

ANALI

PRAVNOG FAKULTETA U BEOGRADU

ANNALS
BELGRADE LAW REVIEW

- 627 Dejan POPOVIĆ, Gordana ILIĆ-POPOV
THE (UN)CERTAIN FUTURE OF TAX SPARING CREDIT IN INTERNATIONAL TAX TREATY LAW
- 679 Emilia MIŠČENIĆ
THE CONSTANT CHANGE OF EU CONSUMER LAW: THE REAL DEAL OR JUST AN ILLUSION?
- 713 Jelena LEPETIĆ
CREDITOR PROTECTION IN CROSS-BORDER CONVERSIONS, MERGERS AND DIVISIONS
- 745 Dušica PALAČKOVIĆ, Sanda ĆORAC
NESAGLASNOST RODITELJA O PROMENI PREBIVALIŠTA DETETA – PROCESNOPRAVNE DILEME I MOGUĆA REŠENJA
- 765 Đorđe IGNJATOVIĆ, Natalija LUKIĆ
O POVEZANOSTI ALKOHOLA I UBISTAVA U UZORKU OSUĐENIH U BEOGRADU
- 795 Mina PAVLOVIĆ
ISTOPOLNE ZAJEDNICE ŽIVOTA U SVETLU PRIMENE HAŠKOG PROTOKOLA O MERODAVNOM PRAVU ZA OBAVEZE IZDRŽAVANJA IZ 2007. GODINE
- 823 Benjamin NURKIĆ, Faris HASANOVIĆ
VLADAVINA PRAVA IZMEĐU PRAVEDNOSTI I PUKE ZAKONITOSTI – KRATAK PRIKAZ RAZVOJA DISKURSA U KONCEPTU VLADAVINE PRAVA

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VLADAVINA PRAVA IZMEĐU PRAVEDNOSTI I PUKE ZAKONITOSTI – KRATAK PRIKAZ RAZVOJA DISKURSA U KONCEPTU VLADAVINE PRAVA

SADRŽAJ

ČLANCI

- 627 Dejan Popović, Gordana Ilić-Popov**
The (Un)Certain Future of Tax Sparing Credit in International Tax Treaty Law
- 679 Emilia Mišćenić**
The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?
- 713 Jelena Lepetić**
Creditor Protection in Cross-Border Conversions, Mergers and Divisions
- 745 Dušica Palačković, Sanda Ćorac**
Nesaglasnost roditelja o promeni prebivališta deteta – procesnopravne dileme i moguća rešenja
- 765 Đorđe Ignjatović, Natalija Lukić**
O povezanosti alkohola i ubistava u uzorku osuđenih u Beogradu
- 795 Mina Pavlović**
Istopolne zajednice života u svetlu primene Haškog protokola o merodavnom pravu za obaveze izdržavanja iz 2007. godine
- 823 Benjamin Nurkić, Faris Hasanović**
Vladavina prava između pravednosti i puke zakonitosti – kratak prikaz razvoja diskursa u konceptu vladavine prava

PRIKAZI

- 859** Sarotte, Mary Elise. 2021. *Not One Inch: America, Russia, and the Making of Post–Cold War Stalemate*. New Haven and London: Yale University Press, 550.
(Boris Begović)
- 882** Ermolovič, Viktor Ivanovič. 2021. *Основные институты гражданского права средневековой Сербии и стран континентальной Европы (X–XV вв.)*. Минск: Белорусский государственный экономический университет, 301.
(Nina Kršljanin)
- 894** Kršljanin, Nina, Uroš Stanković (ur.) 2021. *150 godina od donošenja Ustava iz 1869. godine*. Beograd: Pravni fakultet Univerziteta u Beogradu, 227.
(Đorđe Stepić)

VARIA

- 903** **Uputstvo za autore**

TABLE OF CONTENTS

ARTICLES

- 627 Dejan Popović, Gordana Ilić-Popov**
The (Un)Certain Future of Tax Sparing Credit in International Tax Treaty Law
- 679 Emilia Mišćenić**
The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?
- 713 Jelena Lepetić**
Creditor Protection in Cross-Border Conversions, Mergers and Divisions
- 745 Dušica Palačković, Sanda Ćorac**
Parent’s Disagreement to Changing the Child’s Permanent Residence – Procedural Dilemmas and Possible Solutions
- 765 Đorđe Ignjatović, Natalija Lukić**
The Relationship Between Alcohol Abuse and Homicides in the Sample of Convicted Offenders in Belgrade
- 795 Mina Pavlović**
Same-Sex Relationships in Light of Application of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations
- 823 Benjamin Nurkić, Faris Hasanović**
The Rule of Law Between Justice and Mere Legality – A Brief Overview of the Development of Discourse in the Concept of the Rule of Law

BOOK REVIEWS

- 859** Sarotte, Mary Elise. 2021. *Not One Inch: America, Russia, and the Making of Post–Cold War Stalemate*. New Haven and London: Yale University Press, 550.
(Boris Begović)
- 882** Ermolovič, Viktor Ivanovič. 2021. *Osnovnye instituty graždanskogo prava srednevekovoj Serbii i stran kontinental'noj Evropy (X–XV vv.)*. Minsk: Beloruskiĭ gosudarstvennyi ekonomičeskij universitet, 301.
(Nina Kršljanin)
- 894** Kršljanin, Nina, Uroš Stanković (ur.) 2021. *150 godina od donošenja Ustava iz 1869. godine*. Beograd: Pravni fakultet Univerziteta u Beogradu, 227.
(Đorđe Stepić)

VARIA

- 903** **Guidelines for Authors**

Dejan POPOVIĆ, PhD*

Gordana ILIĆ-POPOV, PhD**

THE (UN)CERTAIN FUTURE OF TAX SPARING CREDIT IN INTERNATIONAL TAX TREATY LAW

Tax sparing clause emerged in double taxation treaties 63 years ago. Despite criticisms, it can presently be found in about 15% of all treaties, with Serbia having this clause in 46% of its double taxation agreements. It is the authors' view that this provision represents a confirmation of the right to introduce tax incentives as a part of a country's right to tax, while pointing out the necessity of preventing abuses of the provision. After conducting an analysis of the effects of tax sparing on foreign direct investments in Serbia and outgoing investments of Serbia's residents, the remaining portion of the paper

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is dedicated to exploration of the interaction between GloBE Income Inclusion Rule and tax sparing. Their incompatibility, which implies that tax sparing would be annulled under BEPS 2.0, may be overcome via a specific carve-out, but at present such initiative is not endorsed by Inclusive Framework on BEPS.

Key words: *Tax sparing credit. – Double tax treaty. – Foreign direct investments. – Income inclusion rule. – Substance-based carve-out.*

1. INTRODUCTION

Serbia is a state with a relatively developed network of double taxation treaties, and its representatives are active in the Organisation for Economic Cooperation and Development (OECD) Committee on Fiscal Affairs – together with representatives of 30 other non-member states – in the continuous efforts to advance the OECD Model Tax Convention on Income and on Capital (hereinafter: OECD Model Tax Convention).¹ Taking into account its involvement in the preparation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, as well as in the Framework on BEPS (Base Erosion and Profit Shifting), it could be said that Serbia's role in the creation, interpretation and implementation of international tax law order is, to say the least, notably cooperative and based on the professionalism of its representatives in the working bodies.

One of Serbia's objections is related to the tax sparing credit clause, which is not contained in the OECD Model Tax Convention. In this respect, Serbia has reserved the right to include such stipulations in its tax treaties.² The circumstance where it achieved this in nearly 50% of its double taxation treaties – despite the nearly quarter-century-long criticism of tax sparing credit by the OECD – demonstrates that, in addition to six members of the OECD with which Serbia has tax treaties that include tax sparing credit clauses, a significant number of countries with a similar level of economic development as Serbia (or even lower) have demonstrated the readiness to support the other contracting state (Serbia) through tax sparing credit, in its effort to attract foreign direct investments through tax incentives. This has most commonly been met by a reciprocal concession on the part of Serbia.

¹ Serbia has stated its position in regard to 17 articles of the OECD Model Tax Convention (the 2017 version) and in regard to the commentary to three articles.

² Eleven other non-member states have done the same.

The aim of this paper is primarily to establish what is tax sparing credit and what are its forms in contemporary international tax treaty law, as well as to analyse the evolution of the position of the OECD, academic circles, and developing countries authorities regarding this institute. The fourth part of the paper explores the true objective of the tax sparing credit and its effects in Serbia. The fifth part of the paper analyses the relationship between the tax sparing credit and the announced income inclusion rule in the BEPS 2.0 measures. The concluding considerations are given in the final part.

2. CONCEPT AND TYPES

In international tax law, tax credit represents the sum of the income or capital tax paid in the source country that can be deducted from the tax the residence country determines on the global income or capital. Some double taxation treaties do, however, contain a type of tax credit – a tax sparing clause – which does not include the condition that the sum of the tax for which the tax obligation of the resident may be reduced must be *paid* in the source country. In the case of the tax sparing credit, the tax that is paid in the other contracting state entails also the tax that *would have been paid* in the other country, had it not been reduced or written off in accordance with its legal stipulations pertaining to tax incentives.³ It is sometimes called *contingent relief* because its extent depends on the degree of relief in the source country (Li 2017, 547).

A similar instrument to the tax sparing credit is the *crédito presumido* (Tavares, Crispim 2017), which in English is most commonly called *matching credit*, and less often *fixed relief method* (Holland, Vann 1998, 1014). It involves the residence country accepting to provide credit for a foreign tax on certain types of income, in the amount determined in the tax treaty, and

³ Some states (e.g. United Kingdom) insist that the tax treaty cite the laws of the source country whose stipulations prescribe tax incentives, with the possibility of accepting subsequent minor amendments to the stipulations that do not affect their overall nature. Should a different provision, which recognises a given tax relief, be subsequently adopted, the competent authority of the contracting state is to concur that it is similar in nature to the provisions cited in the tax treaty. Furthermore, the competent authority of the source country is required to provide confirmation that the tax relief was granted with the aim of improving the country's development. See Convention between the United Kingdom of Great Britain and Northern Ireland and the Socialist Federal Republic of Yugoslavia for the Avoidance of Double Taxation with respect to Taxes on Income, *Official Gazette of the SFRY – International Treaties* 7/1982, Art. 22, paras. 3 and 4. This tax treaty applies to Serbia, as one of the successors of the SFRY.

which is usually higher than the maximal tax sum that is otherwise permitted to the source country in the said treaty or the sum stipulated in its national legislation.⁴ Therefore, the sum of the tax credit approved by the residence country does not depend on the tax relief regulations in the source country. The greater the difference between the contracted credit and the tax rate that is applied in the source country, the greater the tax benefit for the taxpayer. The tax sparing credit and matching credit differ in that the former's "fictional" tax that is recognised in special situations as credit is defined by the relief granted in the source country, while in the latter case the "fictional" tax is not necessarily linked to the level of taxation in the source country nor to the relief that it provides.⁵ The tax sparing credit is most commonly related to the waived taxation of those parts of the income and capital that the source country could subject to its taxation, while the matching credit is usually confined to withholding taxes on passive income (dividends, interest, and royalties) (Holland, Vann 1998, 1014).⁶ Exceptionally, e.g. in the 1993 tax treaty between the Netherlands and Bangladesh, the matching credit is

⁴ For example, Article 3 para. 3 of the 1975 tax treaty between Sweden and Brazil stipulates that in the case of dividends that companies that are residents of Brazil pay to companies (with the exception of partnership and entrepreneurs) that are residents of Sweden, and of royalties, it will be considered that the rate of Brazilian tax (which may be claimed in Sweden as a credit against the tax that it applies as the residence country) is 25%, and 20% for interest, regardless of the fact that Arts. 10–12 of that tax treaty limit the tax on intercompany dividends, interest (with the exception of when the recipient is an individual, partnership or entrepreneur), and royalties (with the exception of trademark), applicable by the source country, to 15%. See: https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-se_01_eng_1975_tt_td1.html (last visited 15 February, 2022).

