradu (PBFUB), oduzeto je zvanje čak trojici profesora teologije, uključujući i jednog episkopa. Štaviše, neusaglašenost

statuta PBFUB sa Statutom UB i Zakonom o visokom obrazovanju Republike Srbije iz 2017 (ZVO) bio je i jedan od glavnih razloga za donošenje novog Zakona o izmenama i dopunama Zakona o visokom obrazovanju (*Službeni glasnik RS* 67/2021). Zbog aktuelnosti tog pitanja za pravnu regulativu UB, ali i širi, ustavnopravni poredak Republike Srbije, naglasak ovog rada će biti, pre svega, na nacionalnom kontekstu preispitivanja pitanja obaveznog blagoslova za izbor profesora bogoslovskih fakulteta, kojem je u Rakitićevom prilogu ipak posvećeno mnogo manje pažnje.

Tri su, naime, glavna tematska okvira u kojima je Rakitić razmatrao sporno pitanje saglasnosti episkopa za konkurisanje za zvanja nastavnika i odobrenja Svetog arhijerejskog sinoda za službu učenja kod izbora u nastavnička zvanja: 1. zakonodavstvo Kraljevine SHS i Kraljevine Jugoslavije; 2. odredbe srpskog Zakona o crkvama i verskim zajednicama iz 2006. godine; 3. prepoznavanje ustavnog načela kooperativne odvojenosti crkve i države u Ustavu Srbije iz 2006. godine. Pre nego što se neposrednije i sam pozabavim spomenutim tematskim okvirima, želeo bih da ukratko osvetlim društveni, politički i pravni kontekst koji je prethodio tome da davanje i oduzimanje saglasnosti za službu učenja na PBFUB postane jedna od najvećih kontroverzi i kamen spoticanja na UB u poslednjih nekoliko godina.

2. DRUŠTVENI KONTEKST

Godine 1952, odlukom jugoslovenske socijalističke vlasti, PBF je udaljen sa UB[1], pa je na taj način došao pod jurisdikciju, okrilje Sinoda Srpske pravoslavne crkve (SPC). Iako su nastavnici PBF bili skloni tome da zadrže autonomiju koju su imali kao deo predratnog UB, Sinod, koji je preuzeo ne samo osnivačku nego i finansijsku odgovornost nad PBF, počeo je da odlučuje i u pitanjima izbora nastavnog kadra, upisa studenata i nastavnih planova i programa. Od 1952. do 2004. godine ta visokoškolska ustanova se zvala *Bogoslovski fakultet Srpske pravoslavne crkve*. Godine 2004, odlukom demokratskih vlasti (vlada Zorana Živkovića)[2], PBF je, nakon pola veka izvan UB, vraćen u sastav tog univerziteta, ali pritom nije povratio i svoju autonomiju u odnosu na Sinod, iako je rešenjem Vlade Srbije, njenim autentičnim tumačenjem iz 2004.

[1] Rešenje Vlade Narodne Republike Srbije, V.S. br. 62 od 15. februara 1952. godine.

[2] Dana 9. januara 2004. godine, na predlog svih tradicionalnih crkava i verskih zajednica u Srbiji i uz podršku 22 fakulteta UB, Vlada Republike Srbije je donela rešenje (05 br. 02–82/2004 od 9. januara 2004. godine) o oglašavanju ništavim rešenja Vlade Narodne Republike Srbije broj 62, od 15. februara 1952. godine,

godine, odluka socijalističkih vlasti iz 1952. oglašena ništavom. Dakle, PBF je vraćen u sastav UB, osnivač mu je ponovo postala Republika Srbija, ali je Sinod i dalje imao formalan uticaj na izbor nastavnika tog fakulteta, a nadležni episkopi na selekciju studenata i konkurisanje za izbor nastavnika. Odgovarajuće odredbe su ušle i u Statut PBFUB koji se, u tom pogledu, do danas nije menjao. Sve to je, naravno, bilo u suprotnosti sa ZVO i Statutom UB, ali je do 2019. godine prenebregavano kao pitanje neusaglašenosti Statuta PBFUB sa tim višim pravnim aktima. Donedavno se SPC, institucija koja je Ustavom Srbije odvojena od države (pa tako i od državnog univerziteta) nije previše uplitala u akademsku delatnost na PBFUB, pa je svojevrstan *modus vivendi* nekako održavao tu, inače, vrlo fragilnu institucionalnu konstrukciju. To pitanje je, međutim, ponovo postalo aktuelno 2019–2020. godine, kada je najpre suspendovano a zatim i otpušteno troje profesora PBFUB (Maksim Vasiljević, Marko Vilotić, Rodoljub Kubat)[3], i to prvenstveno zbog svojih javnih nastupa ili teorijskih gledišta koja nisu bila po volji Sinoda SPC.[4] Nasuprot tome, kao visokoškolskim nastavnicima, njima je država garantovala punu slobodu izražavanja svojih naučnih ideja i koncepcija, ali i moralnih načela – i u fakultetskim salama i u široj javnosti. Na primer, u članu 5 (stav 2) ZVO jasno se ističe da akademske slobode podrazumevaju slobodu naučnoistraživačkog i umetničkog rada, uključujući slobodu objavljivanja i javnog predstavljanja naučnih rezultata i umetničkih dostignuća. Štaviše, prema Zakonu o crkvama i verskim zajednicama (2006), crkve i verske zajednice imaju pravo da samostalno uređuju i sprovode svoj poredak i organizaciju i da samostalno obavljaju svoje unutrašnje i javne poslove (čl. 6), ali, isto tako, „verske obrazovne ustanove uključene u sistem obrazovanja dužne su da poštuju uslove i standarde koji važe u sistemu obrazovanja, u skladu sa propisima o obrazovanju“ (čl. 37).

U svakom slučaju, ubrzo se na velika vrata otvorilo pitanje neusaglašenosti Statuta PBF sa Statutom UB i ZVO. Postalo je, naime, jasno da su spomenuti profesori Bogoslovskog fakulteta otpušteni mimo uobičajenih zakonskih procedura i normi, da su prekršena njihova ljudska prava (Ustav RS, čl. 73 i 36), pa, dakako, i da imaju utuživa subjektivna prava jer je, između ostalog, bio

kojim je Bogoslovski fakultet SPC ukinut kao državna ustanova i isključen iz sastava Univerziteta u Beogradu (*Službeni glasnik RS* 3/2004 i 51/2004 – autentično tumačenje).

3 *https://www.istinomer.rs/analize/crkva-i-vlast-udruzene-protiv-slobode/* (poslednji pristup 25. maj 2022.)

4 Videti, na primer, Rešenje br. 0101–595/1 od 9. oktobra 2020. o zabrani obavljanja poslova nastavnika na akademskim studijama protiv prof. dr Rodoljuba Kubata, redovnog profesora PBF. To rešenje je potpisao dekan PBFUB prof. dr Zoran Ranković.

povređen i Zakon o radu Republike Srbije (tako da neki od njih još uvek vode sporove pred nadležnim državnim sudom).[5] Imajući sve to u vidu, jasno je zašto je uprava UB u jesen 2019. godine, još pre otpuštanja trojice profesora PBF, pokrenula pitanje neusaglašenosti Statuta PBF sa Statutom UB i ZVO, s namerom da se taj pravni problem na univerzitetu konačno reši. Najpre je krajem 2019. svoje mišljenje dao Odbor za statutarna pitanja UB.[6] Utvrđeno je, naime, da je statut PBFUB protivan Statutu UB i ZVO, pa otuda on nije ni mogao da proizvede nekakvo pravno dejstvo. PBFUB se, međutim, nije priklonio toj odluci, pa je na inicijativu Rektorke UB Ivanke Popović formirana i univerzitetska radna grupa s ciljem da se pomogne PBFUB u usklađivanju njihovog statuta sa statutom univerziteta. Petočlana Radna grupa UB[7], čiji je zadatak bio da prevaziđe problem neusaglašenosti odredaba važećeg Statuta PBF sa Statutom UB, bavila se tim spornim pitanjem u periodu od oktobra 2020. do marta 2021. godine. Ona je, između ostalog, analizirala mišljenje Odbora za statutarna pitanja od 8. novembra i 17. decembra 2019. godine, pozitivno zakonodavstvo Republike Srbije, praksu Ustavnog suda RS, uporedna rešenja (posebno u Nemačkoj, Hrvatskoj i Grčkoj), nekada važeće propise Kraljevine Jugoslavije te pravila SPC i RKC. Radna grupa je, na kraju svog mandata, većinski podržala mišljenje Odbora za statutarna pitanja UB da je institut blagoslova (tj. saglasnosti episkopa i Sinoda SPC) u suprotnosti sa ZVO i Statutom UB.

Jasno je da je za akademsku zajednicu UB najsvrsishodniji put rešavanja problema statutarnosti i zakonitosti rada PBFUB, kao uostalom i svakog drugog fakulteta, bilo usklađivanje statuta PBF sa Statutom UB i tada važećim ZVO u onim spornim odredbama koje se tiču davanja saglasnosti episkopa za upis studija i konkurisanje za zvanja nastavnika i odobrenja Sinoda za službu učenja prilikom izbora u nastavnička zvanja. Na tu potrebu je, još od novembra 2019. godine, jasno ukazivao Odbor za statutarna pitanja UB,

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5 Na primer, u rešenju kojim se zabranjuje obavljanje poslova nastavnika na akademskim studijama prof. dr Rodoljubu Kubatu (9. oktobar 2020), dekan PBF se poziva na „ovlašćenja iz *pravosnažne i izvršne* (sic!) Odluke Svetog Arhijerejskog Sinoda SPC", dok u pouci o pravnom leku doslovno stoji: „Protiv ovog Rešenja nije dozvoljena žalba".

6 Preciznije, reč je o sednicama Odbora održanim 8. novembra i 17. decembra 2019. Mišljenje Odbora za statutarna pitanja (br. 06–5156/3–19) od 17. decembra 2019. dostavljeno je potom Senatu UB na usvajanje. Na svojoj sednici od 14. aprila 2021, Senat, koji je radio na ivici kvoruma, nije usvojio mišljenje Odbora. To mišljenje je podržalo 18 dekana UB, ali za usvajanje su bila potrebna 24 glasa. Samo troje profesora bilo je uzdržano, a dekan PBFUB je bio protiv. Iz broja prisutnih članova Senata jasno se vidi da oni ni teoretski nisu mogli da daju potrebnu podršku na samom glasanju.

7 Rešenje Rektorke UB 02 br. 612–3171/1–20, od 30. septembra 2020.

a nešto docnije i univerzitetska Radna grupa u svojim nastojanjima da se prevaziđe problem neusaglašenosti Statuta PBF sa Statutom UB i ZVO. Taj relativno manji problem neusklađenosti dva statuta na UB je 2021. godine, nažalost, solomonski „rešen“ izazivanjem daleko većeg problema: donošenjem novog Zakona o izmenama Zakona o visokom obrazovanju (*Službeni glasnik RS* 67/2021) koji je u suprotnosti sa Ustavom Republike Srbije.

3. RASPRAVA O TRI TEMATSKA OKVIRA

Osvrnimo se sada na tri spomenuta tematska okvira koja je Rakitić izdvojio s obzirom na sporno pitanje saglasnosti episkopa za konkurisanje za zvanja nastavnika i odobrenja Sinoda za službu učenja prilikom izbora u nastavnička zvanja. U delu rada koji se odnosi na nacionalni kontekst primene instituta blagoslova u pravnom sistemu Kraljevine Jugoslavije, Rakitić upućuje na Zakon o Srpskoj pravoslavnoj crkvi iz 1929. godine (čl. 18, st. 2), u kojem je bilo predviđeno da se „profesori i docenti bogoslovskog fakulteta, koji se biraju po Zakonu o univerzitetima, postavljaju pošto se prethodno utvrdi i verska podobnost kandidata ocenom Svetog arhijerejskog Sinoda“.[8] Međutim, pažljiva analiza tog člana Zakona pokazuje da su se ti profesori i docenti birali po Zakonu o univerzitetima (1930), a spomenuti Zakon o SPC nije automatski davao pravo Sinodu da samostalno interveniše nego da pokrene inicijativu kod ministra prosvete za otklanjanje ‘osvedočenih nesuglasnosti’ (Novaković 2012, 953). To je, uostalom, jasno iz stava 1 člana 18 spomenutog zakona gde se navodi kako „Sveti Arhijerejski Sinod nastojava i stara se da predavanja na pravoslavnim bogoslovskim fakultetima državnih Universiteta budu u saglasnosti sa naukom pravoslavne vere. U slučajevima osvedočene nesuglasnosti preduzima kod Ministra prosvete potrebne mere, da se one otklone“.

Sasvim je, dakle, jasno da se prvi stav člana 18 tiče isključivo heterodoksnih stavova, to jest jeresi. Drugim rečima, predavanja na PBFUB treba da budu ‘u saglasnosti sa naukom pravoslavne vere’, odnosno da ne budu jeretička. A prilikom osvedočene (ne samo naslućene ili pretpostavljene) nesaglasnosti, odnosno osvedočene nepravovernosti, jeresi, Sinod nema neposrednog prava da sam interveniše nego se mora obratiti ministru prosvete kako bi se taj problem razrešio. U drugom stavu člana 18 se zatim tvrdi da se profesori

[8] Zakon o Srpskoj Pravoslavnoj Crkvi od 8. novembra 1929. godine, br. 89870, *Službene novine Kraljevine Jugoslavije* 269, 16. novembar 1929.

i docenti postavljaju tek pošto se prethodno utvrdi i verska podobnost kandidata ocenom Svetog arhijerejskog sinoda. No pošto je jasno da 'verska podobnost' znači isto ono što i 'saglasnost sa naukom pravoslavne vere' iz prvog stava člana 18, onda se i ovde zapravo tvrdi da se profesori PBF biraju ukoliko nisu jeretici. To je bio jedini uslov koji je postavljao Sinod, ali čak ni taj uslov on nije mogao da sprovodi samostalno nego je njegovo sprovođenje zavisilo od procene ministra prosvete.

Iako se zakonodavstvo Kraljevine Jugoslavije ne primenjuje od 1946. godine te nije neposredno relevantno za savremeno prosvetno zakonodavstvo u Srbiji, uvid u uredbe PBF koje su potpisivali ministri prosvete 1921, 1932–1934 ili 1935. godine jasno pokazuje da institut blagoslova nije bio deo fakultetske (PBF), ali ni univerzitetske regulative u toj državi.[9] Štaviše, na zahtev ministra prosvete dr Ilija Šumenkovića (potpisnika Uredbe PBFUB iz 1934), 20. aprila iste godine doneto je sledeće rešenje: „Rešavam: da svi fakulteti u zemlji najdalje do 20 maja ove godine podnesu nove projekte fakultetskih uredaba za svoje fakultete. Prilikom izrade novih projekata fakultetskih uredaba fakulteti se imaju u svemu strogo pridržavati propisa Zakona o univerzitetima, Opšte uredbe univerziteta i paragrafa 21 tač. 5 Finansijskog zakona za 1934/35. U uredbe se ne sme uneti nijedna odredba koja bi bila suprotna pomenutim propisima."[10] Jasno je, dakle, da su se u Kraljevini svi fakulteti bez izuzetka, pa i PBF, morali strogo pridržavati univerzitetskih propisa, zakona i uredaba, što automatski isključuje i bilo kakav uticaj Sinoda SPC na rad Bogoslovskog fakulteta. To, uostalom, potvrđuju i zapisnici Saveta PBFUB iz perioda od 1937. do 1944. godine, u kojima je zabeleženo zaista mnogo slučajeva izbora u zvanja, od asistenta do redovnog profesora, ali bez spominjanja bilo kakvog blagoslova Sinoda prilikom izbora nastavnog osoblja.[11] Uostalom – a to je jedno od ključnih pitanja – koje bi bile naučne kompetencije članova Sinoda prilikom izbora univerzitetskih profesora PBFUB? Sinod nije stručno akademsko telo za izbor nastavnika jer ga čine članovi koji najčešće nemaju (iako ponekad mogu imati) univerzitetska zvanja. Većina članova Sinoda obično nema ni doktorat

[9] Videti, na primer, Uredbu Pravoslavnog bogoslovskog fakulteta na Univerzitetu Kraljevine Srba, Hrvata i Slovenaca od 8. juna 1921. koju je potpisao tadašnji ministar prosvete Svetozar Pribićević (*Službene novine* III, br. 127) ili pak Uredbu PBFUB od 11. juna 1935 (god. XVII, br. 133-XXXIII, 1935), koju je potpisao ministar prosvete Stevan Ćirić. Ministar prosvete je, štaviše, imao vrhovni nadzor i nad aktivnostima svih verskih škola u Kraljevini.

[10] Navedeno prema tekstu iz faksimila ovog dokumenta.

[11] Imao sam neposredan uvid u faksimile čitavog niza zapisnika iz tog perioda (1937–1944) i ni u jednom od njih se ne spominje blagoslov Sinoda za izbor bilo kog nastavnika PBFUB.

nauka, pa prema univerzitetskim propisima ne mogu uopšte učestvovati u komisijskoj proceduri potvrđivanja izbora u zvanje docenata, vanrednih i redovnih profesora PBFUB.

U pravnom poretku Republike Srbije, sve do donošenja Zakona o izmenama i dopunama Zakona o visokom obrazovanju 2021. godine, nije postojao nikakav ustavni, zakonski ili statutarni osnov za uvođenje instituta blagoslova (*missio canonica*) u autonomno pravo UB, uključujući PBFUB. *Missio canonica* je, kao što je dobro poznato, specifično rimokatolički institut, a osnov za njegovo unošenje u nacionalno pravo je konkordat potpisan s Vatikanom (kao, na primer, u slučaju Nemačke i Hrvatske), koji Republika Srbija nije nikada potpisala. Štaviše, čak i da takav međunarodni ugovor postoji, pitanje je da li bi se on mogao primenjivati na PBFUB, s obzirom na to da je reč o fakultetu na kojem se izučava teologija druge hrišćanske konfesije. Najzad, čak ni u Republici Grčkoj, u kojoj crkva ustavom nije odvojena od države, ne postoji institut davanja saglasnosti crkvenog organa za izbor nastavnika ili za upis studenata na Kapodistrijski univerzitet u Atini i Aristotelov univerzitet u Solunu, dok u Ruskoj Federaciji ne postoje teološki fakulteti u sastavu državnih univerziteta. U tom smislu s velikom rezervom treba prihvatiti i Rakitićev stav da su „praksa, pravo i teološki stavovi Rimokatoličke crkve značajni za analizu predmeta ovog rada na nacionalnom planu ne samo zato što je ta crkva u suštinskom smislu tradicionalna u državama srpskog naroda, a u formalnom zakonskom smislu i u savremenoj Srbiji, već i zato što se pravo kojim se uređuje položaj Srpske pravoslavne crkve, kao njeno autonomno pravo, praksa i teološki stavovi u XX veku o predmetnom pitanju u bitnim aspektima poklapaju sa pravom, praksom i teološkim stavovima Rimokatoličke crkve“ (Rakitić 2022, 303).

Rakitić kratko razmatra i Zakon o crkvama i verskim zajednicama iz 2006. godine, imajući posebno u vidu dva načela koja proishode iz tog zakona: garanciju koju crkve i verske zajednice uživaju jer su ‘slobodne i autonomne u određivanju svog verskog identiteta’ (čl. 6, st. 2) i obavezu države da ne ometa ‘primenu autonomnih propisa crkava i verskih zajednica’ (čl. 7, st. 1). Rakitić pritom s pravom primećuje da je obaveza države ograničena imperativnim normama pozitivnog prava, ali je ona važna zbog toga što uvodi načelnu obavezu uvažavanja autonomnog prava crkava i verskih zajednica u granicama Ustava i imperativnih normi. Tu najpre treba istaći da sporna pitanja o davanju blagoslova na službu učenja nisu uređena Zakonom o crkvama i verskim zajednicama iz 2006, već tek Zakonom o izmenama i dopunama Zakona o visokom obrazovanju iz 2021. godine. Taj noviji zakon je u potpunosti otvorio vrata SPC da odlučuje o upisu studenata, konkurisanju, izboru, pa čak i otpuštanju nastavnika na PBFUB. Nikad ranije takve odredbe nisu postojale u zakonima o univerzitetima ili visokom obrazovanju, pa čak

ni u Zakonu o SPC Kraljevine Jugoslavije, kojim je doduše bilo predviđeno da se Sinod, ukoliko pribavi dokaze o nečijoj 'osvedočenoj nesuglasnosti' sa 'naukom pravoslavne vere', obrati ministru prosvete da se te neusaglašenosti uklone, što je neuporedivno manje pravo od onoga koje je Sinodu dato zakonom iz 2021. godine.

I najvažnije: umesto da se PBFUB statutarno uskladio s ostalim fakultetima UB, ozbiljno je narušena autonomija UB. Naime, od 2021. godine jednoj vanuniverzitetskoj i nedržavnoj instituciji (SPC) omogućeno je da legalno utiče na upis studenata, izbor i otpuštanje nastavnika državnog univerziteta. To što je jedna vanuniverzitetska institucija, uz pomoć Ministarstva prosvete, ukinula autonomiju univerziteta, više nije samo problem PBFUB i njegovog statuta nego i problem za državni (Beogradski) univerzitet jer su odredbe Zakona iz 2021. godine u suprotnosti sa Ustavom i nekim temeljnim statutarnim normama UB, koje važe od njegovog osnivanja. Kada je, pak, reč o Zakonu o crkvama i verskim zajednicama, podsetimo na odredbu tog zakona prema kojoj su „verske obrazovne ustanove uključene u sistem obrazovanja dužne da poštuju uslove i standarde koji važe u sistemu obrazovanja, u skladu sa propisima o obrazovanju" (čl. 37). Ako to važi za verske obrazovne ustanove, još više bi trebalo da važi za državni teološki fakultet na državnom univerzitetu.

Osvrnimo se, najzad, i na Rakitićevu tezu o kooperativnoj odvojenosti države i crkve u Srbiji. Načelo sekularnosti je u Ustavu iz 2006. godine utvrđeno kao jedno od temeljnih ustavnopravnih načela. Ne samo da je opredeljenje za svetovnu državu tim Ustavom izričito zajemčeno (za razliku, na primer, od Ustava iz 1990), već je ono uzdignuto i na rang ustavnog načela (čl. 11). Imajući na umu odredbe Ustava iz 1990, pisci i donosioci aktuelnog Ustava su izostavili da spomenu materijalne ili neke druge oblike pomoći države crkvi, što svakako nije bilo slučajno; tu je, naime, izražena namera da se princip odvojenosti dosledno sprovede (Marinković 2011, 378–379; Draškić 2013, 38–40). Može se stoga zaključiti da se Ustav iz 2006. opredelio za sistem stroge separacije između crkava (verskih zajednica) i države, dok je Ustav iz 1990. ostavio to pitanje donekle otvorenim, dopustivši da se zakonodavnim putem priznaju i pojedini elementi kooperativne odvojenosti.

Upućivanje na načelo kooperativne odvojenosti crkve i države temelji se na pretpostavci da je sámo to načelo izraženo u nekolike odluke Ustavnog suda Srbije.[12] Istaknimo opet da Ustav Republike Srbije, u skladu sa svojim odredbama, nije utemeljen na načelu *kooperativne* odvojenosti već *striktne*

[12] Ustavni sud Srbije, IUz-455/2011, od 16. januara 2013; Ustavni sud Srbije, IUo-175/2012, od 15. oktobra 2014.

odvojenosti crkve i države (Marinković 2011; Draškić 2013). Svetovnost, sekularnost države je, štaviše, jedno od osnovnih ustavnih načela, a odvojenost crkve od države temeljna vrednost sadašnjeg ustavnopravnog poretka u duhu evropske prosvećenosti. Ne postoji, štaviše, nikakva norma ili odredba u Ustavu Srbije iz 2006. godine koja bi se mogla tumačiti u smislu kooperativne odvojenosti crkava i verskih zajednica od države. Osim toga, Ustavni sud nije nikad do sada doneo nijednu odluku u spornoj materiji koja se odnosi konkretno na pitanje davanja blagoslova/saglasnosti (*missio canonica*) u pravnom sistemu državnih univerziteta. Bilo bi, dakle, neophodno da, u svom tumačenju Ustava, sudije Ustavnog suda navedu valjane ustavnopravne, uporednopravne, istorijske ili neke druge argumente da bi se moglo nedvosmisleno zaključiti kako se Ustav iz 2006. godine nije opredelio za sistem striktne odvojenosti crkve i države već za sistem 'kooperativne odvojenosti' (Marinković 2011, 377–383; Draškić 2013, 39).

Ustav Republike Srbije (čl. 72), Zakon o visokom obrazovanju (čl. 6) i Statut UB (čl. 10) eksplicitno određuju i domen autonomije univerziteta. Autonomija univerziteta (prema čl. 10 Statuta UB) podrazumeva, između ostalog, pravo na: utvrđivanje studijskih programa; utvrđivanje pravila studiranja i uslova upisa studenata; uređenje unutrašnje organizacije; donošenje statuta i izbor organa upravljanja i poslovođenja i studentskog parlamenta; izbor nastavnika i saradnika; izdavanje javnih isprava; raspolaganje finansijskim sredstvima; korišćenje imovine; odlučivanje o prihvatanju projekata i o međunarodnoj saradnji, kao i druga prava koja proizlaze iz dobrih akademskih običaja. Jasno je stoga da vanuniverzitetska tela i organi ne mogu i ne smeju da utiču na opisane procedure. U članu 72 Ustava Republike Srbije izričito se garantuje autonomija univerziteta, visokoškolskih i naučnih ustanova. Prema toj ustavnoj odredbi, autonomija visokoškolskih i naučnih ustanova se ogleda u njihovoj samostalnosti u odlučivanju o unutrašnjoj organizaciji i radu (čl. 72, st. 2). Štaviše, autonomija univerziteta je ugrađena u korpus neotuđivih ljudskih prava. Kako bi onda uopšte mogla da postoji autonomija univerziteta u izboru nastavnika ako saglasnost za konkurisanje i odobrenje za izbor daju vanuniverzitetska tela, koja to odobrenje mogu u svako doba (i bez ikakvog obrazloženja) povući te na taj način po automatizmu dovesti do gubitka zvanja nastavnika? Ustavom je zajemčena i svetovnost države kao jedno od osnovnih ustavnopravnih načela i precizirana odvojenost crkve i verskih zajednica od države (čl. 11). Država, a ne crkva (SPC), jeste osnivač i vlasnik PBFUB od 2004. godine, a ona je to bila i u periodu od osnivanja tog fakulteta pa sve do 1952. godine. Povreda autonomije univerziteta vodi posledično i povredi člana 73 Ustava, kojim se garantuje sloboda naučnog stvaralaštva, pa samim tim i povredi člana 5 Zakona o visokom obrazovanju kojim se garantuju akademske slobode.

Neobično je, zaista, što u svom radu Rakitić ističe da „uticaj crkve na izbor profesora teologije po sebi ne predstavlja povredu autonomije visokoškolske ustanove, ali može biti izraz autonomije samog konfesionalnog teološkog fakulteta, upravo zbog toga što je reč o specifičnoj ustanovi, čije je suštinsko određenje njena konfesionalna priroda“ (Rakitić 2022, 323–324). Autonomija fakulteta u okviru autonomnog univerziteta kategorija je koja, bojim se, ne postoji u koncepcijama koje su dovele do pravnih akata (u našem slučaju: Ustav, ZVO, Statut UB) kojima se definiše autonomija univerziteta. Rakitić tu, na neki način, paradoksalno „štiti“ autonomiju PBF u okviru autonomnog UB, ali istodobno ne vidi problem u tome što uticaj crkve (na primer, Sinoda SPC) na izbor profesora univerziteta neposredno narušava autonomiju tog univerziteta!

Novi Zakon o izmenama i dopunama Zakona o visokom obrazovanju (2021) nije u saglasnosti s Ustavom Republike Srbije u odredbama kojima se predviđa saglasnost nadležnih crkvenih organa za upis studija, učešće u konkursu, zasnivanje radnog odnosa i gubitak zvanja (prestanak radnog odnosa), koji bi važio za PBF kao članicu UB. S obzirom na načelo svetovnosti države i striktnu pravnu distinkciju između crkava i verskih zajednica, s jedne strane, i države, s druge strane, kao i zajamčenu autonomiju univerziteta koja bi bila ugrožena ukoliko bi uticaj na upis studenata i izbor nastavnika imalo neko vanuniverzitetsko telo, Ustav je, dakle, direktno povređen u onoj odredbi kojom se jemči autonomija univerziteta: „(1) Jemči se autonomija univerziteta, visokoškolskih i naučnih ustanova. (2) Univerziteti, visokoškolske i naučne ustanove samostalno odlučuju o svome uređenju i radu, u skladu sa zakonom“ (čl. 72 Ustava RS).

4. ZAKLJUČAK

Na kraju bih se složio s konstatacijom Dušana Rakitića da „razumevanje instituta obaveznog blagoslova u kontekstu prava i pravne tradicije Srbije ne izgleda moguće bez razumevanja mnogih prethodnih pitanja, među koja spadaju i zajednička pravna tradicija evropskih naroda i nacionalna pravna tradicija, tumačenje važećih ustavnih načela, kao i bitni elementi za uravnotežavanje konfesionalnog i verskog samoodređenja u pogledu identiteta i doktrine, kao suštinskog aspekta verske slobode, sa organizacionim aspektima autonomije univerziteta i pravima iz radnog odnosa“ (Rakitić 2022, 322). Nije, međutim, svejedno kojim od tih pretpostavki treba, u kontekstu savremenog univerziteta, pridavati veći ili manji značaj. Kada je reč o pravnom poretku Republike Srbije u trećoj deceniji XXI veka i pravnoj tradiciji koja je tome prethodila, jasno je da važeći Ustav, kao i temeljne norme na kojima je zasnovan pravni sistem Univerziteta u Beogradu, tu nužno treba

da odnesu prevagu nad pravnim nasleđem drugih evropskih naroda u kojima je crkva (naročito RKC) imala većeg uticaja na visokoškolsko obrazovanje, pa tako, naravno, i na istorijat podučavanja na teološkim fakultetima državnih univerziteta. Kada je, pak, reč o interpretaciji važećih ustavnih načela, u Srbiji bi Ustavni sud tek trebalo da iznese ocenu ustavnosti ili zakonitosti Zakona o izmenama i dopunama Zakona o visokom obrazovanju iz 2021. godine, naročito s obzirom na pitanje zaštite autonomije univerziteta (čl. 72), slobode naučnog i umetničkog stvaranja (čl. 73), svetovnosti države (čl. 11) i prava na pravno sredstvo (čl. 36).[13] Verskim i akademskim slobodama, najzad, doprinosi i puna sloboda profesora teologije da, u okvirima svoje matične crkvene i religijske tradicije, izlažu sopstvene teorijske i teološko-filozofske ideje, koncepte i tumačenja koja ne povređuju granice eventualne heterodoksije, a mogu predstavljati doprinos razvoju teologije i podsticaj na dijalog i s predstavnicima vlastite veroispovesti i s kolegama iz drugih konfesionalnih sredina i tradicija.