⁵ There are no significant disagreements regarding the definition of tax sparing credit in tax law literature, but the same is not the case with the definition of matching credit. Therefore, the position of the French Council of State (*Conseil d'État*), that the implementation of the matching credit clause contained in the 1971 tax treaty between France and Brazil requires at least a minimal level of taxation in the source country, is no surprise. See: *Conseil d'État, Société Natexis Banques Populaires v. France*, No. 284930, 26 July 2006. <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008244748/> (last visited 20 February, 2022). However, certain Brazilian and South American authors in general do not agree with such an interpretation (Schoueri 2013, 109; Barreto 2021, 65–66), believing that the matching credit does not depend on the tax relief in the source country and that therefore the minimal tax level condition, which is applied in the source country for enforcement of the matching credit clause, should not exist.

⁶ A rare exception is found in Article 24(5) of the 1979 tax treaty between Argentina and Italy. https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-it_02_spa_1979_tt_td2.html%23tt_ar-it_02_spa_1979_tt_td2_a24 (last visited 22 February, 2022) Its provision stipulates that if, based on Argentinian law, the Argentinian tax on corporate profits is not entirely or partially collected during a certain period of time, it will be considered that this tax, for the purposes of

enhanced by tax sparing credit elements. If, due to the special relief granted based on Bangladeshi law with the intention of encouraging investment in Bangladesh, a tax with a rate lower than 10% has been imposed on interest and royalties in Bangladesh (which the Articles 11(2) and 12(2) of the tax treaty stipulate is the limit to which the source country may tax these two types of income), it will be considered that the tax paid in Bangladesh on those interests and royalties is 10%. However, if according to Bangladeshi law the general tax rates that apply to interest and royalties are reduced below 10%, the lower rates will apply in these cases.⁷

Some authors consider tax sparing credit and matching credit to be the variants of the same mechanism – tax sparing credit in the broader sense, while considering the former as tax sparing credit *stricto sensu* (Schoueri 2013, 109). In our further analysis we will predominantly discuss tax sparing credit *stricto sensu*, which will not be emphasised unless the need arises to differentiate it from matching credit. Furthermore, this variant is the only one that exists in Serbia's tax treaties.

3. DEVELOPMENT OF THE TAX SPARING CREDIT IDEA: DOUBTS, ACCEPTANCE, REASSESSMENT

The explanation for why taxpayers would be recognised the right to a tax deduction in their residence country for the sum that they did not pay in the source country can be found in the nature of tax credit as a method for eliminating double (juridical) taxation. In its original form it annuls the effect of tax incentives provided by the source country with the aim of attracting foreign investors: the relief that it achieved in the country of investment would be lost by the taxpayer in its residence country, which would first determine the tax on its global income, and then only recognise as tax credit the sum of the tax paid in the country of investment. A reasonable assumption is that in the situation when the source country provides the tax relief, the patriotic “urge” – caused by the tax revenue ending up in the treasury of its residence country and not in the treasury of the source

application of the tax credit by the Italian side, has been collected at a rate of 15%. Incidentally, Article 25(4) sets the “standard” matching credit of 15% for dividends, and 20% for interest and royalties.

⁷ Article 23(4) of the Convention between the Netherlands and Bangladesh for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income. <https://wetten.overheid.nl/BWBV0001126/1994-06-08> (last visited 22 February, 2022).

country – will not especially motivate investors to invest in the source country. However, if the tax sparing credit clause is contracted, the residence country will suffer the “fiscal sacrifice” and the source country will achieve the desired goal, because its tax incentive will actually benefit the taxpayer. This “sacrifice” may be in solidarity with the developing country, as support for its intentions to stimulate foreign direct investments, but the source country is often asked in return to lower withholding tax rates or provide stricter permanent establishment rules (OECD 1998, 13).

Discussions on the efficiency of the tax sparing credit have been ongoing since the emergence of the idea of introducing this institute into international tax law. It was first mentioned in 1953 in the report of the British Royal Commission on the Taxation of Profits and Income,⁸ which discussed the justification for providing this type of support to the efforts of the British colonies and countries of the Commonwealth to attract (British) investors through tax reliefs. However, in 1957 (conservative) Chancellor of the Exchequer Peter Thorneycroft turned down the proposal by the Royal Commission to introduce tax sparing credit (Surrey 1957, 7). Nonetheless, already in 1961, the United Kingdom ratified a tax treaty with Pakistan that included the tax sparing credit clause, after the UK Parliament previously enacted legislation that approved such support to developing countries, in order to maintain the effects of their tax relief programmes aimed at promoting industrial, trade, scientific, educational, and other development (OECD 1998, 15). Therefore, even though the concept of tax sparing credit was created in the UK, the first treaties for the avoidance of double taxation to include it had been concluded back in 1959, between FR Germany and India, and between Sweden and Israel (Pepper *et al.* 1972, 3–25). The treaty with Pakistan was not ratified by the United States Senate in 1957, specifically because of the tax sparing credit clause, since it had been significantly swayed by the arguments presented by Harvard Professor Stanley Surrey to the Committee on Foreign Relations (Surrey 1957, 1–25).⁹ This has shaped the US negative view of tax sparing credit, which continues

⁸ Great Britain. Royal Commission on the Taxation of Profits and Income 1953, 3. See especially Prest 1956, 366–374.

⁹ Surrey pointed out that the tax sparing clause was in contradiction with the approach adopted by US domestic law not to make concessions in the case of taxes on foreign corporate profits; that the concession provided for Pakistan would create a precedent for many future such concessions; that the tax sparing credit violates the tax credit mechanism; that it is fundamentally unnecessary taking into consideration the benefit of postponing the tax liability enjoyed by the subsidiaries of American corporations for business in foreign states where they are residents; that the tax sparing credit clause encourages irrational shaping of taxes in the foreign state and corruptive acts by foreign governments; etc.

to this day: not a single double taxation treaty concluded by the US contains a tax sparing clause. Further contributing to this was the fact that Surrey became Assistant Secretary of the Treasury for Tax Policy in the Kennedy and Johnson administrations (1961–1969), and especially the specific position of the US as a country with a vast domestic market, which “has always taken a strong stance in favour of ‘investment at home.’ Also, of course, because of its large potential capital-exporting position, the United States has greater revenue loss concerns than many other countries.” (Brooks 2009, 521).

The commentary to Article 23 of the 1963 OECD Draft Double Taxation Convention on Income and Capital, which defines the methods for eliminating double taxation, mentions that if a developing country provides tax incentives, the other contracting party can either exempt the income from activities that the developing country is striving to encourage, or provide a tax sparing credit *lato sensu*, where the contracting states themselves choose the form of the provisions on that credit. We agree with the opinion in Brooks (2009, 522) that the OECD had at the time provided “lukewarm” endorsement of the tax sparing clause. A similar opinion was presented in the 1977 OECD Model Tax Convention, specifically in the commentary to Article 23: if two contracting states agree that the benefits that the source country has provided should not be annulled, it is possible to choose between matching credit, tax sparing credit *stricto sensu*, and the exemption method, and the contracting states may develop another formula. The commentary points out that the source country (developing country) in such a context should accept the limitation of its withholding tax rates for dividends, interest and royalties, and limiting the duration of the provided benefits in the form of tax sparing credit or exemption. Alternatively, those benefits should be provided only for investments that are contracted after the tax treaty comes into effect.¹⁰

Despite the weak support of the OECD – or perhaps thanks to it – the last third of the 20th century became the “golden age” for tax sparing credit. During that time around 1,500 tax treaties were in force (OECD 1998, 14). For example, between 1961 and 1999, the United Kingdom accepted tax sparing clauses in 47 tax treaties (Brooks 2009, 517–518), but in subsequent years – only in two tax treaties. Taking the OECD data as a whole, 31% of the treaties on double taxation between members and developing countries stipulated tax sparing credit, most of them concluded prior to 2002 (Azémar, Dharmapala 2019a, 6). The absence of a stronger commitment by the OECD

¹⁰ *Model Double Taxation Convention on Income and on Capital*, OECD, Paris 1977, Commentary on Articles 23A and 23B, paras. 70–76.

regarding this clause is understandable taking into account that the Model Tax Convention was primarily intended for the organisation's member states as a model for concluding tax treaties between themselves and which as a rule did not include tax sparing credit because they had developed economies. Also, one should not neglect the influence of the US in the OECD Committee on Fiscal Affairs, which was significantly shaped by Surrey's arguments against the institute of tax sparing.

The initially "lukewarm" endorsement of the OECD was transformed into opposition to introducing tax sparing credit provisions into tax treaties.¹¹ The report *Tax Sparing: A Reconsideration* (OECD 1998) particularly lists the following reasons:

- (1) ineffectiveness – from the viewpoint of the great majority of OECD member states – of the tax sparing credit as an instrument for encouraging foreign investments and achieving national economic goals (OECD 1998, 12);
- (2) broad space for abuse: (a) through transfer prices, (b) through establishing a conduit company by the investor from the third country, who takes advantage of the benefits from the tax treaty the residence state has with the source state and invests into the source country through that company, which has been granted benefits in the form of tax sparing credit, (c) through routing, where a resident bank provides a loan to a foreign investor through the bank in the developing country, in order to take advantage of tax sparing credit on withholding taxes stipulated in the tax treaty between the country or residence and the developing country; (d) through artificially increasing tax rates in the source country, in order to apply pressure on the residence country to provide greater tax sparing credit (OECD 1998, 29, 36–37);¹²

¹¹ The OECD report does not contain the explicit recommendation that the member state abandon the tax sparing credit clause, but it clearly indicates the need for them to revise its contracting (OECD 1998, 42–43).