Pravoslavnu teologiju na PBFUB formulišu, predaju, ali i donose planove i programe profesori pravoslavne teologije. Arhijereji koji sede u Sinodu SPC nisu nužno, a ni po pravilu, pravoslavni teolozi. Oni su visoko sveštenstvo SPC i staraju se o svojim eparhijama, mitropolijama i o Crkvi u celini, ali ne i o nastavnim planovima i programima PBFUB. Oni, pre svega, nemaju odgovarajuće *naučne* kompetencije. Među tim arhijerejima ima, doduše, ponekad i teologa s profesorskim zvanjima, ali je daleko manji broj njih u sastavu Sinoda, a najčešće ih u tom telu uopšte i nema. Sve to pomalo liči na razliku između pravnika na visokim položajima u sudskoj vlasti i profesora prava. Profesori prava donose planove i programe na Pravnom fakultetu UB, ali to, na primer, ne čine sudije Ustavnog suda, iako se među njima može naći i poneki profesor Pravnog fakulteta. Ali i te sudije predlažu i donose, zajedno sa svojim kolegama, planove i programe Pravnog fakulteta kao *profesori* tog fakulteta, a ne kao sudije Ustavnog suda. Kada je pak reč o sadržajima i literaturi pojedinih predmeta na PBFUB, svi profesori koji predaju na tom fakultetu su, po pravilu, teološki obrazovani vernici SPC, a neki od njih i (arhi)jereji, pa se od njih ne bi ni očekivalo da predaju nešto što bi se kosilo s pravoslavnim učenjem. Ako bi se u tom pogledu i javile neke nesuglasice, tu je, kao i do sada, Veliki crkveni sud, koji može da bude angažovan u razmatranju eventualnih spornih pitanja. Međutim, kada su pomenuti profesori izbacivani sa PBFUB, Veliki crkveni sud uopšte nije konsultovan, mada bi njegovo mišljenje za akademsku zajednicu bilo jednako irelevantno koliko i mišljenje Sinoda.

[13] Ovde imam u vidu sledeće odredbe Zakona o izmenama i dopunama Zakona o visokom obrazovanju koje bi opravdano mogle da budu predmet normativne kontrole: čl. 18, čl. 20, čl. 21 i čl. 24.

Preuzimanje ingerencija Sinoda SPC nad programskim sadržajima PBFUB moglo bi dalje stvarati i niz stručnih i praktičnih problema kao što su oni s kojima se UB susretao još od maja 2017. godine kada je grupa teologa PBFUB, uglavnom mlađe generacije, potpisala saopštenje, kao reakciju na peticiju srpskih kreacionista, u kojem su, između ostalog, tvrdili da u ovom času ne postoji nijedna plauzibilna alternativna naučna teorija koja bi mogla da zameni teoriju evolucije. Štaviše, ti bogoslovi su zastupali stav da ne postoji nikakva 'biblijska teorija stvaranja' koja bi se mogla shvatiti kao naučna teorija, odnosno naučna alternativa teoriji evolucije. To saopštenje je naišlo na vrlo negativnu reakciju Sinoda SPC. Ubrzo nakon završetka majskog Sabora SPC 2017. godine, pojedinim nastavnicima PBFUB sa svešteničkim zvanjima uskraćene su glavne dužnosti u njihovim parohijama, a samo im je bilo dozvoljeno da saslužuju u liturgijama. Neki su otpušteni i iz redakcija elektronskih i štampanih medija SPC, a tu odluku je doneo lično počivši patrijarh Irinej. On je ujedno čak petorici profesora zabranio da ubuduće daju javne izjave bez njegovog blagoslova. Sve to je bilo praćeno upozorenjem da će protiv onih koji prekrše to pravilo biti pokrenut crkveni disciplinski postupak (Vukomanović 2020).

U periodu od 2019. do 2021. godine čak trojici teologa je oduzeto pravo da predaju na PBFUB iz razloga sličnih onima koji su izazvali neuobičajeno strog nastup crkvenog vrha 2017. godine. Bojim se da je donošenje Zakona o izmenama i dopunama Zakona o visokom obrazovanju iz 2021, umesto da povoljno utiče na 'identitet, doktrinu i percepciju' SPC, samo utrlo put ka novim čistkama na PBFUB i zamiranju onih glasova u srpskoj pravoslavnoj teologiji koji su u stanju da prate znakove vremena u kojem živimo.

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NIHIL OBSTAT – MEDIEVAL ROAMING OF HIGHER EDUCATION IN SERBIA

Summary

This work is an assessment of three topics considered in Dušan Rakitić's article (Anali 1/2022). All three are relevant for the discussion of the disputed issue of the Holy Synod's blessings for the appointment of theology professors at the University of Belgrade Faculty of Orthodox Theology: (a) legislation of the Kingdom of Yugoslavia; (b) the provisions of the 2006 Serbian Law on Churches and Religious Communities; (c) the constitutional principle of the cooperative separation of church and state in the Constitution of Serbia. Furthermore, the 2021 Law on Amendments to the Law on Higher Education is not in compliance with the Constitution of Serbia regarding the provisions implying the consent of church bodies for enrollment of students, employment and loss of appointment pertinent to the Faculty of Orthodox Theology.

Key words: Missio canonica. – *Faculty of Orthodox Theology. – University autonomy. – Secularity of the State. – Law on Higher Education*.

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LEGAL ASPECTS IN MAURITIUS OF MEDICAL PROCEDURES PERFORMED ABROAD

There are several medical procedures that may be undergone by Mauritian citizens abroad where no harm is suffered by a patient, and yet, important legal questions may stem from them. The main examples of it are surrogacy medical procedures and medically assisted reproduction procedures performed abroad on a Mauritian citizen. The legal aspects of those types of medical procedures performed abroad, which could one day become legal issues before the Mauritian Supreme Court are analyzed in this paper.

Key words: *Mauritius. – Medical. – Procedure. – Law. – Surrogacy. – Assisted. – Procreation.*

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The situation may occur, and it probably happens very often in everyday life, that Mauritian citizens travel abroad and undergo medical procedure in foreign countries[1] either because that particular type of procedure is not available in Mauritius or because the service available abroad is of higher quality. In most cases, medical procedures performed abroad do not raise important legal questions in Mauritius, except the issue of the damage suffered by a patient due to fault or negligence of a medical practitioner who performed the procedure abroad. However, there are few cases of medical procedures undergone by Mauritian citizens abroad where no harm is suffered by a patient, and yet, important legal questions may stem from those procedures. The main examples of it are surrogacy medical procedures and medically assisted reproduction procedures performed abroad on a Mauritian citizen. The legal aspects of those types of medical procedure performed abroad, which could one day become legal issues before the Mauritian Supreme Court, will be analyzed in this paper.

The method used in the preparation of this paper is essentially critical analysis based on desk research. This paper addresses issues pertaining to the Mauritian civil law. Thus, French case law and French scholarly writings, which, for historical reasons,[2] represent a persuasive authority in Mauritius,[3] are taken into account (Law Reform Commission 2010; Domingue 2002, 62; Agostini 1992, 21; Venchard 1982, 31; Angelo 1970, 237; Bogdan 1989, 28; Burgeat 1975, 315; Marrier d'Unienville 1969, 96; Moolan 1969, 137; Palmer, 2012). French Law is a persuasive and not a binding authority, which means that Mauritian judges do not have any formal

[1] For example, an intervention performed on a cardiac patient, a plastic surgery, etc.

[2] The French Civil Code of 1804 was incorporated into the positive law of Mauritius in 1805, because Mauritius was a French colony in the early 19th century. After the English took possession of the Island, the Mauritian Civil Code remained in force, thanks to Article 8 of the Act of Surrender, signed in 1810, which stipulated that the people of the island would maintain their religion, laws and customs.

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

obligation to follow the decisions of their French counterparts.[4] A Mauritian judge will only cite and follow the reasoning developed in a judgement of the French Court of Cassation if the judge considers them appropriate for the Mauritian context. For the above-mentioned reasons, our analysis will draw upon the French case law and doctrine but the outcome will not necessarily be the same as in French law.

1. LEGAL ASPECTS OF A SURROGACY PERFORMED ABROAD

Surrogacy can take two different forms (Garrigue 2018, 702; Courbe, Gouttenoire 2017, 430–431; Hess-Fallon, Simon 2014, 193; Neirnick 2019, para. 48). First of all, there can be gestational surrogacy, where an embryo has been conceived with the gametes (genetic material) of the couple wishing to have a baby or with the gametes of another donors and, after that, the embryo has been transferred into the surrogate mother's uterus. The surrogate mother is supposed to forfeit the baby after she gives birth and to hand it over the child to the couple which are usually called *the intended parents*. The intended parents may sometimes use the medical technique knowns as *surrogate mother*, where the surrogate mother is inseminated artificially with the sperm of the intended father. Of course, as it is also the case in gestational surrogacy, the surrogate mother will forfeit and hand over the child to the intended parents, after giving birth. This second technique of surrogacy differs from the first one in that the surrogate mother will not only carry the child but also conceive it with her genetic material. The surrogate mother gives her genetic material for the conception of the child and carries it to term, when it will be handed over to the intended parents. In other terms, the surrogate mother is in every possible way the baby's biological mother (Mirkovic 2008, 1–2).

Surrogacy is a legal gap in the current legal system in Mauritius (Law Reform Commission of Mauritius, 2013). Thus, there are no rules pertaining to it either in the Mauritian Civil Code nor in a special legislation. From the point of view of the current legislation in Mauritius, surrogacy, performed either in Mauritius or abroad, is not prohibited by any law. As already

[4] This rule has been applied, for instance, to the issue of reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner. See the judgements of the Mauritian Supreme Court in *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* 2007 SCJ 106 and *Naikoo v. Société Héritiers Bhogun* 1972 MR 66 1972, as well as the judgements of the French Court of Cassation ch. mixte, 27 February 1970 n° of pourvoi: 68–10276, and Cass. crim. 17 March 1970 n° of pourvoi: 69–91040.

outlined in the introduction of this paper, Mauritian citizens will sometimes have recourse to medical procedures abroad, if a procedure is not available in Mauritius or is available but with many obstacles and difficulties or is of lesser quality than the same procedure performed abroad. This also applies to surrogacy.[5] Thus, the performance of a surrogacy can be the purpose of a trip of a Mauritian citizen abroad. The first legal issue which arises from that kind of tourism is the treatment that a Mauritian Judge will give, from the legal point of view, to a child conceived abroad with the aid of a surrogate mother. In certain countries surrogacy is legal. For instance, for many years, India was an ideal destination for medical tourism aiming at surrogacy. There were many prospective surrogate mothers in India, the country has broadly allowed this medical practice and the financial cost was not unreasonable. Moreover, medical facilities, such as private clinics, are well equipped to perform this kind of procedure. However, since 2015, major legislative changes have been brought to Indian legislation and now the intended parents have to be Indian. Foreigners cannot come in India and have recourse to a surrogate or gestational mother (Surrogate.com 2022a; The Guardian 2015; Sherwell 2015). Moreover, surrogacy is legal in some other counties, and especially in the United States of America (Intraius Legal Consulting 2018). In some of them surrogacy is available to foreigners.[6] For example, "if you live outside of the United States and are looking to have a child via surrogacy in another country, using an American surrogacy agency is likely your best choice. Many surrogacy professionals in the States have developed programs specifically for international parents where you can connect with qualified American surrogates who are more than happy to carry a child for an international couple" (Surrogate.com 2022b). As previously pointed out, for historical reasons, Mauritian civil law is strongly influenced by French law. Even today, the judgments of the French Court of Cassation on civil law issues are considered as persuasive authority by Mauritian courts of justice, and the legal reasoning of French judges will often (but not always[7]) be followed by their Mauritian counterparts. Thus, there is a strong probability that, if and when a legal issue pertaining to a surrogacy performed abroad

[5] As far as we are aware, and after having discussed with medical practitioners and other professionals, surrogacy is not performed in Mauritian clinics and hospitals.

[6] "Experts say that countries popular with parents for surrogacy arrangements are the US (...) Thailand, Ukraine and Russia. Mexico, Nepal, Poland and Georgia are also among the countries described as possibilities for surrogacy arrangements" (Cheung 2014).

[7] Thus, the question of compensation of unmarried partner as indirect victim for the detriment suffered is differently solved in French Law and in Mauritian Law. See: *Lingel-Roy M. J. E. M. & Ors v The State of Mauritius & Anor* 2017 SCJ 411; *Jugessur*

for the benefit of Mauritian citizens (e.g. in the United States of America) is raised, a Mauritian judge will follow the solutions and spirit of the French Court of Cassation, which is the persuasive authority in Mauritius.

1.1. Prohibition of Surrogacy Agreements

Article 16–7 of the French Civil Code formally prohibits the surrogacy contracts (Garrigue, 2018, 701; Le Gidec, Chabot 2019, para. 35; *see* Dekeuwer-Défossez, Leroyer, Dionisi-Peyrusse 2018, 583; Pichard 2017, 1143 *ff.*; Le Gac-Pech 2016, 486; Tourame 2016, 275 *ff.*), because, "any agreement relating to procreation or gestation on behalf of others is void." This rule is directly linked to the public interest, i.e. the directional public order (*ordre public de direction*) (Porchy-Simon 2021, 152; Tranchant, Egea 2021, 44–45; Ancel 2020, 57 *ff.*), which is comprised of the fundamental values in French society such as the dignity of women (Courbe, Jault-Seseke 2019, 16). That is why the nullity of surrogacy agreements is an absolute one (Hess-Fallon, Simon 2014, 193). Any interested person can invoke this nullity (Courbe, Gouttenoire 2017, 431,) and the surrogacy contract cannot be confirmed by the gestational/surrogate mother and the intended parents. Even before Article 16–7 of the French Civil Code came into force, surrogacy agreements were strictly prohibited by the French Court of Cassation. In the famous judgment of all chambers of the Court of Cassation given on 31 May 1991 (Courbe, Gouttenoire 2017, 430, translated by author), we can read: "Considering Articles 6 and 1128 of the Civil Code, together Article 353 of the same Code; whereas, the convention by which a woman undertakes, even free of charge, to conceive and carry a child and to abandon it after its birth is contrary both to the public order principle of the unavailability of the human body as well as to the principle of the unavailability of the state of persons". This position led the French Court of Cassation to declare the adoption, by the intended parents, of the child carried by a surrogate mother, void and without legal effects, because this kind of adoption amounts to a fraud. On the other hand, the link of filiation[8] could be established between the child and its biological mother, who was the surrogate mother (Fenouillet 2019, 500).