¹² The report states that the treaty should explicitly envision that domestic anti-abuse norms will apply also to the tax sparing credit clause, and it also recommends that in addition to this provision, special anti-abuse clauses be embedded with the aim of preventing the abuse of the tax sparing credit. Subsequently, in the BEPS era, anti-abuse rules were created in the form of a principal purpose of transaction or arrangement test, and the clause on limitation of benefits, which are embedded in tax treaties and also apply to the tax sparing clause.

- (3) the circumstance that the tax incentive provided by the source country – even without the tax sparing credit – will not be lost if the profit of the subsidiary of the resident investor, which is the resident of the source country, remains unrepatriated (OECD 1998, 42);
- (4) possible harmful effects on the source country if the tax sparing clause encourages increased repatriation of profit, therefore reducing its reinvestment (OECD 1998, 22–23);
- (5) the impossibility for the residence country to determine the expense (i.e. loss of tax revenue) of providing support to the source country through tax sparing credit (OECD 1998, 22);
- (6) the absence of a need to provide further support, in the form of tax sparing credit, to states that are not members of the OECD, because many of them have grown economically stronger in the meantime (OECD 1998, 21);
- (7) the weaknesses of tax incentives in principle, since they are considered distortive and complicated (OECD 1998, 25–28);
- (8) poorly formulated provisions in tax treaties on tax sparing credit can encourage harmful tax competition, i.e. support benefits that erode the tax basis of the residence country (OECD 1998, 41);
- (9) administrative difficulties in the implementation of provisions on the tax sparing credit, especially in proving that the taxpayer has actually achieved tax benefit based on the regulations of the source country that stipulate tax incentives (OECD 1998, 30);
- (10) objections by developing countries that in negotiations pertaining to the conclusion of tax treaties, in the part related to the tax sparing credit, they are asked to additionally lower rates of withholding taxes in return (OECD 1998, 13). This argument is cynical to some extent, because Article 12 para. 1 of the OECD Model Tax Convention stipulates that the source countries cannot introduce withholding taxes on royalties;
- (11) the potential disabling of the local Controlled Foreign Corporation (CFC) legislation due to the ban in principle, in Article 27 of the Vienna Convention on the Law of Treaties¹³ that the contracting party may cite stipulations of its domestic law for the purpose of

¹³ Decree on the ratification of the Vienna Convention on the Law of Treaties, *Official Gazette of the SFRY – International Treaties* 30/1972.

justifying the failure to implement the treaty.¹⁴ This is why the 1998 OECD report proposes that tax treaties include explicit stipulations regarding the supremacy of national CFC rules over the tax sparing credit clause (OECD 1998, 38–39; Ferreira 2021, sec. 10.4).¹⁵

The OECD report also influenced subsequent versions of the OECD Model Tax Convention, including the latest version, from 2017. The commentary to Article 23B (OECD 2017a, paras. 75–78.1) points out the fundamental highlights from the report: the potential for abuse created by tax sparing credit, the (in)effectiveness of tax sparing credit as an instrument for foreign assistance in the development of the source country, and the concern that tax sparing may stimulate states to use tax incentives for the purpose of harmful tax competition. The commentary also does not explicitly insist that the inclusion of a tax sparing credit clause should cease, but it does emphasise that such clause could be found – nearly as *ultimum remedium* – only in treaties where the economic level of the other contracting state is significantly beneath the level of the OECD member states. Therefore, it is not surprising that in the 21st century there are relatively few new tax treaties between OECD member states and developing countries that include a tax sparing credit clause. We estimate that since 2000, more than 2,000 treaties for the avoidance of double taxation have been concluded.¹⁶

¹⁴ See *infra*, section 5.1 for a discussion on the possible justification of the application of domestic CFC rules to the profit of a non-resident company, even though Article 7 of the tax treaty, based on the OECD Model Tax Convention, stipulates that the profit of the company from the contracting state will be taxed only in that state (unless the company operates in the other contracting state through a permanent establishment).

¹⁵ If the CFC measures were to apply only to passive income, income of conduit companies, income from highly mobile sources, and income from jurisdictions with low taxes (Barker 2007, 356), and the tax sparing credit clause were to apply only on active income – there would be no collision. However, in practice the provisions on the tax sparing credit also often apply to passive income, and some CFC legislations (such as in Brazil) do not limit themselves only to passive income or to income from jurisdictions with low taxes, but to the total profit of controlled foreign companies. The legislator does not call it “profit” but rather “variation in the value of investment equivalent to profits” (orig. “variação do valor do investimento equivalente aos lucros”), in order to create the illusion that it is not taxation at the level of a foreign company but at the level of a Brazilian one, therefore avoiding challenges to the constitutionality of the CFC rules and incompatibility with Article 7 of the OECD Model Tax Convention and UN Model Double Taxation Convention.

¹⁶ The study covering the 1997–2013 period (Wijnen, De Goede 2014, 118), shows that at the time 1,854 tax treaties were concluded (1,811 were analysed and 43 were not available to the authors). We believe that Andrade (2020, 14) gives an incorrect exaggerated estimate that between 2000 and 2020 around 4,000 treaties for the

During the 2000–2020 period, the common law countries (United Kingdom, Canada, Australia, and New Zealand), which were very active in the last third of the 20th century in providing tax sparing credit clauses in the tax treaties that they concluded at the time, signed a total of only seven such tax treaties with developing countries and two with other OECD members. A similar treatment can be noted in other OECD member states, which had previously been prepared to provide a tax sparing clause (Andrade 2020, 14, 16–18, 20–21).¹⁷ Overall, tax sparing credit clauses exist in more than 5% of all tax treaties concluded since 2000, but one should not neglect the circumstance that most clauses from the treaties signed in the last third of the 20th century are still in force, raising their presence in treaties for the avoidance of double taxation closer to 15%.

On the other hand, 12 countries, including Serbia,¹⁸ have presented their position regarding Article 23 of the OECD Model Tax Convention, retaining the right to add tax sparing credit provisions related to tax incentives prescribed in their national legislations. This is why the Draft treaty for the avoidance of double taxation, which is the starting point for Serbia’s representatives in negotiations on concluding tax treaties (predominantly based on the OECD Model Tax Convention, but also to some extent on the UN Model Double Taxation Convention), includes a tax sparing credit clause (Dabetić 2008, 188). However, the final outcome of the negotiations depends on the relative bargaining powers of the two sides, therefore Serbia does not condition the conclusion of the treaty on the acceptance of this provision, provided that it receives concessions on some other provisions, nor can it insist on this provision in negotiations with countries that have greater bargaining power. In the course of the current century, Serbia has concluded 17 tax treaties

avoidance of double taxation were signed, because the most common number is somewhat above 3,000 treaties, which also includes those from the 20th century. Compare OECD 2017b; International Centre for Tax and Development 2021.

¹⁷ According to the calculation of the authors of this article, based on the overview provided by Andrade (2020, 14–16), during the 2000–2020 period 17 other members of the OECD (Turkey, Spain, Ireland, Italy, Luxembourg, Greece, Germany, Korea, Portugal, Norway, Latvia, Slovakia, Estonia, Poland, Austria, Finland, and Switzerland) concluded a total of 27 such tax treaties with countries that are not members of the organisation, and three with other members. In total, between 2000 and 2020 the OECD member states concluded tax treaties with 34 developing countries, containing a tax sparing clause *lato sensu*, while it also appears in round 70 tax treaties concluded between states and jurisdictions that are not OECD members. One should bear in mind that Andrade states that the list is not comprehensive.

¹⁸ Albania, Argentina, Brazil, India, Ivory Coast, Malaysia, Morocco, China, Serbia, Thailand, Tunisia, and Vietnam.

that contain a tax sparing clause, comprising a significant 38.6% of the total number of tax treaties concluded during that period (44), but only one of them was with an OECD member state (Hungary).

Despite the generally unfavourable attitude of the OECD, we conclude that the tax sparing credit has not been completely marginalised, because its implementation continues in numerous previous tax treaties, and it is also included in some new treaties, particularly those where one of the contracting states is an emerging influential economic power, such as China, India, Vietnam, or (until recently) Brazil, which could also find itself in the role of a capital exporting country, as well as a capital importing country. The theoretical foundation for disputing the OECD attitude can be found primarily in South American tax law literature. Bearing in mind that due to the long-term insistence of leading South American countries on the tax sparing credit clause and persistent refusal by the United States of America, the US now has only one treaty for the avoidance of double taxation with a country in that region (Venezuela)¹⁹ and one with a Central American partner (Mexico) – where both countries are large oil exporters (Avi-Yonah 2019, 3).²⁰

Advocating the revision of the OECD attitudes, Brazilian tax legal scholar Luís Eduardo Schoueri summarised the arguments in favour of the matching credit and tax sparing credit *stricto sensu*. In his opinion, the aim of the matching credit is to ensure that in the situation when the source country unilaterally limits its right to tax and stipulates a tax relief in the form of a lower tax rate (e.g. from 25% to 15%), the residence country will continue providing the tax credit, as if the tax relief did not exist, where the taxpayer will exact privilege directly from the tax treaty, reflected in the difference between the “standard” rate that the residence country recognises for the use of the tax credit (25%) and the lower rate that is applied by the

¹⁹ The tax treaty between the US and Venezuela was signed on 25 January 1999 – eight days before Hugo Chávez came to power in Venezuela. The Senate ratified it and it came into force on 1 January 2000.

²⁰ Avi-Yonah (2019, 4) believes that the refusal to accept the tax sparing clause is a fake clue when attempting to explain the absence of a wide network of tax treaties between the USA and Latin America. In his opinion, the true reason is the highly unequal flow of investments, which would lead to the one-sided loss of tax revenue in the source countries. It is therefore no surprise that the only two US tax treaties are with Mexico and Venezuela, states that, due to their oil exports, have more balanced investment flows with the USA, compared to other Latin American countries. The arguments that applied to Venezuela in 1999 have become invalid since the USA imposed sanctions on it due to human rights violations by the Nicolás Maduro regime.

source country (15%). In this case it is not a matter of support, i.e. type of development assistance by the residence country to the source country, but the acceptance of the right of the source country to autonomously set the tax rate. At the same time, the right of the residence country to taxation begins only at the rate of 25%, therefore its position remains unchanged: it would have to provide a tax credit of 25% even in the situation where the tax relief has not been provided in the source country (Schoueri 2013, 110–111). In regard to the tax sparing credit *stricto sensu*, Schoueri resonates that in principle the source country taxes to a certain level, and the residence country provides a tax credit for the tax paid in the source country, based on the tax treaty. If the source country decides not to tax a non-resident to the extent permitted by the tax treaty (i.e. to provide him a tax relief), the residence country is required to respect such a decision and provide a tax credit equal to the maximal amount that the source country could have taxed (Schoueri 2013, 111).