Mrs Shati & ORS vs Bestel Joseph Christian Yann & ANOR 2007 SCJ 106; *Naikoo vs Société Héritiers Bhogun* 1972 MR 66; *Moutou vs Mauritius Government Railways* 1933 MR 102.

[8] The link of filiation is a legal bond between a child and its parent to which the Mauritian Civil Code attach certain rights and obligations. For instance, parents have the right and the obligation to educate their children (Article 371 *ff.* of the Mauritian Civil Code), to provide food and clothes to them (Article 203 of the

In other words, the refusal by the French Civil Code and the Court of Cassation to validate contracts on surrogacy is based on the idea that a woman and her body should not be used as a mere production tool. The capacity to carry a child is not something ordinary but one of the most intimate aspects of a women's existence. The pregnancy is not and cannot be considered as usual work (Mirkovic 2008, para. 8; Courbe, Gouttenoire 2017, 430). Moreover, the idea to abandon a baby, a human being as a whole, to a couple who "ordered" it seems to be morally shocking (Garrigue 2018, 702,), and that is why the French Court of Cassation, in its decision dated 31 May 1991 cited Article 1128 of the Civil Code, prohibiting an object of contract which would not be in conformity with the law, public interest and good morals. It is certain that a baby (a human being) cannot be considered as an ordinary goods nor handed over by one party to a contract to another.

As mentioned previously, the case law of the French Court of Cassation is the persuasive authority in Mauritius regarding civil law cases. Thus, if and when in the future the legal issue of validity of surrogacy agreements, concluded abroad by Mauritian citizens, is raised before the Supreme Court of Mauritius, there is a strong probability that the Supreme Court will follow its French counterpart and will declare this type of agreement null and void, whether consideration is given or promised to the surrogate mother or not. Even though the principle of the unavailability of the human body is not explicitly set out in the Mauritian Civil Code, there is no doubt that it can be inferred from the existing legislation in Mauritius (*Cf.* Marais 2018, 173–174). Section 6 of the Mauritian Constitution prohibits slavery,[9] which means that no one in Mauritius can be sold for good consideration and deprived of his or her liberty. The human body as a whole is a material object that cannot be sold by contract (Penneau, Terrier 2019, para. 55). This rule stems also from Articles 1128 and 1598 of the Mauritian Civil Code.[10] For the same reason, contract on surrogacy should be illegal in Mauritius. This type of contract seems to be contrary to the public interest mentioned in Article 6 of the Mauritian Civil Code (Marais 2018, 174), as well as to the dignity of the child, who cannot be treated as an object for sale. Moreover, the dignity of a

Mauritian Civil Code), etc. On the other hand, children have the right to bear their father's family name (Article 27 of the Mauritian Civil Code), to receive part of their parents' property upon the parents' death (Article 913) of the Mauritian Civil Code, etc.

9 "No person shall be held in slavery or servitude".

10 On other illegal objects from the point of view of the Mauritian Contract Law, *see*: Section 6 of the Dangerous Drugs Act 2000; section 3 of the Firearms Act 2006; sections 4, 5 (1) and 17 of the Human Tissue (Removal, Preservation and Transplant) Act.

mother prohibits her body from being treated as a simple tool of production in Mauritius. Thus, if a child is born abroad thanks to a surrogacy to which Mauritian citizens have reverted, it seems that the recourse to this technique should be declared illegal in Mauritius. The next issue which that will be considered is the legal status in Mauritius of a baby conceived abroad, carried by a surrogate mother and handed over to Mauritian intended parents (Garrigue 2018, 703).

1.2. Impossibility to Establish the Link of Filiation in Mauritius of a Baby Born Abroad to a Surrogate Mother

On 6 April 2011 the French Court of Cassation answered an important question of the legal status of a surrogacy performed abroad by French intended parents. The French Ministry of Justice (Attorney General's Office) had required that the Civil Status Service refuse to transcribe in the French Civil Status Register the filiation link of the child conceived abroad (in the United States of America) with the aid of a surrogate mother. This refusal of the French Court of Cassation is based on the principle of the unavailability of the status of persons (Neirinck 2011, abstract; Fenouillet 2019, 500 *ff.*, para. 581; Garrigue 2018, 706). However, this position of the French Court of Cassation has been criticized by the European Court for Human Rights in its judgments in *Mennesson* and *Labassee* dated 26 June 2014 (Garrigue 2018, 707–708; Hess-Fallon, Simon 2014, 197; *see* Hilt 2019, 2190 *ff.*). According to the Court, the refusal to bestow upon a child a link of filiation is contrary to the right of the child to its private life. The French Court of Cassation has followed in the steps of the European Court for Human Rights and has abandoned its position taken on 6 April 2011. Thus, when a child is conceived abroad with the aid of a surrogate or gestational mother, its link of paternal filiation established abroad could be transcribed in the French Civil Status Register (Fenouillet 2019, 503–504). This rule was set out in several judgments of the French Court of Cassation dated 5 July 2017 (Garrigue 2018, 711).[11] As from the day those judgments have been given, the paternal filiation established abroad can be transcribed in the French Civil Status Register, because it is contrary to the supreme interest of the child not to have such a filiation. According to some French academics, the position adopted by the French Court of Cassation has abolished Article 16–7 of the French Civil Code prohibiting surrogacy agreements (Chenede 2017, 375). On the other hand, it has to be noted that the abovementioned solution will

[11] Cass. 1st Chamber, 12 September 2019, comment Chénédé 2019, 531.

not apply to the woman who has not given birth to the child, even though she may have given her genetic material for the child's conception. Her link of filiation will not be transcribed in the French Civil Status Register, because the biological mother (gestational or surrogate mother) is mentioned in the civil status document produced abroad. However, the intended mother will be able to establish the link of filiation trough an adoption of the child (Fenouillet 2019, 505–506; Garrigue 2018, 711–712; *see* Granet-Lambrechts, 2017, 729 *ff.*, Part III, sub-part B).[12] In October 2019, the French Court of Cassation allowed for the transcription of the link of filiation of the intended mother in the French Civil Status Register.[13]

It is the author's opinion that the solution adopted by the European Court for Human Rights and followed by the French Court of Cassation is the most suitable one for Mauritius. The supreme interest of the child should not be used as the argument authorizing the intended parents to circumvent the prohibition on surrogacy agreements. This prohibition does not prevent the surrogate mother, who gave birth to the child, from establishing her link of filiation, but the intended parents should not be able to do so. The acknowledgement in Mauritius of the link of filiation established abroad for the benefit of intended parents would amount to fraud, given the recommendation that surrogacy agreements be considered void in Mauritius.

2. MEDICALLY ASSISTED PROCREATION

In Mauritius, medically assisted procreation is a legal gap, i.e. this medical mechanism is not regulated by any law. However, according to available data, some private clinics in Mauritius offer the services that qualify as medically assisted procreation.[14] Thus, in vitro and in vivo inseminations are performed in Mauritius. These techniques do not entail anything bad

[12] Cass. 1st Chamber, 12 September 2019, comment Chénédé 2019, 531.

[13] Cass Pl. Ass. 4 October 2019; *see* Cass. Pl. Ass. 5 October 2018; and ECHR Opinion 10 April 2019.

[14] "At Wellkin Hospital, the following fertility services are provided:

- Intra Uterine Insemination;
- In Vitro Fertilization with Intra Cytoplasmic Sperm Injection (ICSI);
- Cryopreservation of Embryos, Spermatozoa and Eggs;
- Frozen embryo transfer;
- Semen testing" (Wellkin Hospital. 2018. In Vitro Fertilisation (IVF). *https://www.wellkinhospital.com/medical-specialities/in-vitro-fertilisation-ivf/* (last visited 18 May 2022)).

or illegal. The desire of a married couple, or even of an unmarried one, to conceive and give birth to a child is easy to understand and if the medical science can help them in doing so, it should not be a priori illegal. However, two types of issues may arise from this type of medical procedure. The first is under what conditions may a married and/or unmarried Mauritian couple legally have access to medically assisted procreation. The second is determining the legal consequences in Mauritius of a medically assisted procreation performed abroad.

2.1. Uncertainty Pertaining to the Conditions for Medically Assisted Procreation

Unlike Mauritius, France has regulated the conditions under which a couple may have recourse to medically assisted procreation. In France, on one hand, the Code of Public Health (*Code de la santé publique*) sets out the conditions required for an individual to be eligible for medically assisted procreation, whereas, on the other hand, the French Civil Code governs its effects. Medically assisted procreation is defined by article L. 2141–1 of the French Code of Public Health as "clinical and biological practices allowing in vitro conception, preservation of gametes, germinal tissues and embryos, embryo transfer and artificial insemination." The common characteristic of all those techniques (*see* Amice, Beuvillard, Piraud 2015, 1 *ff.*) is the absence of the conception of a child in a natural way, i.e. through sexual relationship between the parents (Courbe, Gouttenoire 2017, 421). The list of medically assisted reproduction techniques available to the future parents is defined by a decision of the Minister of Health. Those techniques have to conform to the public order, i.e. with the core principles of the French society, such as human dignity, security of the mother and child, etc. (Fenouillet 2019, 481 *ff.*).

Article L. 2141–2 (1) of the French Code of Public Health provides that "the purpose of medically assisted procreation is to remedy the infertility of a couple or to avoid transmission to the child or to a member of the couple of a disease of a particular gravity" (Courbe, Gouttenoire 2017, 425; Mallet-Bricout, 2004, alert 46; Neirinck, 2013, landmark 2). Thus, the French legislator has specified in which cases a couple living together in a stable and continuous manner, whether married or not, may have recourse to medically assisted procreation. Those cases seem to justify properly the recourse to medically assisted reproduction techniques, and it is highly probable that the Supreme Court of Mauritius will not consider illegal the desire of the parents who cannot conceive a child naturally, or who wish to avoid the birth of a sick child, to have recourse to medically assisted procreation.

However, as we have already mentioned, medically assisted procreation is not currently regulated by Mauritian law; there is a legal gap pertaining to this medical technique. Thus, the question might be raised before the Supreme Court of Mauritius whether medically assisted procreation techniques can be used in circumstances different from those mentioned in article L. 2141–2 (1) of the French Code of Public Health, for example, in order for an individual (a woman) living alone to ensure offspring (Fulchiron 2014, para. 1).

It is not certain how the Supreme Court of Mauritius would resolve such an issue, and what would be the position of the Mauritian Supreme Court when, for instance, a widow wishes to implant into her uterus an embryo created with her egg and the sperm of her husband or non-married partner while he was still alive (Blanc 2015, 44). On one hand, every individual in Mauritius has the right to their private life including the right to create a family (Fenoullet 2019, 477). This right is guaranteed by Article 22 of the Mauritian Civil Code. However, and on the other hand, it is in the best interest of the child to have both parents and to be raised in the best possible environment (Blanc 2015, 49; Courbe, Gouttenoire 2017, 434–435). It is the author's opinion that the latter argument should prevail. Medical aid and assistance in a conception of a child should be a remedy to serious difficulties and problems that some Mauritian couples might be facing and such aid and assistance have to lead to the creation of a stable family background, which is one of the core values in Mauritius (*ordre public*). Medically assisted procreation must not be used as a tool for satisfaction of an individual's selfish interests or desires.

Article L. 2141–2 of the French Code of Public Health provides that medically assisted reproduction is available only to the couples composed of a man and a woman (Fenoullet 2019, 483; Courbe, Gouttenoire 2017, 433–434; Garrigue 2018, para. 1116 *ff.*);[15] they must be alive, of reproductive age and must consent to the medical procedure before the embryo transfer or artificial insemination. The aim of those conditions is, on one hand, to allow people to get offspring and, on the other hand to protect the interests of the child – which is to have a stable family environment. Those conditions prevent some categories of persons in France from having recourse to medically assisted procreation. Thus, single women, widows, and women who are getting divorced cannot be medically assisted in order to ensure offspring. Elderly couples are also excluded from medical assistance in order to get a child (Fenoullet, 2019, 483–484). It is currently uncertain what the position of the Supreme Court of Mauritius would be regarding such questions if an issue pertaining to a procreation performed abroad is raised before the

[15] They can be legally married or not (unmarried partners).

Court. There is nothing in the current legislation in Mauritius to prevent a single woman, not married (Fenouillet 2019, 479; Courbe, Gouttenoire 2017, 432–433; Pichard 2019, 2143 *ff.*) or a widow (Blanc 2015, 44; *see* Labrusse-Riou 2019, para. 61),[16] or an elderly married or unmarried couple to have legally recourse to medically assisted reproduction performed abroad (*see* Blanc 2015, 45–46). In the author's opinion, despite the legal gap, the abovementioned groups of individuals should be excluded from the right to medically assisted procreation. Indeed, such aid and assistance must lead to the creation of a stable family situation, which is one of the core values in Mauritius (*ordre public*). Moreover, medically assisted procreation cannot be used as a tool for satisfaction of an individual's selfish interests and desires.

2.2. Legal Consequences in Mauritius of a Medically Assisted Procreation Performed Abroad

As previously explained, there does not exist any reason, in the current Mauritian law, why medically assisted procreation should be prohibited in Mauritius when a woman who gives birth to the child is his intended mother and when she lives in a couple. Thus, where a medically assisted reproduction has been performed abroad for the benefit of a Mauritian couple of reasonable age, they will be able to establish in Mauritius the link of filiation with the child in conformity with the Mauritian Civil Code. In other words, the link of filiation will be established between the child created by medical procedure and the intended parents.

Article 311–20 (2) of the French Civil Code stipulates that "the consent given for medically assisted procreation excludes any action for the purpose of establishing or contesting the link of filiation unless it is proved that the child is not created by a technique of medically assisted procreation or that the consent has been deprived of effect" (translated by author). Moreover, article 311–19 of the French Civil Code stipulates that "in case of a medically assisted procreation with a third donor, no link of filiation may be established between the author of the donation and the child born out of that procreation". In addition, this article provides that "no liability action can be brought against the donor" (Fenoullet 2019, 497; Courbe, Gouttenoire 2017, 440). Thus, where a medically assisted procreation is

[16] According to some authors, the possibility for a widow to have recourse to a medically assisted procreation after the death of her husband or unmarried partner would contribute to the blurring of the lines between life and death.

performed abroad with the aid of a third donor, i.e. with the help of a donor of sperm or of an egg, such a donor, whether a man or a woman, cannot come before a court in order to establish his or her link of filiation with the child. The French law considers that the intended parents of the child, i.e. the woman who gave birth to the child and her spouse or partner, are the biological parents and thus, they are the only persons who are parents of the child from the legal point of view. It is the author's opinion that the same logic should be respected by the Supreme Court of Mauritius if the issue is raised one day before the Court. Thus, the members of a married couple are considered as parents of the child and the link of filiation will be established between them and the child. Moreover, even if the members of the couple are not married, the link of filiation with the child will be established between them and the child, through acknowledgment (*reconnaissance*). The third donor, who gave his or her genetic material for the conception of the child will not be able to contest this link. On the other hand, the link of filiation can be contested for the reasons applicable to all parents, for instance if the child is not created by a medically assisted procreation but is the result of an adultery committed by his mother.[17]

Article 311–20 (4) of the French Civil Code creates an obligation for the man who is the intended father to recognize the natural child born out of a medically assisted procreation. A man (the intended father) who does not comply with this obligation would incur "the responsibility towards the mother and towards the child". Moreover, the paternity of such a father may be judicially declared, i.e. it can be established by the court (Fenoullet, 2019, 495–496). The similar question may be raised one day before the Supreme Court in the case of a child conceived abroad with the aid of a medically assisted reproduction. In other terms, if the Supreme Court considers that a medically assisted reproduction performed abroad is not illegal when unmarried partners living together in a stable and continuous manner have recourse to it abroad, the father of such child will be allowed to establish his link of filiation through acknowledgement. This is stipulated in Article 334 of the Mauritian Civil Code.[18] The refusal of the intended father to do so could be construed as abusive behavior and impose an obligation upon him to make up the material and moral damage caused to the mother and/or the child.[19] The abuse stems from the contradictory nature of the father's

[17] Article 312 (2) of the Mauritian Civil Code and article 315.

[18] "The acknowledgement of a natural child will be made in an authentic act, when it has not been in his birth certificate".

[19] Articles 1382 and 1383 of the Mauritian Civil Code.

behavior: after having encouraged the intended mother (his unmarried partner) to resort to medically assisted reproduction, the intended father has changed his mind and does not want to assume the material and legal responsibility for the child by acknowledging it.

The Mauritian Civil Code does not prevent the mother of a child, conceived abroad with the aid of a medically assisted reproduction to bring an action before the Supreme Court of Mauritius in order to establish the link of filiation between her unmarried partner and the child. In fact, Article 340 of the Mauritian Civil Code provides that "paternity outside marriage can be judicially declared (...) in the case where the alleged father and the mother lived in notorious cohabitation state during the legal period of conception".

The situation is much simpler where a Mauritian married couple goes abroad for a medically assisted reproduction and returns to Mauritius. According to Article 312 (1) of the Mauritian Civil Code, the man who was, at the time of conception, the husband of a mother who gave birth to a child, will be considered by law as the child's father, i.e. the link of filiation will be automatically presumed (Courbe, Gouttenoire 2017, 439). The fact that the child was conceived with the aid of a reproductive technique does not change anything regarding his link of filiation with the child.

3. CONCLUSION

In this paper it has been shown that medical tourism, involving Mauritian citizens going abroad and undergoing medical procedures, may raise some practically very important and theoretically very interesting questions, especially when a Mauritian couple goes abroad and resorts to surrogacy or to medically assisted procreation. On one hand, it is the author's opinion that civil law surrogacy agreements are not in conformity with the current law and public interest in Mauritius, and that the link of filiation between a child and the intended parents, established abroad, cannot be recognized in Mauritius. On the other hand, it is the author's opinion that, provided the fulfillment of certain conditions, medically assisted procreation is in conformity with the current law and public interest in Mauritius. If it is performed abroad, the link of filiation between the intended parents, married or not, and the child can be recognized in Mauritius.

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Collin, Peter (Hrsg.) 2021. *Konfliktlösung im 19. und 20. Jahrhundert*. *Handbuch zu Geschichte der Konfliktlösung in Europa, Band 4* (GHrsg. David von Mayenburg). Berlin: Springer, XXXVI + 738.

The monumental *Handbuch zur Geschichte der Konfliktlösung in Europa* (Handbook of the history of dispute resolution in Europe) is composed of four volumes, covering Antiquity, the Middle Ages, the Early Modern period, and the 19th and 20th centuries, respectively. All four volumes were published in 2021, as the result of a State Offensive for the Development of Scientific and Economic Excellence (LOEWE) project under the same name, initiated in October 2013, under the general editorial guidance of David von Mayenburg, professor at the Goethe-Universität Frankfurt am Main Faculty of Law. While all four volumes, beyond any doubt, merit scholarly attention and can be recommended to any reader interested in the subject for a given period,[1] this review will focus on the fourth and final book, dealing with dispute resolution in the 19th and 20th centuries, i.e. in modern legal

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[1] The editors of the volume on Antiquity are Nadine Grotkamp and Anna Seelentag, for the Middle Ages – David von Mayenburg, and for the Early Modern period – Wim Decock. More information can be found at *https://www.springer.com/series/16478* (last accessed 25 February, 2022.) The volume reviewed here is the longest in the series, despite covering the shortest period, obviously reflecting the disproportional abundance of available source material on modern legal systems compared to earlier periods.

systems. The editor of the volume, Peter Collin, is a long-time affiliate of the Max Planck Institute for Legal History and Legal Theory, and an expert on the history of public law, including judicial history.

The book opens with a brief Introduction, printed in all four volumes, explaining the methodological framework of the project, such as the concept of dispute resolution (*Konfliktlösung*) and the history of its research throughout the 20th century, a multidisciplinary approach to the problem in the series and its focus on European legal systems, with a few exceptions.

The first chapter, written by Peter Collin, gives the reader a general overview of the matter in this particular volume, pointing out the dominance and specific profiling of state courts in the dispute resolution of this period, yet underlining the insufficient state of research in the history of procedural law in most European countries (Germany, England and France are mentioned as exceptions), not to mention alternative modes of dispute resolution. He points out other common factors for the period, such as the professionalisation of judges, the courts' focus on state-made written law, as opposed to other social norms (with some exceptions), but also the spread of certain models of judicial organisation and procedural law (from Napoleon's conquest on), leading to increased uniformity in the area. Access to justice gradually expanded for all layers of society, as did the procedures' general openness to the public, while features such as judicial privileges of the nobility (and, to a large extent, of churches and religious communities) were relegated to history. The 20th century led to an increased specialisation of courts in particular areas of law and types of conflicts (e.g. labour law), but also to a gradual internationalisation of justice and proliferation of arbitration. In the final section of his text, Collin asks whether we are witnesses to a process of erosion of state judiciary, gradually being pushed out by various alternative institutions. However, he points out that similar processes have existed and waxed and waned in many periods, and that their significance and supposed radical character have regularly been overestimated by contemporaries. He admits that while such procedures often do not come with all the guarantees of due process before state courts, this is not necessarily a flaw in itself, as long as parties willingly consent to it. However, since no strict line can be drawn between free and forced consent, the state should insist on at least a minimum of guarantees in such procedures. He finishes by stating that these two modes of dispute resolution tend to influence each other: ADR methods are becoming more professionalised, while state courts are under pressure to become more efficient. One might say that a convergent tendency is visible.

The first part of the book deals with fundaments and fundamental problems (*Grundlagen und Grundprobleme*) and it contains five papers. The first three chapters, fairly short, do cover some basic topics relevant for the entire scope of the book: Access to Justice, by Pia Letto-Vanamo – a comprehensible text that explains the concept well, although it might be argued that its dominant focus on the period after the concept itself was invented in the 1960s overlooks an important part of the analysis;[2] two chapters by Heinz Mohnhaupt discuss the importance of the principle of publicity (*Medien der Konfliktlösung*) and legal certainty/security (*Rechtssicherheit*), including the methods of publication of verdicts and proceedings (as well as laws and their commentaries). The fourth paper, on places where courts sit (*Gerichtsorte*), by Pierre Friedrich, deals with a subject that one probably would not name as one of the main issues in the history of judiciary, but which is nevertheless interesting and relevant (although focused on Germany), showing an evolution from the baroque buildings of the 18th century and the grand palaces of justice of the early 19th, full of symbolism, to the modern glass-and-steel buildings of the 20th century.

However, the final chapter in this part, "Justice in National Socialism" (*Justiz im Nationalsozialismus*), by Annemone Christians, stands out. While it does cover the issue of this very delicate question fairly well (even without quoting the often-indispensable Gustav Radbruch), its position in the introductory part of the book, which is devoted to basic problems, seems misplaced. As dark and widespread as the influence of National Socialism had been, placing the chapter about it among the core issues of the judiciary in 19th and 20th century Europe, alongside chapters dealing with very general themes, creates a skewered perspective. It probably would have been better had this chapter been placed in the part providing country overviews, either as part of the existing chapter on Germany, or as a separate one (this approach could be defended for several reasons) but still describing the issue in a single state under a single regime.

The second part, "Actors in Dispute Resolution" (*Akteure der Konfliktlösung*), contains only three chapters, but they all deal with highly important aspects of modern judiciary: gender and the position of women, the professionalization of judges, and lay participation in dispute resolution. The chapter "*Frauen vor und im Gericht*", by Marion Röwekamp, deals with the evolution of women's access to justice and entry into the legal profession, focusing on such issues as married women's capacity to appear

[2] A good example of a broader historical approach to the subject can be seen in Rhode 2004, 47–78.

as parties before courts and the obstacles faced and gradually overcome by women aiming to appear as judges, jurors and attorneys. The chapter can be commended for providing a broad overview of countries involved, although some were inevitably reduced to short examples. The chapter on professional judges (*Berufsrichter*), co-authored by Peter Collin, Lena Foljanty and Zeynep Yazici Caglar, gives a very engaging and enlightening overview of the patterns in a professional judge's career, from social background, education and recruitment (an important step, not to be overlooked!), social position and reputation, to issues of judicial independence and organisation. While it could be criticized for limiting itself to the already fairly well-studied countries – Germany, England and France – it is clear that the authors sacrificed breadth for depth. Finally, the chapter on laymen as judges (*Laien als Richter*), by Peter Collin, gives an (again geographically broader) overview of various forms of participation of laymen in the workings of both ordinary courts and specialised courts and arbitrations. Collin shows a particularly interesting tendency towards professionalisation of the latter, particularly in the case of commercial and trade arbitrations, leading to the fact that one can only speak of lay judging there in a very limited sense ("*hier kann man nur noch eingeschränkt von Laiengerichtsbarkeit sprechen*", 134).

The third part discusses dispute resolution in various forms of procedure and institutions (*Konfliktlösung in Verfahren und Institutionen*). Two chapters are devoted to civil procedure (in continental Europe and in England), two to criminal procedure (in continental Europe and, more broadly, in the Common Law legal space), two to international dispute resolution (international arbitration and international criminal procedure), and a final chapter to justice in the EU. Different approaches have been taken in the chapters, to good effect. The chapter on civil procedure in continental Europe (*Der Zivilprozess in Kontinentaleuropa*), by Dirk Heirbaut, is commendable for an overview of main influences – dividing the period into the French 19th century, the Austrian 20th and – with an inevitable question mark – the European 21st century. On the other hand, the chapter on criminal procedure (*Der kontinentaleuropäische Strafprozess*), by Martin Heger, adopts a different, but equally useful approach to the main subjects that can be traced throughout the period, from the codification of criminal procedure law and its relation to material criminal law, to various important procedural principles and issues in practice.

Some avoidance of difficult and delicate subjects can be noticed: for example, the chapter on international criminal courts (*Internationale Strafgerichtsbarkeit*), by Daniel Segesser, fails to mention – except perhaps in the most indirect manner – the controversies surrounding the International Criminal Tribunal for the former Yugoslavia and, to a lesser extent, Rwanda.

While the author's main area of expertise lies in the first half of the 20th century, and thus his unwillingness to address politically sensitive subjects may be understandable, it could still be argued that this leaves the reader with incomplete information. The chapter on EU justice (*Justiz im EU-Raum*), by Alexander Thiele, does discuss the European Court for Human Rights and its relation to the EU Court of Justice, but given the ECtHR's significance in the European space, perhaps it would have merited a separate chapter – despite the fact that it does not solve cases between individuals – as individual disputes are at the heart of its decisions.

The fourth part of the book is dedicated to fields in which disputes arise (*Konfliktfelder*), showcasing specific environments of dispute resolution other than the regular civil and criminal procedure. Some speak of specific areas of law where special dispute resolution is a novelty of the Modern age – administrative disputes, individual and collective labour disputes. There are also chapters on dispute resolution related to rural areas, commerce, the military, and family matters. The specificities of these areas are by no means new, but major changes occurred during in this period. The chapter on rural areas (*Konfliktlösung auf dem Lande*), by Anette Schlimm, is particularly interesting, as it shows the impact of the abolishment of patrimonial courts – after the French Revolution – on the possibilities for dispute resolution in rural communities, that had for a millennium been under a drastically different form of judiciary, but also property relations, compared to urban communities. In the chapter on disputes in the family (*Formelle und informelle Regelung familiärer Konflikte*), Margareth Lanzinger briefly but poignantly shows the evolution from the patriarch's dominance, which included the right to punish his wife and children, to the modern approach to mediation in family disputes, showing not only the advances in gender equality, but also excellently illustrating the impact of material law on the procedural.

Of particular interest is the chapter on dispute resolution in European colonies (*Konfliktlösung in europäischen Kolonialgebieten*), by Harald Sippel, as it places European colonial powers in the necessary imperialist context, which would have been painfully absent had the volume focused only on their internal laws – but also as it draws attention to insufficient research in this field so far.

The final four chapters in this part are devoted to dispute resolution pertaining to major religious communities: the Catholic Church, the Protestant churches, Jewish communities, and Islamic (Shariah) law. Two things stand out in this section. Firstly, while the first three chapters discuss dispute resolution *within* a given religious community, the last chapter (*Rechtskulturkonflikte mit dem islamischen Recht*), by Raja Sakrani, discusses

legal culture conflicts *with* Islamic law, drawing heavily on the concept of the Other,and showcasing the status of Muslim communities and Shariah tribunals in the UK, France, and Germany. The approach is highly appropriate, given the expansion of parallel normative systems and means of dispute resolution, and the author's conclusion that a peaceful and balanced solution currently seems like a utopia is justified. Secondly, there is no chapter on dispute resolution related to the Orthodox Church(es), despite the fact that the Orthodox Church is the second largest single Christian denomination in the world, numbering over 220 million believers worldwide, most of them in Eastern Europe (O'Brien and Palmer 2007, 22).

The fifth, final and longest part, encompassing more than half of the volume, is devoted to research on dispute resolution in individual countries (*Länderforschungsberichte*). The order of the chapters is curious – an approximate geographical clockwise circle, starting with Germany, going to the south and east of Europe, and then gradually back to the west and north, thus ending in Scandinavia. As described by Collin in the introductory chapter (5–6), since the European landscape changed during the analysed period, some concessions had to be made in that regard relating to countries that ceased to exist or were formed during this period. Thus, Russia and the Soviet Union, or the Ottoman Empire and Turkey are covered in the same chapters, while, on the other hand, the chapter on Yugoslavia doesn't span beyond that country's existence. Collin also points out that no authors could be found to cover Albania and Bulgaria, although he does refer to several existing works covering the latter.

However, the picture is not as simple as it might seem. The smallest European countries have been omitted as a matter of course: there is no mention of, say, Andorra, Liechtenstein, Monaco, or Cyprus. Countries that were created for the first time as the result of the recent break-ups of larger ones were not included by design, due to their short existence, which could be justified in principle, but the treatment is nevertheless inequal. The chapter on Russia/the Soviet Union seems understandable, as Russia had existed as an independent country long before the USSR was created (unlike other successor states), and it had a judiciary drastically different from the subsequent Soviet one. However, a similar logic could be applied to Yugoslavia, as Serbia and Montenegro existed as independent countries prior to the Yugoslav unification, yet their history of dispute resolution in the 19th and early 20th centuries is not covered. On the other hand, the Czech and Slovak lands had a similar history under Habsburg rule, prior to the formation of Czechoslovakia, yet the chapter concerns only Czechia and Czechoslovakia. All five Scandinavian countries have been placed together

in a single chapter by Robert Kessel, although the length of the bibliography seems to indicate that it was not for a lack of material on the individual countries. On the other hand, there is a chapter on Great Britain and Ireland until the latter's independence – and a separate, albeit short one, on independent Ireland.