Analysing the specific objections from the OECD report, Schoueri believes that the argument regarding the ineffectiveness of the tax sparing credit as an instrument for promoting foreign investments is indefensible, and further points out that there is no empirical evidence that would corroborate the discontent of most states by the tax incentives. In his opinion, the argument regarding the “free rider”, according to which tax sparing credit is provided even though without it the investor would have made the same decision to invest, because tax reasons are of lesser importance than other factors (political, market and infrastructure circumstances in the country of investment), cannot be accepted at face value either. Namely, the question could be raised whether tax treaties then have any significance in making decisions to invest, and studies do not provide a conclusive answer. Speaking against the arguments that developing countries must pay the price for gaining tax sparing credit by making concessions to the sum of the withholding taxes on dividends, interest, and royalties, Schoueri points out the abovementioned remark that the OECD itself advocates the lowering of these rates, including a zero tax rate for withholding taxes on royalties, which we have labelled as specific cynicism. He also disputes the thesis that some countries that are not members of the OECD have become economically strong in the meantime, and that therefore there is no need to provide them further support in the form of tax sparing credit, adding that numerous developing countries are still very vulnerable. The argument that the tax sparing credit clause can be abused is unacceptable, in Schoueri’s opinion. His view is that a more consistent approach to this issue would be to generally review the issue of “treaty shopping” and to adopt solutions that were reached sometime later, as part of the BEPS Actions (the principal

purpose of transaction or arrangement test or limitation on benefits clause) (see Popović, Ilić-Popov 2019, 7–34; Andrade 2020, 21–22).²¹ The fact that abuse may occur is not sufficient to reject the tax treaty provision, which would otherwise be in the interest of both contracting states. Finally, according to Schoueri’s review, the OECD objection that the tax sparing credit clause is harmful to the source country because it stimulates repatriation of profits at the expense of re-investment, is invalid, unless the clause has a sunset clause. Otherwise, the investor’s decision on whether to reinvest the profit or repatriate it depends primarily on commercial reasons (Schoueri 2013, 113–117).

It is a fact that the tax sparing credit has in a way been pushed into the background, following the 1998 OECD report, and that the member states accept it significantly less often when negotiating new tax treaties. However, it is indisputable that such a clause is still present in many treaties for the avoidance of double taxation that are still in force.

²¹ One should bear in mind that the objection regarding the possibility of abuse was made 17 years before the OECD (together with the G20) announced its anti-BEPS actions. As part of the BEPS project Article 29 (Entitlement to benefits) was added to the OECD Model Tax Convention (the version from 2017), containing a principal purpose of transaction or arrangement test, and other anti-abuse measures. Furthermore, the commentary on Article 29 para. 175 explicitly mentions the tax sparing clause as a benefit (in the form of limitation of the contracting state’s right to tax) to which this article applies. On the other hand, Andrade points out that it is necessary to differentiate between abuse of the provisions of the tax treaty on tax sparing credit and abuse of domestic regulations on tax incentives. Several actions were developed as part of the BEPS project in connection with the latter case: (1) BEPS Action 3, pertaining to CFC measures, which allows for the application of a minimal effective tax rate (https://read.oecd-ilibrary.org/taxation/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report_9789264241152-en#page65, last visited 5 March, 2022); (2) BEPS Action 4, which stipulates methods for preventing excessive interest deductions; (3) BEPS Action 5, addressing harmful tax competition; (4) BEPS Action 6, focusing on the abuse of tax treaties; and (5) BEPS Actions 8–10, and 13, which aim to prevent abuse of transfer pricing. Tax treaty law includes different measures related to the abuse of the tax sparing credit clause, which have been mentioned above [*supra*, fn. 12 and at the beginning of this footnote, in the context of Art. 29 of the OECD Model Tax Convention (2017)].

4. TAX SPARING CREDIT: MEASURE FOR SUPPORTING DEVELOPING COUNTRIES OR REFLECTION OF FISCAL SOVEREIGNTY?

The scope of the problem that could be resolved by the tax sparing credit clause depends on the method of eliminating double taxation chosen by the contracting state other than the state providing the tax incentives. In the event that the former state, the residence country, applies the exemption method from Article 23A of the OECD Model Tax Convention, the issue would not even exist for the income and capital that is exempt (unless a subject-to-tax clause is contracted) (Nilsen 2013, 17; Marchgraber 2014, 293–302),²² but rather only for the income that the source country can tax, to which the exemption does not apply and requiring “additional” application of credit method (dividends, interest, royalties, etc.). However, if the residence country has opted for the credit method from Article 23B of the OECD Model Tax Convention, the effect of the tax incentive would be annulled for all types of income and capital that could have been taxed (but were not) in the source country.

Let us take a look at the structure of the provisions on tax sparing credit in the treaties for the avoidance of double taxation that are binding for Serbia.

In 2022 the tax sparing credit clause exists in 29 out of the 63 tax treaties that Serbia has entered into (46%). In three of the tax treaties (out of the 29), tax sparing credit is not stipulated as Serbia’s obligation, but only for the other contracting state. The tax sparing credit provisions initially existed also in treaties for the avoidance of double taxation that the Socialist Federal Republic of Yugoslavia (SFRY) had entered into with Denmark (1981) and Norway (1983), which were replaced by new treaties between Serbia and these countries, as well as in the treaties between the former Yugoslavia and Sweden and Finland, which continues to apply to Serbia, but they include a sunset clause regarding the tax sparing credit norm of ten years from the treaty entering into force in the treaties with Denmark, Norway, and Sweden, and five years in the case of the treaty with Finland. The current tax treaty with the United Kingdom also includes a sunset clause, however, it pertains to the specific taxpayer, who may enjoy benefit in the form of tax sparing credit for a period of ten years, starting with the tax period when the taxpayer is first granted a tax relief. Such a formulation does not limit the

²² Serbia has inherited a number of tax treaties from the former SFRY, based on which it applies exemption as a method for avoiding double taxation (with Belgium, France, the Netherlands, Italy, Cyprus, Germany, Sri Lanka, Sweden, and the United Kingdom), but they do not include a subject-to-tax clause.

Table 1. The tax sparing credit clause in Serbia's tax treaties

No.	Other contracting state	Signatory state "on our part"	Scope of application*	Date of conclusion of the tax treaty	Date of entry into force	Tax sparing credit	Article of the tax treaty	Method of eliminating double taxation
1	Albania	Serbia–Montenegro	I + C	22 December 2004	1 January 2006	Reciprocal	25 (3)	Credit
2	Armenia	Serbia	I + C	10 March 2014	1 January 2017	Reciprocal	24 (3)	Credit
3	Azerbaijan	Serbia	I + C	13 May 2010	1 January 2011	Reciprocal	24 (3)	Credit
4	Bosnia and Herzegovina	Serbia–Montenegro	I + C	26 May 2004	1 January 2006	Reciprocal	24 (3)	Credit
5	Bulgaria	FR Yugoslavia	I + C	14 December 1998	1 January 2001	Reciprocal	24 (3)	Credit
6	China	FR Yugoslavia	I + C	21 March 1997	1 January 1998	Reciprocal	24 (3)	Credit
7	Cyprus	SFR Yugoslavia	I + C	29 June 1985	1 January 1987	Reciprocal	22 (3)	In Serbia: exemption, ¹⁾ in Cyprus: credit
8	Egypt	Serbia–Montenegro	I	31 July 2005	1 January 2007	Reciprocal	23 (3)	Credit

No.	Other contracting state	Signatory state "on our part"	Scope of application*	Date of conclusion of the tax treaty	Date of entry into force	Tax sparring credit	Article of the tax treaty	Method of eliminating double taxation
9	Greece	FR Yugoslavia	I + C	25 June 1997	1 January 2011	Reciprocal	24 (2)	Credit
10	Hong Kong	Serbia	I + C	14 August 2000	1 January 2021	Reciprocal (limited to 1 January 2027)	23 (3)	Credit
11	Hungary	FR Yugoslavia	I + C	20 June 2001	1 January 2003	Reciprocal	24 (4)	In Serbia: credit; in Hungary: exemption ²⁾
12	India	Serbia-Montenegro	I + C	8 February 2006	1 January 2009	Reciprocal	25 (3)	Credit
13	Indonesia	Serbia	I	28 February 2011	1 January 2019	Reciprocal	23 (3)	Credit
14	Italy	SFR Yugoslavia	I + C	24 February 1982	1 January 1986	Obligates only Italy (explicitly) Maximum: 25%	23 (4)	In Serbia: exemption; in Italy: credit

No.	Other contracting state	Signatory state "on our part"	Scope of application*	Date of conclusion of the tax treaty	Date of entry into force	Tax sparing credit	Article of the tax treaty	Method of eliminating double taxation
15	Korea, PDR	FR Yugoslavia	I + C	25 December 2000	1 January 2002	Reciprocal	24 (3)	Credit
16	Kuwait	FR Yugoslavia	I + C	2 April 2002	1 January 2004	Reciprocal	24 (3)	Credit
17	Libya	Serbia	I	12 November 2009	1 January 2011	Reciprocal	23 (3)	In Serbia: credit; in Libya: exemption ³⁾
18	Moldova	Serbia– Montenegro	I + C	9 June 2005	1 January 2007	Reciprocal	23 (3)	Credit
19	Montenegro	Serbia	I	20 July 2011	1 January 2012	Reciprocal	23 (3)	Credit
20	North Macedonia	FR Yugoslavia	I + C	4 September 1996	1 January 1998	Reciprocal	24 (3)	Credit
21	Pakistan	Serbia	I	21 May 2010	1 January 2011	Reciprocal	23 (3)	Credit
22	Poland	FR Yugoslavia	I + C	12 June 1997	1 January 1999	Reciprocal	24 (4)	In Serbia: credit; in Poland: exemption ⁴⁾