The matter of selection aside, the chapters are well-written, and provide comprehensive basic information on both the judiciary and alternative methods of dispute resolution in the countries covered. This is of particular importance for those countries for which the literature on this issue in major Western European languages is scarce, as these chapters are bound to become default reference works for some time to come. This is especially the case for the chapters on Romania (by Manuel Gutan) and on Portugal (by Miguel Lopes Romão), where all the references are in the local languages, but very few references in English, German and French are also noticeable in many other chapters: on Czechoslovakia/Czechia (by Jaromír Tauchen), on Poland (by Danuta Janicka), on Italy (by Bernardo Sordi), on Spain (by Fernando Martínez-Pérez), and the chapter on Yugoslavia (by Zoran Mirković and Zoran Pokrovac). The latter is particularly noteworthy since there has been little recent research on the subjects of judicial procedure and arbitration during this period even in the ex-Yugoslav languages, and thus it can be viewed as a part of a wave of renewal of interest in the history of procedural law.[3] On the other hand, a fairly negative example can be apparent in the chapter on Russia/the Soviet Union, by Sandra Dahlke. Despite an impressively long bibliography – over 7 pages in small print – only a handful of the references are in Russian, mostly articles on narrow subjects, while recent major reference works, such as Kolokolov 2009 (and later editions) have not been included.

To summarize, the fourth volume of the *Handbuch zur Geschichte der Konfliktlösung* is an impressive reference work, containing many high-quality texts by experts in the field. As such, it is bound to be indispensable for some time, especially given the scarcity of literature on such subjects for many countries and specific issues. However, it is not without its flaws. Not counting some peculiarities in the structure of the chapters, the main flaw seems to be the West-Eurocentrism of its contents, as less attention is devoted to subjects relevant to Eastern European countries. These countries form the majority of those omitted from the individual country reports. Most of the chapters focusing on common themes in the first four parts of the

[3] Notable recent exceptions, i.e. other parts of the wave, being Ilić 2020 and Davinić 2020, two papers published in a book on the law of the "First Yugoslavia", edited by Begović and Mirković, published after the *Konfliktlösung* was finalised.

book omit any reference to Eastern Europe, and even where it would have been logical to devote a chapter to a relevantly Eastern European subject (the Orthodox Church) – this was not done.

Naturally, such an approach is not at all unusual for Western European publishing houses; quite to the contrary, the number of books claiming in their title to deal with a certain subject in Europe – while in fact covering solely *Western* Europe – is likely beyond count. However, it is a shame that a worthwhile publishing effort, which seemingly aimed for an egalitarian perspective and the coverage of the entire continent, has nevertheless fallen prey to some of the usual traps. Still, a step was taken in the right direction. May the next one take us even further.

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Boris BEGOVIĆ, PhD*

Mulder, Nicholas. 2022. *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War*. New Haven and London: Yale University Press, 614.

The timing was exquisite. The book with such a title and content was published just in time: only weeks before all hell broke loose in Ukraine and in relations between the West and Russia, demonstrating vividly that economic sanctions are indeed a tool of modern war. In the case of Russia's 2022 invasion of Ukraine, economic sanctions have actually been a substitute, at least for the time being, for fully-fledged war, i.e. military combat engagement of the West.

The book is, nevertheless, not about ongoing developments, but rather about the history of modern economic sanctions. The author traces their origin to the First World War and provides their history through the end of the Second World War in 1945.[1] According to the author, the subject of the book is how economic sanctions arose in the three decades after the First World War and how they developed into their modern form. The author believes that the emergence of economic sanctions signalled the rise of a distinctively liberal approach to the world conflict, the one that is very much alive and well today. At the very beginning of the book he points out that economic sanctions have shifted the boundary between war and peace, producing new ways "to map and manipulate the fabric of the world

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[1] The author refers to Thucydides' account of relations between rival city-states in Ancient Greece. In *History of the Peloponnesian War*, he records Athens's commercial ban on merchants from the Greek port city of Megara in 432 BC – an event that, according to the author, international relations scholars have proclaimed the first case of economic sanctions in history.

economy", changing the way how liberalism considers coercion, and altering the course of international law. Well, the burden of proof for all these observations is on the author, one way or the other.

The book is composed of three parts, each of which examines a consecutive phase in the history of economic sanctions. Part I, "The Origins of the Economic Weapon", covers the period of economic blockade of the Central powers, pursued by Britain and France from 1914, spanning the Great War and the immediate post-war years, up to the restoration of trade with Bolshevik Russia in 1921, i.e. with the end of first peacetime economic sanctions imposed.

It is indisputable that the origin of the modern economic sanction, those imposed in a globalised world, should be traced back to the First World War. However, such an origin provides for a basic contradiction regarding the economic sanctions. Are they or at least should they be a mechanism for winning an ongoing war or a mechanism to prevent a future war? The economic sanction, basically trade blockade, against the Central powers (Germany *et al.*), imposed in 1914 by the Entente countries and enforced mainly by the (British) Royal Navy, were wartime sanctions, aimed at undermining the war effort of the foe in any feasible way, including decreasing the living standard of the civilian population, but primarily by cutting-off inputs to German war-related manufacturing. The author provides a vivid case study of manganese as a crucial input in steel production, answering the questions what were the mechanisms of foreign trade and options that were available for the German steel industry (Krupp *et al.*) to purchase the input at the time of the first globalisation. Then the author analyses the mechanisms used to prevent the supply of manganese to the German steel industry. Obviously, the idea of the trade blockade to bring the enemy down was a supplement to military operations, especially as at the time these operations provided no visible gain at huge human and material costs.

There was a dilemma regarding how the economic sanctions should be applied: by a naval (trade) blockade (the Admiralty approach) or by financial blockade (the Treasury approach). The naval blockade approach ran into technical difficulties as for neutral countries, such as Netherlands, the freedom of the seas and transportation were not to be violated. The author points out the complicated and administratively demanding mechanisms to ensure that the goods delivered to the Netherlands did not end up in neighbouring Germany. For some reason, the author did not mention the German countermeasure, a naval blockade of the Entente countries by unrestricted submarine warfare. Irrespective of how effective it was in regard to the Entente's war efforts, this was instrumental in bringing the USA into the war in 1917.

It is a rather widely accepted insight that the naval blockade was the reason for the German defeat in 1918, so it was economic sanctions, weakening the German economy and undermining morale of the civilian population, that decided the outcome of the war. The author points out that there is no evidence to support such a thesis. Furthermore, it is a bit counterintuitive, because in 1918 the German victory on the Eastern Front, embodied in the Treaty of Brest-Litovsk, made Ukrainian resources available to them to compensate for the effects of the blockade. So, the blockade-driven defeat explanation is, to the great extent, part of the post-war "stab-in-the-back" myth (*Dolchstosslegende)*, according to which it was the home front that collapsed, not the "heroic" German Army. The author subscribes to the view that it was the military collapse of the German Army on the Western Front and surrender of the German soldiers *en masse* that was decisive for Germany's defeat (Ferguson 1998; Geyer, 2001). It was, it seems, the US enhanced military might of the Entente that brought the Great War to an end, rather than the trade blockade and the collapse of the home front.[2] The first caveat about the efficacy of the economic sanctions came rather early. For those ready to listen to the arguments and to re-evaluate their own actions.

Starting with the "war to end all wars", economic sanctions have become the inseparable companion of war. Nonetheless, the appalling costs of the Great War provided both incentives and fertile ground for consideration of the mechanism to prevent such bloodshed in the future. Accordingly, the 1919 Paris Peace Conference after all was not only about reparations and new borderers (MacMillan 2001). The leading proponent of the brave new world at the Conference indisputably was the US President Woodrow Wilson, who championed economic sanctions as a mechanism to prevent the war, as he, the author points out, believed that a threat of "an absolute isolation ... that brings a nation to its senses just as suffocation removes from the individual all inclinations to fight ... Apply this economic, peaceful, silent, deadly remedy and there will be no need for force" (pp. 1–2). Wilsonian idealism of liberal internationalism at work! With "suffocation" as an appropriate metaphor! President Wilson's persuasive effort was effective, as the peacemakers in Paris incorporated the economic weapon of sanctions into Article 16 of the Covenant of the League of Nations, and they transformed them, as the author points out, from a wartime to a peacetime instrument, allowing

[2] After all, general Erich Ludendorff who on 29th September 1918 requested from Kaiser Wilhelm to ask the Entente powers for armistice (Neiberg 2017) was (effective) commander-in-chief of the German armed forces (officially he was a Chief of German General Staff) not in the command of the home front.

the League of Nations to apply blockade-style sanctions without declaring war on aggressor states. Nonetheless, the wartime origin of the economic sanctions could not be erased.

The basic problem was that wartime mechanism was to be used as a peacetime instrument, aimed to be a deterrent, i.e. never to be used, similar to strategic nuclear weapons during the Cold War, the author remarks. Ostensibly, according to the Wilson's belief, it is quite sufficient to threaten a nation with economic sanctions and peace will prevail. As in many other things, President Wilson was wrong – starting with his blunder about the willingness of the US Congress to ratify documents he signed at the Paris Peace Conference. At the beginning of the 1920s, America reverted to isolationism and neutralism, it did not join Wilson's League of Nations pet project and left other great powers to deal with the economic sanctions.

The first peacetime economic sanctions, after the Great War, were those against the Communist regimes in Soviet Russia and Béla Kun's Soviet Hungary, obviously the motivation being regime change, according to the contemporary parlance, not their aggression against any other nation. Hence, preserving the peace was hardly an aim of the first modern peacetime economic sanctions. The author claims that this episode launched a public debate across Europe, not about the aim but about the ethics of economic war on civilians, with vocal campaigns by feminist, humanitarian, leftist, and liberal groups. The episode ended with the demise of the soviet republic in Hungary and with the end of the civil war in Soviet Russia, with the West recognising Bolsheviks' domestic victory. The ethical dilemmas regarding economic war on civilians remain to this day.

Part II of the book, "The Legitimacy of the Economic Weapon", provides the answer how the national elites of the great powers at the time and the technocrats in the League of Nations managed the powerful but incomplete system of economic sanctions that took shape during the 1920s, beginning with the League's convening of an International Blockade Committee in 1921 and ending with the international crisis over Japan's invasion of Manchuria in 1931, and especially how successful they were in their task.

The author has no doubts that there was a profoundly imperial dimension to the way the economic weapon operated during this period. Threats of economic sanctions within the framework of the League of Nations were used to restrain border wars in the Balkans, convince Turkey to give up territorial claims in Iraq, and were continuously considered against striking workers and anticolonial nationalist resistance in China. The threat of sanctions worked well in the case of border troubles and skirmishes in the

Balkans in the 1920s between Yugoslavia (officially Kingdom of Serbs, Croats, and Slovens) and Albania, and between Greece and Bulgaria – it precluded wars in the Balkan region. There are two important points, regarding the outcomes. First, it was the threat of economic sanctions, not the sanctions themselves that worked. Second, this was done against small, poor nations, not powerful international players. Well, as the author points out "Despite their supposed universality, League sanctions were considered suitable for use mainly against peripheral European states and 'semi-civilized' countries" (p. 8). The dilemma remains whether "suitable" refers to the efficacy of the economic sanctions in preventing wars or to the moral terms.

During this period, even given the consensus against whom the sanctions could and should work, according to the author, there was a struggle within the countries that championed such an intervention to secure wider legitimacy for economic sanctions against civil society and private economic interests, which led to a deep political rift within Western liberal elites. This split between pro-sanction and neutralists attitudes weakened the imperial-internationalist consensus on which the League of Nations rested and complicated the organisation's relations with external powers, especially with the United States, which was overwhelming neutralist during this period. The early period of economic sanctions came to an end with the advent of the Great Depression and its economic and political consequences.

Part III of the book, "Economic Sanctions in the Interwar Crisis", assesses the role of the economic weapon in the global political crisis of the 1930s and 1940s, from the Great Depression through to the end of the Second World War. The period starts with the unchecked Japanese invasion of Manchuria, as the League of Nations failed to stop Japan from aggression against China, effectively starting the Second World War (Overy 2021). Perhaps the most prominent failure of the economic weapon, the economic sanctions against Mussolini's regime during the Italo-Ethiopian War, which did not work as a deterrent and did not produce the desired outcome, as the aggressor won the war, is thoroughly analysed in the book. The author suggests that the focus of the sanctions, in this case, changed, arguing that this crisis produced a new understanding of sanctions, which focused on attrition. The Italo-Ethiopian War was a dress rehearsal for the ultimate failure of economic sanctions to prevent the outbreak of the Second World War. The author asks the crucial question why economic sanctions did not prevent the return of conflict and the eventual outbreak of another world war. His answer (save the previous one that the sanctions were designed for second-grade countries) is that the threat of economic sanctions provided incentives for the imperialistic competition for raw materials, financial reserves, and territory.

The mechanism of these incentives is straightforward. Under sanctions, Italy was on the brink of economic collapse and that lesson was carefully learned in both Berlin and Tokyo. In Germany, the lesson was augmented by the memory of the Great War blockade, and the domestic front collapse narrative, which was the conventional wisdom at the time about the failure of losing the war. Accordingly, all the future Axis powers started programs of becoming autarkies, i.e. self-sufficient economies, independent of import of inputs for their economies, especially their military-related industries and, above all, for their war machines. It was especially Germany that moved towards autarky with its Four Year Plan, a plan of substitution of imported inputs, or with tight political and military control of the territories from which the inputs were imported (Tooze 2006). Hence, it was the threat the economic sanctions and something that the author calls "blockade-phobia" – brought on by memories of the 1914–1918 economic war and kept alive by interwar sanctions – that provide incentives for Germany to enlarge the Reich and obtain new territories. The war in the East was for Germany, among other historically undisputed motives, a way to secure vast resources, inputs for its economy and war machine, from the territory of the Soviet Union.[3]

Accordingly, one of the crucial findings of the book is that the economic sanctions actually backfired in the 1930s and provided incentives for the crucial authoritarian powers of the time, which become the Axis powers in due course, for their invasions of other countries. Not only neighbours, but for the imperialist grabbing of the territory far from the metropole and obtaining, under preferential terms, resources from those territories. "The internationalist search for more effective sanctions and the ultra-nationalist search for autarky thereby became locked in an escalatory spiral" (p. 11). This was hardly the idea of those supporting economic sanctions as a deterrent to aggression.

However convincing the analysis of economic sanctions backfiring in the case of great powers may be, it seems that the author went too far with his "materialist interpretation" of the Second World War as a conflict revolving around the construction of coalitions for resource control. This is

[3] Treaty of Non-Aggression between Germany and the Soviet Union (Molotov–Ribbentrop Pact) and accompanying German–Soviet Credit Agreement concluded in 1939 provided Germany access to strategic inputs from the Soviet Union, with an enhanced trade agreement concluded in 1940, but it is firm control of the supply under own terms that was preferable for Germany (Johnson 2021). The other motives of Hitler's decision for the June 1941 aggression and breach of the non-aggression treaty with the Soviet Union, such as the creation of the *Lebensraum* and the extermination of the Jews that lived on that territory, are herewith not disputed.

not to say that resources control motivation was absent from the strategic consideration of the great powers, but this interpretation alone can hardly explain the developments leading up to the global conflict and during the war. The reader, however, easily subscribes to the author's view that "while historians have given plenty of attention to conventional military factors, as well as the ideological, political, economic, and social origins of war, the role of sanctions in shaping the aggression of fascist and militarist powers in the late 1930s has not been sufficiently examined" (pp. 11–12).

The substantial change during this period was the return of America to the international scene with the new administration, the presidency of Franklin Delano Roosevelt (FDR), and the New Deal liberal spirit with its liberal interventionism attitude in international relations. Although the isolationist sentiment was still very strong, the USA become an active international player, particularly on the Pacific Rim and especially toward Japan's war excursion into China. The author explains that the US sanctions were introduced gradually, step by step, with the final one being the oil embargo, effectively imposed in July 1941 after Japan took over Frech Indochina. The motive for that escalation of economic sanctions remains unknown to the reader. Nonetheless, this information is important since the escalation, the airtight Anglo-Dutch-American oil embargo, was the final straw for Japan's political and military elite (somewhat merged at that time) to decide to go to war against both the US and UK, primarily to get hold of the oil-rich Dutch East Indies (Indonesia) by military means.

The author refers to the testimony of commander-in-chief of the US Navy Admiral Harold Stark, who believed in July 1941 that the Japanese military would "consolidate their positions and await world reaction to their latest move." He doubted that they would attack "unless we embargo oil shipments to them.... They will do nothing ... until the outcome of the German-Russian war on the continent is more certain." (p. 279). Therefore, a senior US military official gave his clear and unambiguous warning about the outcome of the oil embargo on Japan. It is difficult to believe that his voice was lost in the corridors of power in Washington. It may have been disregarded, or perhaps misunderstood (with the blunder that the sanctions would work in opposite direction),[4] it is possible that a cacophony of opinions dominated,

[4] According to the author, the threat of an oil embargo worked for the US in the case of Spain a year earlier, influencing Franco's decision for his country to remain neutral, so the hope could have been that the oil embargo would work well again. However, Spain and Japan had substantially different strategic positions and foreign policy aims. The author refers to the memorandum of Stanley Hornbeck, a special adviser to the US Secretary of State, dated October 1941, as being positive that the oil embargo was working, and that Japan would not commence any military activity.

or the US administration knew exactly what it was doing[5]– or at least it was aware of what the risk of such a policy was.[6] The author remains silent about the relative merits of these hypotheses.

Nonetheless, what is indisputable is that the US administration advanced the idea of a dual policy of economic sanctions: negative sanctions, in the form of a trade blockade of the aggressor country, and positive sanctions, embodied in support for the country that is the victim of the aggression. The author points out that it is actually with the US Lend-Lease program, which unified coercion against the aggressor and aid to the victim into a single constellation, that the pro-sanction segment of the Western political elite belatedly attained the collective security that had eluded it in the 1930s. It is a bit ironic, the reader concludes, that this happened in the middle of a global war. Considering that very global war, what is missing from the book, for some reason, is the reference to the practice of negative sanctions in the war, with thorough trade blockades, with deadly unrestricted submarine warfare in both the Atlantic (against Great Britain) and Pacific (against Japan), with its pinnacle in 1945 mining of Japanese ports to prevent merchant and fishing vessels from going out to sea. The latter military operation had a telling codename– Operation Starvation.

The book concludes by examining how the legacy of the interwar economic weapon shaped the post-1945 international order and what this history means for our present twenty-first century, as the widespread use of sanctions today raises new questions about the politics of globalisation. In explaining the omnipresence of sanctions in the modern world (the UN estimates that in 2015 about one third of the world population lived under some form of sanctions), the author refers to the change in the aims of

[5] This is not to propose a conspiracy theory that FDR knew about the Japanese plans to attack Pearl Harbor and withheld that information from the US military. But this is rather about FDR wanting to involve the US in the world conflict and his careful political manoeuvring because of the strong neutralist and isolationist sentiment in the US, which dominated the US Congress, which held the power to declare war. This is not to say that there was a straightforward plan by the US administration, but rather not dismissing the possibility that perhaps the motive was to put additional pressure on Japan's political and military elite to do something stupid. Which they did. Also, there is ample evidence of Roosevelt's skilful political manoeuvring regarding the declaration of war with Germany in December 1941, when he allowed Germany (FDR accepted the "Germany first" sequence) to declare war on the US, leaving the US Congress no choice (Simms, Laderman 2021).

[6] Winston Churchill was obviously aware of the risk as he wrote to Roosevelt on 5 November 1941 that the Anglo-Dutch-American front had been "brilliantly successful. But our joint embargo is steadily forcing the Japanese to decisions for peace or war" (p. 282).

the sanction. "Interwar sanctions were focused narrowly on the *external* goal of stopping inter-state war. Multilateral and unilateral sanctions since 1945 have usually had *internal* goals: to address human rights violations, convince dictatorships to give way to democracy, smother nuclear programs, punish criminals, press for the release of political prisoners, or obtain other concessions" (p. 294, italics in the original). Furthermore, the author points out that since the norms of liberal internationalism have been largely determined by the transatlantic alliance, sanctions objectives are also an index of changing foreign policy concerns. In short, economic sanctions have become the universal method of accomplishing a comprehensive set of foreign policy aims, although the reader can only speculate about the origin of such a change, as the author provides no explanation.

Furthermore, the author emphasises that the efficacy of sanctions is not high, as to him the historical record is relatively clear: most economic sanctions have not worked. According to Hufbauer *et al.* (2007), in the 20th century, only one in three uses of sanctions was at least partially successful, although this observation of the poor record is disputed by estimates that are far worse.[7] The author has no second thought that, from the available data, it is clear that the history of sanctions is largely a history of disappointments. What is striking for the author, as well as to the reader, is that this limited utility of sanctions has not affected the frequency of their application. On the contrary: sanctions use doubled in the 1990s and 2000s compared to the period between 1950 and 1985; by the 2010s it had doubled again. Yet while during the 1985–1995 period, at a moment of great relative Western power, the chances of sanctions success were still around 35–40 percent, by 2016 this had fallen below 20 percent. "In other words, while the use of sanctions has surged, their odds of success have plummeted" (p. 296).

So, the reader wonders about the explanation of this paradox. Why would rational people continuously apply something that does not produce results? Furthermore, the fewer the results, the higher the frequency of application – it is puzzling. The author points out that "Sanctions would no doubt work better in a world of perfectly rational, consistently self-interested subjects, but this is not the world that we actually inhabit" (p. 297). Well, a trained economist would just point out that self-interest is a subjective category, that preferences of the individuals are their own free choices and that perhaps the author mistakes self-interest for material wealth. Nonetheless, human

[7] Pape (1997) and Pape (1998) has convincingly challenged the previous edition of this study and argued that of its 40 supposed successes out of 115 cases examined, only 5 stand up to real scrutiny in the sense that the policy success in question can be feasibly attributed to economic coercion.

beings are much more than material wealth, their utility function often include a wide range of (non-material) items. Furthermore, it is hardly that Western political elite and decision makers are not aware of the "world that we actually inhabit", but they still continue to insist and insist even more on economic sanctions. One way or the other, this cannot be a convincing explanation of the paradox.

The problem, as it appears to the reader, is not a wrong reaction on the sanctioned side but rather on the sanctioning side, whatever the ostensible objective of the sanctions may be. Hence, the crucial question is why such inefficient sanctions are imposed, i.e. what is the rationale of the Western political elite, who champions economic sanction these days, to persist in doing something that has by and large proved to be a failure? Well, the author did not provide the answer to these questions.

It seems to the reader that the answer must have something to do with the costs. The author emphasises that back in the spring of 1919, Robert Cecil, one of the British early advocates of economic sanctions, waved away protests against using a blockade to overthrow Bolshevism by responding that he saw "no other alternative". Nonetheless, there was an alternative – a full scale military intervention and Western military engagement in the Civil War that was going on in Russia, siding with White Russian. That would have been truly liberal internationalism, committed to the political and economic freedom that the Bolsheviks had started to repress, and some politically relevant people, such as Winston Churchill, advocated that option. The only problem, the Western political elite realised, was the high costs of such an engagement. Many of today's internationalists see no (viable) alternatives, precisely because of their high costs.

Accordingly, it seems to the reader that economic sanctions have been a cost minimising operation, as sanctions generate very limited, almost non-existent costs to those who impose them. It was Woodrow Wilson who claimed "Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. ... It does not cost a life outside of the nation boycotted." (p. 2). In the author's words – it is about a pen, not a sword.

So, economic sanctions are the easy path for liberal internationalists, especially with the public option crying "do something", the media frenzy about some heinous person or his deeds, and with NGOs advocating whatever they advocate–with admirable zest. Hence, the internationalists pretend that by imposing sanctions they are doing (right) things, and it is reasonable to assume, or at least should not be ruled out, that they are not quite interested in the results of their actions in the countries on which the sanctions are imposed. After all, they are accountable to their own constituencies, to their

home countries, not to the people of some "far-away country ... of whom we know nothing". Accordingly, whoever is annoying to the political elite and the public of Western countries, or who is perceived as a security threat – Lenin's Soviet Russia, Mussolini's Italy, militaristic Japan, Kim's North Korea (whichever the Kim in the office), Islamic Iran (whoever is running it), Milošević's Serbia, or even Putin's Rusia invading Ukraine – it is much less costly to impose economic sanctions than to do anything else. Sanctions are the easiest way for those who imposed them, whatever the outcome for the country on which the sanctions are imposed. The cost minimising rational behaviour of the decision-makers in the West explains why the sanctions are employed with increased frequency despite their decreasing efficiency.

It seems that this is about to change with the economic sanctions against Russia, in connection with its 2022 invasion of Ukraine. In terms of relative costs, it is evident that imposed economic sanctions, for the time being, are less costly for the West than fully fledged military confrontation with Russia. However, these sanctions are also harming the countries that imposed them, especially in the energy sector, and it seems that there are long-term plans to completely stop dealing with Russia in that sector. The sanctions will bring energy deficits, with fuel and food prices soaring, substantial inflation, and possibly a recession in the countries who imposed them on Russia. It is definitely time for the Western political elite to demonstrate whether it is committed to the reason for the sanctions, which is not only to influence Russia's political elite decision-making process regarding the war in Ukraine, but rather to isolate Russia politically and economically from the West and to weaken its economic and military potential in due course. For the first time the sanctions are being imposed on a global power, with a strong energy sector, with a nuclear arsenal, and a KGB-cradled political elite with a superpower mentality – although the country they run is not. This time is different!

At the time of this review going to press, the "special military operation" against Ukraine is about to enter its fourth month, and so are economic sanctions imposed on Russia. The sanctions are wide ranging and escalating almost on a daily basis. No one knows what the future brings. Only time will tell whether the sanctions will be effective and efficient, whether the countries that imposed them will stick to the letter and spirit of the sanctions, and what will be the long-term effects on the Russian economy and politics. Perhaps some books not yet written will be reviewed in years to come with insights about that.

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Nikola ILIĆ, PhD*

Devlin, Alan J. 2021. *Reforming Antitrust*. Cambridge, the United Kingdom & New York, United States: Cambridge University Press, 330.

"Every reform movement has a lunatic fringe."

Theodore Roosevelt

Since 2020, the US antitrust law has been undergoing a massive overhaul. Congress has introduced several new bills, including the Klobuchar Bill, which could radically amend the pillars of the US antitrust law.[1] The New Brandeis movement, on one side, claims that these bills will reduce the market power and industry concentration, and make the US economy prosper (Klobuchar 2021, Hawley 2021). On the other side of the spectrum, many scholars strongly disagree with the proposed amendments and warn of possible adverse economic consequences (Crane 2020, Hovenkamp 2021). Alan J. Develin's book, with new ideas and stances on antitrust law reform, could significantly contribute to this ongoing public debate.

The book consists of three logical parts. In the first part, the author describes in detail the role and features of the US antitrust law. In the second part, he analyses the warning signals in the US economy that may indicate or justify the need for antitrust law reforms. Finally, in the last part of the book, the author discusses possible reforms and the future evolution of the US antitrust law.

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1 Ilić (2022) provides a detailed review of the Klobuchar Bill and the antitrust law reform.

Each of these three major parts in the book further consists of three subsections – all related to the antitrust law reform in one way or another. The reader may take those subsections separately, depending on individual preferences and interests in specific antitrust topics. Regardless of their choices, in any event, the reader finds a gold mine of references and a fairly objective analysis of burning antitrust law issues.

The author opens the first part of the book by posing a relatively simple question. What is the purpose of antitrust law, i.e. what is its *raison d'être*? After an in-depth discussion, he admits that maximizing competition – in the most simplistic sense of the term – would be self-destructive, and, thus, it is not and should not be the sole purpose of antitrust law. Perfect competition leaves no room for a considerable profit margin, meaning that firms cannot recoup their fix-cost investments in R&D (i.e. they cannot innovate) and consequently cannot considerably improve their productivity. Furthermore, the author points out that the protection of consumers also cannot be the purpose of antitrust law because consumer interests can justify almost any government intervention in a market.

It might seem that by noting what the purpose is not, the author intentionally avoids explaining what the purpose of antitrust law should be. However, while this may disappoint some readers, it may also assist others in learning more about antitrust law and preparing them for a more detailed discussion about the role of antitrust law and burning issues, such as market power and industry concentration.

Market power and industry concentration are at the heart of the ongoing public debate calling for radical antitrust law reform in the US. The Neo-Brandeisians claim that big companies, such as Google, Amazon, Microsoft, Facebook, etc., possess significant market power. This enables them to take over incumbent competitors and increase their profit margins, i.e. further increase their market power. In this way, these big companies may considerably increase the industry concentration and prices and, thus, harm the US economy and consumers. In the opinion of the Neo-Brandeisians, the radical antitrust law reform should break this causal link, decrease industry concentration, and make the US economy great again! However, supporters of neoclassical economics fundamentally challenge this line of reasoning by questioning the alleged causal link and warning of potential adverse economic consequences that the planned antitrust law reform may have.

The author contributes to this debate in two ways. First, he meticulously describes the historical development of the US antitrust law and policy and discusses the initial purpose of the antitrust law. Second, he unbiasedly and in detail presents the core attitudes of the opposing sides in the ongoing

debate. While doing so, the author tries to provide sufficient evidence for readers, based on available findings in economic theory and evidence, to help them reach independent and impartial conclusions. For instance, the author analyses "the missing link: concentration and market power". Even though the title of this subsection in the book is suggestive, the author uses more than 140 relevant references and invokes the most important theoretical and empirical findings on the link between concentration and market power from the early twentieth century to the present. He provides plenty of food for thought and enables readers to observe different factors that may affect concentration and market power (such as characteristics of industries and products, the potential for innovation and further development, etc.). In other words, the main finding that the causal link between concentration and market power is fragile and often missing is objective and well supported. Therefore, the author's conclusions could be relevant for all participants in the debate and all the readers – those inclining toward neoclassical economics, as well as those supporting the New Brandeis movement.

The second part of the book discusses the warning signals in the US economy that may be a sound reason for antitrust law reform. One can immediately notice that the author excludes (i.e. does not consider) signals such as economic inequality, environmental protection, cultural diversity, etc. In this way, the author implicitly (and consistently with the first part of the book) implies that the antitrust law is not the proper policy tool for addressing those and similar concerns raised by the New Brandeis movement. The signals that the author is concerned about are solely those related to an ostensible competition decline.