No.	Other contracting state	Signatory state "on our part"	Scope of application*	Date of conclusion of the tax treaty	Date of entry into force	Tax sparring credit	Article of the tax treaty	Method of eliminating double taxation
23	Qatar	Serbia	I	2 October 2009	1 January 2011	Reciprocal	23 (2)	Credit
24	Romania	FR Yugoslavia	I + C	16 May 1996	1 January 1998	Reciprocal	25 (3)	Credit
25	Sri Lanka	SFR Yugoslavia	I + C	7 May 1985	1 January 1987	Reciprocal	23 (3)	In Serbia: exemption; ⁵⁾ in Sri Lanka: credit
26	The Netherlands	SFR Yugoslavia	I + C	22 February 1982	1 January 1984	Obligates only the Netherlands (explicitly)	23 (2)	In Serbia: credit; in the Netherlands: credit
27	Tunisia	Serbia	I + C	11 April 2012	1 January 2014	Reciprocal	25 (3)	Credit
28	United Kingdom	SFR Yugoslavia	I	6 November 1981	1 January 1983	Obligates only the UK (explicitly)	22 (3)	In Serbia: exemption; in the UK: credit
29	Vietnam	Serbia	I	1 March 2013	1 January 2014	Reciprocal	23 (3)	Credit

* I + C: income and capital; C: capital

- 1) In Serbia the tax sparing applies only to dividends, interest, and royalties.
- 2) In Hungary the tax sparing applies only to dividends, interest, and royalties.
- 3) In Libya the tax sparing applies only to dividends, interest, and royalties.
- 4) In Poland the tax sparing applies only to dividends, interest, and royalties.
- 5) In Serbia the tax sparing applies only to income from using ships in international transport, dividends, interest, and royalties.

general effect of the provision on tax sparing credit that the United Kingdom offered the former SFRY, therefore the tax sparing norm continues to apply to taxes that have not been paid in Serbia due to the application of tax incentives. It is our belief that providing a time limit on the tax sparing credit provisions may lead to distorted stimuli. Namely, the general sunset clause leads to the accelerated repatriation of profit from the source country, while the time limit that applies to the specific taxpayer encourages the founding of “new” companies or the transfer of profit to associated companies by way of transfer prices.

The fact that nearly 90% of Serbia’s tax treaties that include the tax sparing credit clause define this provision as reciprocal, shows that the role of tax sparing as an instrument for providing assistance to developing countries has been reduced, if not completely lost. In the 1980s as many as six tax treaties of the SFRY with developed countries included a unilateral clause that was not binding for the Yugoslav side, and only one tax treaty included binding reciprocity.²³ The fact that in the 21st century two thirds of tax treaties containing a tax sparing credit clause have been concluded between countries that are not members of the OECD, i.e. which are either developing countries or emerging economies, indicates a change of emphasis on a much broader scale. Tax sparing credit is increasingly perceived as a mechanism of supporting national tax policies in the domain of investment incentives. In line with such an approach, the right to provide tax relief to taxpayers constitutes part of every state’s right to tax, and the interference of other states, or the OECD, in that right violates fiscal sovereignty. Let us recall Schoueri’s thesis that the residence country is required to respect the decisions of the source country not to tax the non-residents to the level permitted by the tax treaty (i.e. to provide them a tax relief) and to provide tax credit equal to the maximum sum of the tax that the source country could have levied. It is clear that whether a tax sparing credit clause will be included in the tax treaty depends on the relative bargaining powers of the states drafting the treaty. We cannot accept the thesis that such double non-taxation – stemming from the legitimate (non-abusive) provision of tax incentives – is contrary to the object and purpose of tax treaties. Nevertheless, the preamble to the 2017 (post-BEPS) version of the OECD Model Tax Convention states that two countries intend to conclude a

²³ Unilateral clauses exist today in current tax treaties with the United Kingdom, the Netherlands, and Italy, and they existed in the treaty with Sweden (which has expired), as well as in previous treaties with Denmark and Norway. Only the treaty with Finland contained a reciprocity clause, but it too has expired, as mentioned previously. In the treaties with Cyprus and Sri Lanka, Serbia opted for the exemption method, while the other party provides tax sparing credit.

treaty for the avoidance of double taxation of income and capital “without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance”. The non-abusive tax incentive, supported by tax sparing credit, does not fall under such a defined object and purpose of the tax treaty; accordingly, the commentary to Article 23B also does not contain the disqualification of a tax sparing clause.

Table 2, on incoming foreign direct investments during the 2011–2021 period, where the “fiscal sacrifice” is borne by the treasury of the investor’s residence country, and the benefits are achieved by the investor and the Serbian state (to the extent to which the tax sparing credit contributed to the investor deciding to invest in it), indicates that the stake of investments from states and jurisdictions with which Serbia has a tax sparing credit clause, in its total foreign direct investments, has varied. In 2011 it was low (19.6%), because in that year 25% of the total foreign direct investments came from Luxembourg (a total of EUR 885 million) based on the sale of the Delta Maxi company to the Delhaize company, where the tax treaty with this country does not include a tax sparing credit clause. This was followed by three years of growth – up to 54.1%, influenced by the significant proportion of investments from the Netherlands, which provides a tax sparing credit. In 2015 the sudden increase in *total* foreign direct investments, which continued in the subsequent years, lead to the proportion of investments from countries with which Serbia has a tax sparing credit clause in the total foreign direct investments decreasing to 30% (2015 and 2016), with an increase to 47.4% in 2017, due to the significant proportion of investments from the Netherlands and Italy. A decrease was recorded in 2018 (28%) since as much as 55.1% of the foreign direct investments was from France (a total of EUR 716.3 million), primarily based on the concession for the Nikola Tesla Airport in Belgrade granted to French company Vinci – and the tax treaty with France does not include a tax sparing credit clause. In 2019 and 2020 the stake increased to 46.3% and 44.6%, respectively, reaching 56.6% in 2021, in part due to the fact that the tax treaty with Hong Kong entered into effect.

The state through which the most foreign direct investments entered Serbia during this period was the Netherlands, which was regularly ranked first, with the exception of 2011, 2012, and 2018.²⁴ The tax sparing credit may have played a role in this, but one should not overlook the fact that the

²⁴ At the time most foreign direct investments came from Luxembourg (2011) and France (2018), which has been mentioned previously. In 2012 investments from Russia topped the list, because of the one-off growth of the stake of investment in crude oil exploitation in total foreign direct investments.

Table 2. Foreign direct investments from countries with which Serbia has a tax treaty with a tax sparing credit clause

Other contracting state	2011		2012		2013		2014		2015		2016	
	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank
The Netherlands	215	4	153	3	380	1	373	1	362	1	342	1
Italy	136	7	79	9	67	10	101	4	145	4	-	-
China	-	-	-	-	-	-	83	7	-	-	70	11
Cyprus	166	7	4	20	26	15	10	19	51	12	61	12
Hong Kong	13	20	-	-	23	16	-	-	42	14	122	6
United Kingdom	70	10	7	17	80	8	58	9	-	-	40	16
Hungary	63	11	-	-	35	13	56	10	32	17	33	17
Bosnia and Herzegovina	15	19	13	14	-	-	-	-	-	-	-	-
Bulgaria	-	-	40	10	36	12	22	15	-	-	-	--
Greece	31	16	-	-	37	11	90	5	-	-	43	14
Montenegro	-	-	9	16	-	-	19	16	45	13	49	13
Poland	-	-	5	18	14	19	-	-	-	-	-	-
Romania	-	-	-	-	68	9	-	-	-	-	-	-
Total FDI in Serbia	3,544		1,009		1,548		1,500		2,114		2,127	
Percentage of total FDI	19.6%		30.7%		48.0%		54.1%		30.0%		30.0%	

Other contracting state	2017		2018		2019		2020		2021	
	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank
The Netherlands	543	1	351	3	804	1	591	1	683	1
Italy	196	3	169	9	108	10	175	5	27	19
China	103	10	192	8	264	7	410	3	569	3
Cyprus	49	14	-	-	-	-	139	6	147	8
Hong Kong	36	17	458	2	74	12	118	7	205	6
United Kingdom	118	9	151	10	-	-	-	-	335	5
Hungary	142	18	40	17	521	3	-	-	145	9
Bosnia and Herzegovina	-	-	37	18	45	17	-	-	43	15
Bulgaria	-	-	-	-	24	20	40	17	32	17
Greece	-	-	30	20	-	-	-	-	-	-
Montenegro	-	-	-	-	-	-	-	-	-	-
Poland	58	12	-	-	-	-	-	-	-	-
Romania	-	-	-	-	-	-	-	-	-	-
Total FDI in Serbia	2,548		3,465		3,815		3,039		3,863	
Percentage of total FDI	47.4%		28.0%		46.3%		44.6%		56.6%	

The grey fields indicate data for years where the tax treaty was still not in force.

Source: National Bank of Serbia, Balance of Payments (https://www.nbs.rs/sr_RS/drugi-nivo-navigacije/statistika/platni_bilans), last visited 24 April 2022).

overall tax regime in the Netherlands, especially the institute of participation exemption in its tax law, along with the broad network of tax treaties (101),²⁵ makes this country extremely attractive for registering holding companies, through which foreign direct investments are made in third countries. In reviewing the role of tax sparing credit, the OECD reported that many US companies have acknowledged that “it is rather the absence of a tax treaty, not the absence of tax sparing, that deters further investment” (OECD 1998, 25).

The outbound investments are several times lower than the inbound, and are presented in Table 3. In these cases, the “fiscal sacrifice” is borne by Serbia’s treasury, while the benefit is reaped by the resident investor and the state or jurisdiction in which the investment was made (to the extent to which the tax sparing credit contributed to the investor investing in it). The share of the investments in the states or jurisdictions with which Serbia has a tax sparing credit clause in total foreign direct investments by its residents increased significantly during the 2012–2015 period, from around 40% to around 90%, due to the expansion of investments in Montenegro (which in 2015 reached as much as 61.8% of the total net increase in financial assets). This was followed by a downward trend, reading 41% in 2020.²⁶ In 2021 this stake increased to 55%, primarily due to the significant increase in investments in Montenegro and Bosnia and Herzegovina.

The state that received the most foreign direct investments from Serbia during this period was most often Bosnia and Herzegovina, followed by Montenegro, but since 2018 Switzerland, Slovenia, and Russia have topped the list.²⁷ This indicates that when choosing the destination for investing capital, Serbia’s residents were more motivated by other factors (commercial, ethnic, political or evasion reasons, as well as favourable withholding taxes from applicable tax treaties) rather than the (non-)existence of a tax sparing credit clause.

²⁵ <https://taxsummaries.pwc.com/netherlands/individual/foreign-tax-relief-and-tax-treaties> (last visited 24 April, 2022).

²⁶ The deterioration of political relations between Serbia and Montenegro was accompanied by a decrease in Serbian investments in Montenegro (from EUR 192 million in 2015, in 2016 they saw the withdrawal of EUR 2.7 million, and the modest investment of around EUR 20 million per year during the 2017–2020 period). After a government that did not include the Democratic Party of Socialists was formed in Montenegro in late 2020, direct investments from Serbia in Montenegro in 2021 more than quadrupled compared to 2020.

²⁷ https://www.nbs.rs/sr_RS/drugi-nivo-navigacije/statistika/platni_bilans (last visited 14 March, 2022).

Table 3. Direct investments from Serbia in countries with which it has tax treaties with a tax sparing credit clause

Other contracting state	2011		2012		2013		2014		2015		2016	
	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rank
Bosnia and Herzegovina	62	1	90	2	103	1	64	2	52	2	73	1
Montenegro	39	3	92	1	77	2	146	1	192	1	-	-
Greece	-	-	2	12	2	12	2	12	2	13	3	11
Cyprus	1	18	-	-	-	-	-	-	8	6	6	8
Hungary	-	-	9	6	9	5	-	-	10	4	19	5
Poland	-	-	-	-	-	-	-	-	-	-	-	-
Romania	-	-	10	5	45	3	5	8	8	9	11	7
Bulgaria	18	5	41	3	5	6	23	4	2	13	2	16
China	-	-	-	-	-	-	-	-	-	-	1	18
Hong Kong	-	-	-	-	-	-	-	-	-	-	-	-
Albania	6	8	-	-	-	-	-	-	1	15	-	-
N. Macedonia	2	13	-	-	-	-	-	-	3	11	5	9
Total DI from Serbia	225		256		250		264		310		228	
Percentage in total DI	39.6%		95.3%		96.4%		90.9%		89.7%		52.6%	

Other contracting state	2017		2018		2019		2020		2021	
	mil. EUR	Rank	mil. EUR	Rank	mil. EUR	Rang	mil. EUR	Rank	mil. EUR	Rank
Bosnia and Herzegovina	45	1	55	3	30	4	11	6	69	3
Montenegro	22	3	43	4	23	5	18	2	76	2
Greece	5	7	7	9	9	10	8	7	20	5
Cyprus	2	13	7	10	5	12	-	-	8	7
Hungary	1	16	2	15	9	9	4	10	6	9
Poland	-	-	-	-	2	18	6	8	-	-
Romania	-	-	28	5	31	3	2	11	9	6
Bulgaria	-	-	-	-	-	-	-8	18	-30	20
China	-	-	-	-	4	14	-	-	-	-
Hong Kong	2	12	2	16	2	19	-	-	-	-
Albania	-	-	-	-	-	-	-	-	1	17
N. Macedonia	4	8	-	-	5	13	-	-	-28	19
Total DI from Serbia	130		308		264		100		238	
Percentage in total DI	60.8%		46.1%		44.7%		41.0%		55.0%	

The grey fields indicate data for years where the tax treaty was still not in force.

Source: National Bank of Serbia, Balance of Payments (https://www.nbs.rs/sr_RS/drugi-nivo-navigacije/statistika/platni_bilans), last visited 14 March, 2022).

The data from Tables 2 and 3 sheds a different light on the role of tax sparing credit as an instrument that by supporting the efforts of the country of investment to attract foreign investments contributes to their growth and consequently the economic growth of the country. There is no contracted tax sparing with countries that are the source of the greatest individual investments, e.g. Germany and Austria, and it appears that the most prominent support is for investors from the Netherlands, who are most commonly represented by conduit companies. The Dutch Centre for Research on Multinational Corporations (*Stichting Onderzoek Multinationale Ondernemingen* – SOMO) has shown that direct foreign investments contribute to economic development and the increase in public revenue depending on: (1) the sum of the capital leaving the country through the repatriation of profit, interest on inter-company loans, and royalties; (2) the balance between the imports based on foreign direct investments (e.g. machines and semi-finished products) and the exports generated by foreign direct investments; (3) the balance between the taxes paid by multinational companies and the subsidies granted to them by the government in order to attract them; and (4) the extent of the abuse of transfer prices aimed at avoiding taxation. For example, if the investment was made in Serbia, but the generated profit is either untaxed (or taxed at a low rate), due to the transfer of profit through the abuse of tax treaties (e.g. by introducing a conduit company), the state will not collect revenue based on the tax on corporate profits. In such a context, foreign direct investments cannot be equated with development (McGauran 2013, 19–20). Regardless of the efforts to reduce the scope of tax evasion through base erosion and profit shifting, it is our conclusion that in addition to the foreign direct investments and tax incentives for such investments, there are also many other factors that contribute to economic development (legal and political stability of the state, possibility of activating domestic savings, etc.). Therefore, we will repeat that the right to introduce tax incentives is primarily part of the subjective right to tax of every state and that tax sparing credit is a reflection of the respect that the investor's residence country shows to the right of the source country by permitting the deduction from the tax on the investor's global income of the maximum amount that the source country could have taxed.

5. TAX SPARING CREDIT AND THE INCOME INCLUSION RULE

5.1. The Prospect of Relying on Past Experience Involving CFC Legislation

The BEPS project did not discuss tax sparing credit. However, preparations for BEPS 2.0, and especially for the introduction of the Pillar Two, which stipulates the prescription of a minimal 15% profit tax rate, as well as the implementation of the Income Inclusion Rule, create new dilemmas regarding tax sparing credit.

The implementation of the Income Inclusion Rule should begin in 2023.²⁸ We note that in October 2021, 137 states and jurisdictions from the Inclusive Framework on BEPS agreed to start reforming the rules of international taxation through the implementation of a two-pillar plan, which would ensure that multinational companies pay a fair tax portion regardless of where they operate.²⁹ The measures from Pillar One redefine the allocation of the right to taxation of profit from operations at an international level; the rights to tax will be granted to states where the consumers are located, on the part of the residual profit (in excess of 10% of the revenue), provided that the multinational company has a global turnover in excess of EUR 20 billion and profitability above 10% (OECD 2021b, 1). The aim of Pillar Two is for qualified multinational companies to pay a minimum tax regardless of where their seat is located or in which state or jurisdiction they operate, in order to suppress harmful tax competition and reduce the motivation to transfer profit to states and jurisdictions with low tax rates (OECD 2021b, 4).³⁰ In order to achieve this goal, two Global anti-Base Erosion Rules (GloBE)

²⁸ At the time of the great crisis caused by Russia's aggression against Ukraine, it is difficult to judge whether this will lead to the postponement of the BEPS 2.0 measures or their possible revision.

²⁹ Only four states from the Inclusive Framework on BEPS (Pakistan, Nigeria, Kenya, and Sri Lanka) have not supported this agreement.

³⁰ This is a group of multinational companies that have an annual revenue of at least EUR 750 million in the consolidated financial statement of the ultimate parent entity, in at least two of the four fiscal years immediately preceding the fiscal year in which the testing occurred. This threshold is also used for country-by-country reporting for the assessment of transfer prices. See OECD 2015, 21. It has been adopted in Serbian tax law in article 61v of the Law on Corporate Profit Tax, *Official Gazette of the RS* 25/2001, ..., 118/2021. It is estimated that such a high limit excludes 85%–90% groups of multinational companies from the obligation to report country-by-country for the assessment of transfer prices, but it applies to the remaining groups of multinational companies, which control around 90% of the global corporate revenues.

are proposed to be incorporated in national law – an Income Inclusion Rule and an Undertaxed Payment Rule – as well as a Subject to Tax Rule in the tax treaties (OECD 2021b, 3).

The income inclusion rule grants the residence state of the parent entity the right to attribute to the parent company in the multinational group of enterprises, a top-up tax for every constituent entity (company–group member, or permanent establishment) that has been taxed too low in the state of its residence, thus fighting the harmful tax competition. In simple terms, the top-up tax would correspond to the difference between the stipulated minimal tax rate of 15% and the effective tax rate in the residence country of the low-taxed constituent entity (OECD 2021c, 29). Without going into the details of the proposal for defining the GloBE income (OECD 2021c), we will mention that in determining the basis to which the top-up tax will be applied in the residence state of the parent entity, a substance-based income exclusion is applied, consisting of two carve-outs: based on payroll costs and based on the carrying value of the tangible assets. The carve-out will initially be 10% of the payroll costs and 8% of the carrying value of the tangible assets, lowered 0.2 percentage points per year during the first five years, and then 0.8 percentage points per year for payroll costs and 0.4 percentage points of the carrying value of the tangible assets, for the next five years (OECD 2021b, 4).

The analysis should answer the question whether the tax sparing credit provisions in Article 23 of the OECD Model Tax Convention could limit the application of the GloBE rules on income inclusion. Since at the time of the submission of this article the rule is still in its draft phase, the assessment of its future interaction with the tax sparing credit will apply the decades of experience involving the CFC rules, whose effects are similar to the effects of the rule on income inclusion (OECD 2020, 14). Both rules attribute the income generated by a controlled foreign corporation to its parent company, which is a resident of a different state, thus granting this other state the right to tax the income generated by the company that is not its resident. However, the differences are significant. CFC rules are most often aimed at passive income (dividends, interest, and royalties) of the controlled companies that are the residents of states and jurisdictions with low tax rates,³¹ and the tax that will apply to it in the state of residence of the parent company will have the same rate as the company's income from other sources. The Income Inclusion Rule, however, grants the right to the parent entity's residence country to tax *all* income of the constituent entities that are subject to an effective tax rate that is lower than 15% in other states and jurisdictions,

³¹ For an exception, see *supra*, fn. 15.

and the top-up tax is equal to the difference between 15% and the effective tax rate in the residence country of the constituent entity. Also, one should bear in mind that the income subject to CFC rules is determined based on the national regulations of the parent company's residence country, while the rule on income inclusion stipulates that attributed income should be determined uniformly (e.g. in accordance with the International Financial Reporting Standards) (Navarro 2021, 10).³²

From a legal point of view, however, one could consider the analogy with CFC rules to be inappropriate. Namely, some authors (De Wilde 2022, 4–5) believe that the top-up tax cannot be equated with the CFC measure. Unlike the CFC legislation, the aim of Pillar Two is not to ensure that the domestic income is taxed, despite the fact that in the context of aggressive tax planning (which is only the extreme example), it has been moved to the base company with the intention of postponing the application of tax by the shareholder's residence country. The top-up tax from the GloBE rules is essentially “an extraterritorial tax on foreign corporate profits produced by foreign group member companies” (De Wilde 2022, 4). Pillar Two is aimed against tax competition – specifically “The global minimum tax agreement does not seek to eliminate tax competition, but puts multilaterally agreed limitations on it” (OECD 2021a). The aim of the top-up tax is for the income that is sourced abroad, regardless of its nature, to be subject to a minimal tax, therefore introducing a new dimension to a system that has been established for decades, resting on the postulate from Article 7 of the OECD Model Tax Convention, with certain limitations (e.g. CFC measures) in order to prevent abuse.