In the author's opinion, one of the most visible warning signals is the raising consolidation in specific US industries, such as the airline industry. The big wave of consolidation, driven by mergers and acquisitions, significantly reduced the number of market participants in these industries. In the airline industry, Delta acquired Northwest Airlines in 2008, United Airlines purchased Continental Airlines in 2010, and American Airlines merged with US Airways in 2013.[2] As a result, only three companies (American, United, and Delta) account, along with the low-cost carrier Southwest Airlines, for almost three-quarters of the industry sales. These companies have increased their profit margins (pre-COVID) and, in some cases, significantly decreased their services. The same happened in the US mobile phone industry,

[2] The DOJ assessed and approved all these mergers and acquisitions, the latter two under additional conditions.

video-content programming, insurance, food, beer industries, etc. Moreover, all these anecdotal observations seem to be confirmed by various statistical analyses of the US industrial concentration.[3]

In the author's opinion, the consolidation phenomenon is noticeable at the voter level and thus "fuels a political reawakening in antitrust" (p. 119). The New Brandeis movement often uses consolidation examples and industry concentration as irrefutable evidence that the US faces a massive competition issue.[4] The author does not explicitly deny those claims. However, he attempts to bring some objectivity to this debate by claiming that the trend of consolidation and industry concentration is more modest than the New Brandeis movement would suggest. To support this argument, among other sources, the author invokes the OECD report (2018) that evaluates industry concentration in the US. The report explicitly states that "concentration in US markets is more likely to be increasing than decreasing, though the increase is not a dramatic one". [5] The same report concludes: "even where there is evidence to suggest an increase in concentration, in the absence of evidence on the movements of other indicators it is extremely difficult to draw any conclusion on whether there has been a change in competitive intensity."

However, the author notably omits some significant parts of the OECD report, such as the part stating that "mark-ups and profits in the US have significantly increased" or the general remark that the broad measure of concentration "tells us little about competitive intensity".[6] While this may cast a shadow on the author's objectivity, it certainly does not undermine his conclusions on the New Brandeis movement and political reawakening.

Some of the readers may even conclude that the author is against antitrust reforms based on the critiques of the New Brandeis movement and the relativization of the issues such as consolidation and industry concentration. However, it seems the author supports antitrust law reform, but not for the same reasons as the New Brandeis movement. This becomes obvious in the third part of the book, where he rethinks some of the fundamental principles of the US antitrust law and discusses its further evolution.

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[3] Among other sources, the author refers to the US Council of Economic Advisers study (2016), White and Yang (2017), and Grullon *et al.* (2019).

[4] See, for instance, Amy Klobuchar's (the New Brandeis movement prominent supporter) statement, available at: *https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement* (last visited 5 May 2022).

[5] The report is available at *https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf* (last visited 5 May, 2022).

[6] *Ibid.*

First, it seems the author is not satisfied with the antitrust law enforcement in the US. He claims that the antitrust agencies are too afraid of making mistakes when accessing mergers, and, thus, they have a relatively small number of cases of challenged mergers. In the author's opinion, these agencies should challenge more mergers, i.e. bring more antitrust cases to the courts and make more Type I errors. The main argument for such a claim is that the market will eventually undo the mischief of a Type I error that blocks procompetitive mergers. By contrast, a Type II error, which would allow harmful mergers to materialize, may take years for the market to erode. In addition, the author claims that an increase in the number of challenged mergers, i.e. antitrust cases, would lead to more consistent antitrust law enforcement and further evolution of the common law. Interestingly, he is not concerned about the magnitude of the Type II errors and what could happen if the DOJ loses its already damaged credibility due to those errors. One thing is clear, a prominent Washington-based antitrust lawyer, such as the author of this book, would not complain about additional cases.

When considering further antitrust law development, the author suggests replacing the consumer-welfare standard with a new effect-based standard founded on "preserving competitive pressure". The book does not provide detailed guidelines on specifying and interpreting the suggested legal standard in antitrust law practice. Instead, it concludes, once again, that the FTC and DOJ should bring and lose more cases because the litigation clarifies the scope of the law and leads doctrine to evolve. Following the same line of reasoning, the author suggests altering the relevant market definition in antitrust cases in a way that it becomes broader. Namely, a broader defined relevant market could shift the antitrust law focus from protecting competition and consumer welfare to preserving competitive pressure. Consistently with other ideas in this book, implementing a broader relevant market definition would lead to more antitrust cases in practice and further evolution of the US antitrust law.

Finally, it remains upon the readers to decide whether the author is trying to bring some objectivity to the public debate concerning the antitrust law reform or to represent a new interest group in this debate – the US antitrust lawyers. It is important to emphasize that one does not exclude the other. Regardless of the author's intentions and objectives, in any event, one thing is for sure – readers interested in antitrust law and the ongoing antitrust legislative reform in the US will enjoy this book.

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– Vukadinović, Radovan. 5–6/2015. O pravnom regulisanju posla bankarske garancije u novom Građanskom zakoniku. *Pravni život* 64: 17–36.

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Prema Bartoš (1959, 89 fn. 100) – *tamo gde je fusnota 100 na 89. strani*;

Kao što je predložio Bartoš (1959, 88 i fn. 98) – *tamo gde fusnota 98 nije na 88. strani*.

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(videti, na primer, Bartoš 1959; Simović 1972)

(videti posebno Bakić 1959)

(Stanković, Orlić 2014)

Jedan autor

Citat u tekstu (T): Kao i Ilaj (Ely 1980, broj strane), tvrdimo da...

Navođenje u spisku literature (L): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

T: Isto kao i Avramović (2008, broj strane), tvrdimo da...

L: Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup.* Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu. (Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup*. Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu.)

T: Vasiljević (2007, broj strane),

L: Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu. (Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Dva autora

T: Kao što je ukazano (Daniels, Martin 1995, broj strane),

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

T: Kao što je pokazano (Stanković, Orlić 2014, broj strane),

L: Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos. (Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos.)

Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

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

Više od tri autora

T: Prema istraživanju koje je sproveo Tarner sa saradnicima (Turner *et al*. 2002, broj strane),

L: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

T: Pojedini autori smatraju (Varadi *et al*. 2012, broj strane)...

L: Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu. (Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Institucija kao autor

T: (U.S. Department of Justice 1992, broj strane)

L: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

T: (Zavod za intelektualnu svojinu Republike Srbije 2015, broj strane)

L: Zavod za intelektualnu svojinu Republike Srbije. 2015. *95 godina zaštite intelektualne svojine u Srbiji*. Beograd: Colorgraphx. (Zavod za intelektualnu svojinu Republike Srbije. 2015. *95 godina zaštite intelektualne svojine u Srbiji*. Beograd: Colorgraphx.)

Delo bez autora

T: (*Journal of the Assembly* 1822, broj strane)

L: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

Citiranje više dela istog autora

Klermont i Ajzenberg smatraju (Clermont, Eisenberg 1992, broj strane; 1998, broj strane)...

Basta ističe (2001, broj strane; 2003, broj strane)...

Citiranje više dela istog autora iz iste godine

T: (White 1991a, page)

L: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

Istovremeno citiranje više autora i dela

(Grogger 1991, broj strane; Witte 1980, broj strane; Levitt 1997, broj strane)

(Popović 2017, broj strane; Labus 2014, broj strane; Vasiljević 2013, broj strane)

Poglavlje u knjizi

T: Holms (Holmes 1988, broj strane) tvrdi...

L: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

Poglavlje u delu koje je izdato u više tomova

T: Švarc i Sajks (Schwartz, Sykes 1998, broj strane) tvrde suprotno.

L: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664, *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Knjiga sa više izdanja

T: Koristeći Grinov metod (Greene 1997), napravili smo model koji...

L: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

T: (Popović 2018, broj strane),

R: Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu. (Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Navođenje broja izdanja nije obavezno.

Ponovno izdanje – reprint

T: (Angell, Ames [1832] 1972, 24)

L: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Članak

U spisku literature navode se: prezime i ime autora, broj i godina objavljivanja sveske, naziv članka, naziv časopisa, godina izlaženja časopisa, stranice. Pri navođenju inostranih časopisa koji ne numerišu sveske taj podatak se izostavlja.

T: Taj model koristio je Levin sa saradnicima (Levine *et al*. 1999, broj strane)

L: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: Na to je ukazao Vasiljević (2018, broj strane)

L: Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46. (Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46.)

T: Orlić ističe uticaj uporednog prava na sadržinu Skice (Orlić 2010, 815–819).

L: Orlić, Miodrag. 10/2010. Subjektivna deliktna odgovornost u srpskom pravu. *Pravni život* 59: 809–840.

Citiranje celog broja časopisa

T: Tome je posvećena jedna sveska časopisa *Texas Law Review* (1994).

L: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance,* special edition 72: 1203–1702.

T: Osiguranje od građanske odgovornosti podrobno je analizirano u časopisu *Anali Pravnog fakulteta u Beogradu* (1982).

L: Anali Pravnog fakulteta u Beogradu. 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288. (*Anali Pravnog fakulteta u Beogradu.* 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288.)

Komentari

T: Smit (Smith 1983, broj strane) tvrdi...

L: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

T: Prema Šmalenbahy (Schmalenbach 2018, broj strane), jasno je da...

L: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–55. *Vienna Convention on the Law of Treaties: A Commentary*, eds. Oliver Dörr, Kirsten Schmalenbach. Berlin: Springer-Verlag GmbH Germany.

T: Perović (Perović 1980, broj strane) tvrdi da...

L: Perović, Slobodan. 1980. Član 45. Predugovor. 221–224. *Komentar Zakona o obligacionim odnosima*, ur. Slobodan Perović, Dragoljub Stojanović. Gornji Milanovac: Kulturni centar – Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.

Članak u časopisu ili dnevnim novinama bez autora

T: objavljeno u *Politici* (2019)

L: Politika. 2019. Srbija snažno posvećena evropskom putu. Mart 2019. (*Politika*. 2019. Srbija snažno posvećena evropskom putu. Mart 2019)

T: Kao što je objavljeno u časopisu *Newsweek* (2000)...

L: Newsweek. 2000. MP3.com Gets Ripped. 18 September.

Članak u časopisu ili dnevnim novinama sa autorom (autorima)

T: U *Vremenu* je objavljeno (Švarm, Georgijev 2018) da...

L: Švarm, Filip, Slobodan Georgijev. 2018. Razgraničenje je model u skladu sa politikom etničkog čišćenja. *Vreme*. Avgust 2018.

T: (Mathews, DeBaise 2000)

L: Mathews, Anna Wilde, Colleen DeBaise. 2000. MP3.com Deal Ends Lawsuit on Copyrights. *Wall Street Journal*. 11 November.

Neobjavljeni rukopis

T: (Avramović, Todorović 2017)

L: Avramović, Pavle, Nenad Todorović. 2017. Sticanje bez osnova u rimskom pravu. Neobjavljen rukopis. Univerzitet u Nišu, Pravni fakultet, avgust. (Avramović, Pavle, Nenad Todorović. 2017. Sticanje bez osnova u rimskom pravu. Neobjavljen rukopis. Univerzitet u Nišu, Pravni fakultet, avgust.)

T: (Daughety, Reinganum 2002)

L: Daughety, Andrew F., Jennifer F. Reinganum. 2002. Exploiting Future Settlements: A Signaling Model of Most-Favored-Nation Clauses in Settlement Bargaining. Unpublished manuscript. Vanderbilt University, Department of Economics, August.

Radni dokument

T: (Stojanović, Savić 2017)

L: Stojanović, Ognjen, Martin Savić. 2017. Pravna priroda ugovora o kreditu. Radni dokument. Institut za pravo i finansije, Beograd. (Stojanović, Ognjen, Martin Savić. 2017. Pravna priroda ugovora o kreditu. Radni dokument. Institut za pravo i finansije, Beograd.)

T: (Eisenberg, Wells 2002)

L: Eisenberg, Theodore, Martin T. Wells. 2002. Trial Outcomes and Demographics: Is There a Bronx Effect? Working paper. Cornell University Law School, Ithaca, NY.

Numerisani radni dokument

T: (Tomić, Pavlović 2018)

L: Tomić, Janko, Saša Pavlović. 2018. Uporednopravna analiza propisa u oblasti radnog prava. Radni dokument br. 7676. Institut za uporedno pravo, Beograd. (Tomić, Janko, Saša Pavlović. 2018. Uporednopravna analiza propisa u oblasti radnog prava. Radni dokument br. 7676. Institut za uporedno pravo, Beograd.)

T: (Glaeser, Sacerdote 2000)

L: 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.

Lična korespondencija/komunikacija

T: Kao što tvrdi Damnjanović (2017),

L: Damnjanović, Vićentije. 2017. Pismo autoru, 15. januar. (Damnjanović, Vićentije. 2017. Pismo autoru, 15. januar.)

T: (Welch 1998)

L: Welch, Thomas. 1998. Letter to author, 15 January.

Stabilni internet protokol (URL)

T: Prema Zavodu za intelektualnu svojinu Republike Srbije (2018),

L: Zavod za intelektualnu svojinu Republike Srbije. 2018. Godišnji izveštaj o radu za 2017. godinu. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, poslednji pristup 28. marta 2018. (Zavod za intelektualnu svojinu Republike Srbije. 2018. Godišnji izveštaj o radu za 2017. godinu. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html,* poslednji pristup 28. marta 2018.)

T: According to the Intellectual Property Office (2018)

L: 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.

U štampi

T: (Bogdanović 2019, broj strane)

L: Bogdanović, Luka. 2019. Ekonomske posledice ugovaranja klauzule najpovlašćenije nacije u bilateralnim investicionim sporazumima. *Nomos*, tom 11, u štampi. (Bogdanović, Luka. 2019. Ekonomske posledice ugovaranja klauzule najpovlašćenije nacije u bilateralnim investicionim sporazumima. *Nomos*, tom 11, u štampi.)

T: (Spier 2003, broj strane)

L: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Prihvaćeno za objavljivanje

T: U jednom istraživanju (Petrović, prihvaćeno za objavljivanje) posebno se ističe značaj prava manjinskih akcionara za funkcionisanje akcionarskog društva.

L: Petrović, Marko. Prihvaćeno za objavljivanje. Prava manjinskih akcionara u kontekstu funkcionisanja skupštine akcionarskog društva. *Pravni život.*

T: Jedna studija (Joyce, prihvaćeno za objavljivanje) odnosi se na Kolumbijski distrikt.

L: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Sudska praksa

F(usnote)*:* Vrhovni sud Srbije, Rev. 1354/06, 6. 9. 2006, Paragraf Lex; Vrhovni sud Srbije, Rev. 2331/96, 3. 7. 1996, *Bilten sudske prakse Vrhovnog suda Srbije* 4/96, 27; 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.

T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12, ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

F: Zakonik o krivičnom postupku, *Službeni glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014, čl. 2, st. 1, tač. 3; 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, 60, Art. 6 (3).

T: Za reference u tekstu koristiti skraćenice (ZKP ili ZKP RS; Regulation No. 1052/2013; Directive 2013/32) konzistentno u celom članku.

L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

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U časopisu se objavljuju naučni članci, kritičke analize, komentari sudskih odluka, prilozi iz međunarodnog naučnog života i prikazi knjiga. Časopis izlazi i u elektronskom obliku (eISSN: 2406-2693).

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