Regardless of the above-mentioned differences in the structure of the CFC norms and income inclusion rules, or in their objectives, the position of the doctrine on the relationship between CFC rules and tax treaties can serve as a guideline for how to resolve issues of compatibility of the income inclusion rules with the tax sparing clause.

The commentary to Article 1 of the 1992 OECD Model Tax Convention states that measures such as CFC rules “are part of basic domestic rules set by national tax law for determining which facts give rise to a tax liability.

³² Navarro also states that CFC rules may also be based on the deemed dividend approach, according to which it is deemed that the shareholders have received dividends that have in fact not been distributed to them, or the notional sum approach, which leads to the increase in the tax base of the parent company equal to the fair value of its stake in the subsidiary, while the rules on income inclusion always imply that the parent company is attributed income that the constituent (controlled) entity *obtained* – in accordance with the rules of private law and accounting.

These rules are not addressed in tax treaties and are therefore not affected by them” (OECD 1992, para. 23). However, such a general assessment was confronted with the explicit provisions of Article 7 para. 1 of the OECD Model Tax Convention, that “profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein,” as well as the explicit norm in Article 10 para. 5 that “where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not [...] subject the company’s undistributed profits to a tax on the company’s undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.” Therefore, it could be understood that Article 7 para. 1 of the OECD Model Tax Convention prohibits the residence state of the controlling company to tax profit derived in a controlled foreign company, because the profit of the controlled company can only be taxed by the country of its residence, unless the controlled company has a permanent establishment in the residence country of the controlling company. The provisions of Article 10 para. 5 could be interpreted as limiting the right of the residence country to tax a controlling company regarding the profit arising in the controlled company that remains undistributed (Navarro 2021, 13). The commentary to Article 1 of the 2000 OECD Model Tax Convention only states that there is a “large majority” of OECD member states that do not accept the interpretation of the mentioned provisions meaning that they prevent the application of national CFC rules, but also states a “dissenting view” (OECD 2000, para. 23) that was given a specific weight by the decision of the French Conseil d’Etat in the *Société Schneider Electric* case, regarding the incompatibility of the national CFC rules with the tax treaty between France and Switzerland.³³

Therefore the 2003 commentary (in the part pertaining to the two mentioned provisions) attempted to use additional words to confirm the previous position that there is no impediment to the residence country taxing its residents based on its national CFC legislation because such a tax does not reduce the profits of the company from the other contracting state, and may not, therefore, be said to have been levied on such profits (OECD 2003, Art. 7 para. 10.1). Neither is valid the objection that the residence country’s CFC measures tax undistributed profits, since Art. 10 para. 5 pertains to the taxation at the source, and not in the residence country, and applies only to the taxation of companies, not shareholders (OECD 2003,

³³ Conseil d’Etat, Assemblée, du 28 juin 2002, No. 232276. <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008092462/> (last visited 11 March, 2022).

Art. 10 para. 37). The commentary to Article 1 of the 2003 OECD Model Tax Convention omits the views of the “large majority” and “minority” of the member states, but explicitly states that the CFC measures “are now internationally recognised as a legitimate instrument to protect the domestic tax base” and that “whilst some countries have felt it useful to expressly clarify, in their conventions, that controlled foreign company legislation did not conflict with the Convention, such clarification is not necessary. It is recognised that controlled foreign corporation legislation structured in this way is not contrary to the provisions of the Convention” (OECD 2003, Art. 1 para. 23). Lang (2003, 54–55) presented the argument that just as it must be accepted that one contracting state taxes a partnership, while the other taxes the partners, in accordance with their respective laws, thus it must be accepted that one state taxes the controlled foreign company and another state taxes the shareholder in regard to the income of the controlled foreign company that it attributed to them based on its CFC legislation. Tax treaties do not decide on attribution, but simply accept the attribution as it has been implemented in domestic laws. In other words, tax treaties do not influence how the contracting states will arrange the attribution of income in their law, which is done through CFC rules. The profit of the contracting state’s company (in this case company that controls a foreign entity), which in accordance with Article 7 para. 1 of the OECD Model Tax Convention, must be taxed only in that state,³⁴ whose right to taxation therefore must not encroach on the profit of the company that is a resident of the other contracting state, encompasses the entire profit determined in accordance with the state’s national law, including the part that is attributed in accordance with the national CFC legislation.

International tax law literature includes criticism of the legality and legitimacy of the technique applied by the OECD Council and Committee on Fiscal Affairs, when they backed their opinions by general claims through which they strived to “kill” the minority view that the CFC legislation is not compatible with tax treaties (Martin Jiménez 2004, 23–26). In order to eliminate dilemmas regarding the compatibility of the local CFC legislation and tax treaties, at least *pro futuro*, Article 1 para. 3 of the 2017 version of the OECD Model Tax Convention incorporates a *saving clause*. According to it “This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7,³⁵ paragraph 2 of Article 9 and Articles 19, 20, 23 [A] [B], 24, 25 and 28”. We draw attention to the fact that such a conclusion does not apply to

³⁴ With the exception of the permanent establishment.

³⁵ The corresponding adjustment regarding the implementation of the arm’s length principle in determining the profit of the permanent establishment.

the rules of tax sparing credit from Article 23B, to which the saving clause does not apply. The commentary to Article 1 of the 2017 OECD Model Tax Convention repeats the argumentation pertaining to CFC measures from the commentary to the 2003 version (OECD 2017a, para. 81).³⁶

In summarising the discussion on the compatibility of CFC measures with tax treaties, we can conclude that the implementation of the saving clause eliminates any dilemma, and that without it there is no consensus, whilst the commentary to the OECD Model Tax Convention claims that there are no doubts, which is supported by a number of authors (Lang 2003, 51–58; Canè 2017, 521–563) and part of the jurisprudence of administrative courts,³⁷ while part of the doctrine (Navarro 2021, 6–19; Martin Jiménez 2004, 17–30) and jurisprudence of administrative courts believes³⁸ that national CFC legislation is not compatible with tax treaties, with the exception of cases when they include the saving clause. The OECD report on the Pillar Two blueprint points out that “In subjecting a domestic taxpayer to tax on its share of the foreign income of a controlled subsidiary, therefore, the [Income Inclusion Rule] operates in a way that is closely comparable to a CFC rule and raises the same treaty questions. Although there are a number of differences between the [Income Inclusion Rule] and the CFC rules of many jurisdictions, these do not alter the analysis” (OECD 2020, 173). One of these differences is that the Income Inclusion Rule may also be applied to the *business profit* of the constituent entity (if it is taxed at a low rate), while the CFC rule predominantly applies to low-taxed *passive income* of controlled foreign companies.

5.2. How to Harmonize the Income Inclusion Rule with the Tax Sparing Credit Clause?

The question of whether the residence country, in applying the income inclusion rule, should provide relief to its resident (the ultimate parent company) in the form of credit for the tax that was spared in the source

³⁶ Reservations regarding Art. 1 para. 3 of the OECD Model Tax Convention were voiced by France, Germany, Hungary, Ireland, Luxembourg, and Switzerland, whilst Costa Rica (which in 2017 was still not a member of the OECD), Serbia, and Singapore presented their positions in the form of reservations regarding this provision.

³⁷ Supreme Administrative Court of Finland, Case A Oyi Abp, 20 March 2002 (*Finland–Belgium Tax Treaty*), KHO:2002:26, *International Tax Law Reports*, 2002, 1009 *et seq.*

³⁸ Conseil d’Etat of France, 28 June 2002, No. 232276.

country, by a separate taxpayer (the constituent company). In this case no support can be expected from the saving clause, because it does not apply to the provisions of Article 23B, which defines the tax sparing credit. A dilemma emerges whether the ultimate parent company should be taxed for the income of the constituent entity, with or without taking into consideration the tax sparing of that entity when calculating its effective tax rate. In some states, such as the United Kingdom, judging according to the administrative practice applied to CFC rules,³⁹ one could expect the answer to this question to be affirmative. However, on one hand, Andrade Rodríguez and Nouel indicate the incompatibility of the tax treaties that include the tax sparing clause with the rules of Pillar Two, because unlike the British tax authorities, they do not see the space where the tax sparing could be included in the calculation of the effective tax rate (Andrade Rodríguez, Nouel 2021, 256). On the other hand, Chand, Turina and Romanovska start from the new formulation of Article 23B para. 1 of the 2017 OECD Model Tax Convention:

“Where a resident of a Contracting State derives income [...] which may be taxed in the other Contracting State in accordance with the provisions of this Convention (except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State [...]), the first-mentioned State shall allow: a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State; [...]”

In the opinion of these authors (Chand, Turina, Romanovska 2021, 15–16), since the stipulations of the national law on income inclusion (or CFC rules) tax the income of the constituent entity (or controlled foreign company) – i.e. a different taxpayer – in the hands of the ultimate parent company (or shareholder), Article 23B para. 1 of the 2017 OECD Model Tax Convention does not require the second state to provide relief for the tax paid in the first country, including for tax that has *not been paid*, which is indicated in the tax sparing credit clause. This is because it is not the ultimate parent company (or shareholder) that pays taxes in the source country, but rather the constituent entity (or controlled foreign company).

Navarro points out the flaw in the commentary to Article 23 of the OECD Model Tax Convention, when it claims that – even without the previously given text in parenthesis, which was added in 2017 – the formulation of Article 23

³⁹ Where the terms of a double taxation agreement provide for credit to be given against UK tax in respect of tax “spared” in an overseas territory, any tax “spared” by the overseas territory in relation to a CFC should be included in the company’s creditable tax up to the limit specified in the double taxation agreement. (Taxation /International and Other Provisions/ Act). <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm230300> (last visited 13 March, 2022).

logically inferred that both states are not reciprocally required to provide credit for the other's tax, which is introduced solely based on the residence of the taxpayer, and not based on the source or location of the permanent establishment (OECD 2017a, para. 11.1). He believes that by implementing a "policy through interpretation" approach (Navarro 2021, 16), the OECD is attempting to impose the view that the non-application of the tax credit provision in the case of CFC measures (as well as future income inclusion rules) would be quite logical also in tax treaties based on previous versions of the OECD Model Tax Convention (Navarro 2021, 15). Such an approach is in contravention with Article 31 para. 1 of the Vienna Convention on the Law of Treaties, which states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", as well as Article 26 "*Pacta sunt servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The effort to influence the application of the tax sparing clause by changing the commentary must be dismissed as contrary to the legitimate expectations of the contracting states (Navarro 2021, 17).

Discrepancies with the approach to this issue (so far only in the domain of CFC measures) also exist in the jurisprudence in a single state. In the *Lin* case, the court of first instance in New Zealand ruled that a resident of New Zealand, who had an ownership stake in a controlled foreign company in China, could claim the spared tax granted to the controlled company based on Chinese law on tax relief, as a tax credit against the New Zealand tax determined in accordance with the national CFC law, in accordance with Article 23 para 3 of the 1986 tax treaty between New Zealand and China.⁴⁰ The Court of Appeal, however, took the position that in the case of CFC measures this is a matter of *economic* double taxation (two legally different entities, i.e. the controlled foreign company and the resident shareholder, taxed in two states with a tax on the same income), and that Article 23 of the tax treaty applies to the elimination of double *juridical* taxation. The provision of Article 23 para. 2, point (a) of the tax treaty stipulates that the Chinese tax paid on income that the New Zealand resident derived from a source in China can be allowed as a credit against the tax that is to be paid in New Zealand in respect of that income. Adhering to the linguistic interpretation of Article 23 of the tax treaty, the Court of Appeal stated that "tax spared in China" is not "Chinese tax paid" by the New Zealand resident.

⁴⁰ https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_cn-nz_01_eng_1986_tt_td2.html%23tt_cn-nz_01_eng_1986_tt_td2_a23 (last visited 19 March, 2022).

The New Zealand resident (Mrs. Lin) did not “derive” the income of the controlled foreign company in China, therefore “the tax paid or spared to the CFC was not payable, paid by or spared to Mrs. Lin. The tax imposed on two different persons is ‘in respect of’ two different income streams”.⁴¹

Let us take a look at what the effects of the tax sparing credit would be if the income inclusion rule is applied. For example, Article 24 para. 3 of the 1998 tax treaty between Serbia and Bulgaria stipulates that for the purpose of allowance as a credit in one contracting state the tax paid in the other contracting state shall be deemed to include the tax which is otherwise payable in that other state but has been reduced or waived by that state under its legal provisions for tax incentives. If Serbia were to offer tax exemption to the Company A founded by an investor – a Bulgarian resident, who invested capital in excess of RSD 1 billion (approx. EUR 8.5 million) and employed no fewer than 100 new workers for an indefinite period of time – then Bulgaria would be required to recognize for this investor as tax credit the tax that would have been paid in Serbia on the business profit had there been no tax exemption. However, the effective tax rate on that investment is 0%, therefore if Bulgaria introduces the GloBE rule on income inclusion, its top-up tax of 15% would ensue. If we accept the position that the provisions from the 2017 OECD Model Tax Convention commentary cannot apply to the interpretation of the 1998 treaty, there will be incompatibilities between the stipulations of the tax treaty on tax sparing credit and the stipulations of the Bulgarian national law on income inclusion. The aim of the former norm is to support tax incentives, and, due to the suppression of tax competition, the aim of the latter is to indirectly prevent the effective tax rate in the source country from being lower than 15%. Only in the case where the formulation of the tax credit provision from para. 1 of the article of the tax treaty, which corresponds to Article 23B of OECD Model Tax Convention (Art. 24), were to be as in the 2017 version – which is not the case at the moment – the incompatibility would be avoided because Bulgaria would not be required to implement the tax sparing credit clause, since the provisions of the national law on income inclusion tax the income of the constituent entity, i.e. a different taxpayer, controlled by the ultimate parent company, and in that case Article 23B para. 1 from 2017 does not require the second state to provide relief for the tax paid in the first country, not even for taxes that have not been paid, as stipulated by the tax sparing credit clause. This is

⁴¹ Court of Appeal of New Zealand, CA 308/2017 [2018] NZCA 38 (*Commissioner of Inland Revenue v. Patty Tzu Chou Lin*). <https://forms.justice.govt.nz/search/Documents/pdf/jdo/3b/alfresco/service/api/node/content/workspace/SpacesStore/ae028be3-23bc-462a-a35f-9e82eedcb0f5/ae028be3-23bc-462a-a35f-9e82eedcb0f5.pdf> (last visited 19 March, 2022).

because it is not the ultimate parent company (a resident of Bulgaria), but rather the constituent entity that is subject to taxation in the source country (Serbia).

The analysis has shown that only one of the Serbia's 29 tax treaties that include a tax sparing credit clause (the 2020 treaty with Hong Kong) contains the stipulation on tax credit with limitation introduced in Article 23 para. 1 of the 2017 version of the OECD Model Tax Convention. It is not present in any of the other tax treaties that Serbia has concluded since 2017 (with San Marino, Israel, Japan, and Singapore) and which, as previously pointed out, do not contain the tax sparing clause. The limitation contained in Article 23 para. 1 of the tax treaty between Serbia and Hong Kong is nonreciprocal because in the negotiations leading up to the conclusion of the treaty only Hong Kong had an interest in protecting its local CFC legislation, since Serbia has none.

The actual effect of the income inclusion rule on the tax sparing credit clause depends on whether the state applies the *worldwide foreign tax credit blending rule*⁴² or whether it relies on the *jurisdictional/entity blending approach*.⁴³ In the former case, it may happen that the income that is taxed according to an effective rate that is lower than the stipulated minimal rate (15%) is not subject to the top-up tax because the "excess" credit generated in the country where taxes are higher than in the residence country of the parent entity will "fill the valley" created by the difference between 15% and the lower effective tax rate that applies to the constituent entity. In the latter case, which is applied more often, there will be no such effect – the top-up tax is applied and a conflict arises between domestic law and the tax treaty in the part that contains the tax sparing clause.

The relationship between the two sets of rules can therefore manifest itself in three forms.

In the first situation the tax sparing credit is not recognised and only the tax that the constituent entity had actually paid can be deducted. An incompatibility arises in such circumstances.

⁴² This is a mechanism with which the taxpayer can average out the income and taxes paid in all the foreign jurisdictions, which leads to the situation where multinational enterprise operating in jurisdiction with high taxes (higher than in the residence country) may have a position with excess credit, eliminating the residual income tax achieved in jurisdictions with low taxes.

⁴³ This is a mechanism where the tax credit is determined only for the situation of the taxpayer in the given tax jurisdiction, without the possibility of the "excess" credit achieved in a country with higher tax rates than in its residence country being used at the expense of a small or non-existent tax credit from countries with low taxes.

In the second situation, if the worldwide foreign tax credit blending rule is applied (this is rarely the practice), income subject to the effective tax rate lower than 15% due to a tax relief may not accrue a top-up tax so there would be no incompatibility.

In the third situation, if the tax sparing credit were to be taken into account when calculating the credit applied for the purpose of determining the minimal paid tax – and that is not foreseen in the Pillar Two Model Rules – there would be no conflict between the income inclusion rules and the tax sparing clause (Andrade 2020, 25).

We can conclude that from the legal standpoint, the tax sparing credit clause is not compatible with the GloBE rules. The application of income inclusion without limitation would annul the provisions of the tax treaties that contain such a clause. This is why carve-out is recommended in literature, which GloBE rules should provide for in cases where tax treaties include tax sparing credit provisions. Pistone *et al.* (2020, 17, 20) are in principle against the application of a carve-out because it violates the neutrality and renders the tax system more complex.⁴⁴ However, they also believe that an exception should be made in the case of tax sparing credit, considering that “carve-outs may be the only way to prevent the GloBE from triggering a treaty override vis-à-vis treaties containing clauses relating to tax sparing and tax exemption backed up by anti-abuse provisions” (Pistone *et al.* 2020, 18). The impression is that they actually propose a special carve-out for the case of tax sparing credit, which would prevent the tax relief provided in the form of a tax sparing clause in the developing country – which has not economically developed in the meantime (Pistone *et al.* 2020, 20 fn. 82) – from being lost by disregarding that clause.⁴⁵

The Pillar Two Model Rules contain, however, a general carve-out – the substance-based carve-out based on payroll costs and based on the carrying value of tangible assets.⁴⁶ It is also designed as a type of “relief” for developing countries whose policy of providing tax incentives for foreign investments, along with tax sparing credit, could fail if the parent company’s residence country applies the top-up tax from the income inclusion rules, and the tax

⁴⁴ In the opinion of these authors, the rare exceptions where carve-out should be permitted are tax incentives for investments by mining companies in countries with low income (provided that environmental protection standards are met) and for R&D activities that facilitate technology transfer.

⁴⁵ At the time of the submission of this paper, the documentation prepared by the Inclusive Framework on BEPS, under the auspices of the OECD, does not include a solution in the form of a special carve-out in the case of tax sparing credit.

⁴⁶ See *supra*, section 5.1.

Table 4. Impact of substance-based carve-out on top-up tax

Example 1a: Constituent entity A	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax		Final top-up tax
				rate	Without substance-based carve-out	
	1.000	25%	0%	15%		150
Example 1b: Constituent entity B	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax		Final top-up tax
				rate	Without substance-based carve-out	
	1.000	25%	10%	5%		50
Example 2a: Constituent entity A	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax rate	Total carve-out	Final top-up tax
	1.000	25%	0%	15%	230	115,50
Payroll costs A	Carve-out based on payroll (10%)	Statutory tax rate	Effective tax rate	Top-up tax rate	Carve-out based on carrying value of tangible assets (8%)	Total carve-out
	1.500	150	1.000	80	230	230
Example 2b: Constituent entity B	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax rate	Total carve-out	Final top-up tax
	1.000	25%	10%	5%	230	38,50

Payroll costs B	Carve-out based on payroll (10%)		Carrying value of tangible assets B		Carve-out based on carrying value of tangible assets (8%)		Total carve-out
	1.500	150	1.000	80	230		
Example 2c: Constituent entity C	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax rate	Total carve-out	Profit in excess of carve-out	Final top-up tax
		1.000	25%	0%			
	Payroll costs C	Carve-out based on payroll (10%)	Carrying value of tangible assets C		Carve-out based on carrying value of tangible assets (8%)	Total carve-out	Total carve-out
5.000	500	4.000	320	820	820		
Example 3: Constituent entity D	GloBE income	Statutory tax rate	Effective tax rate	Top-up tax rate	Total carve-out	Profit in excess of carve-out	Final top-up tax
		1.000	25%	0%			
	Payroll costs D	Carve-out based on payroll (10%)	Carrying value of tangible assets D		Carve-out based on carrying value of tangible assets (8%)	Total carve-out	Total carve-out
6.800	680	4.000	320	1.000	1.000	1.000	

sparing is not classified as “included taxes” (and it is not) when calculating the effective tax rate of the constituent entity. The proposed substance-based carve-out based on payroll costs (initially 10%) and based on the carrying value of tangible assets (initially 8%) will somewhat mitigate the negative effects in the domain of tax incentives, but it will not eliminate them. Let us take a look at Table 4.

Example 1 demonstrates that in the case where there is no substance-based carve-out the extent of the top-up tax depends on the top-up tax rate, which is equal to the (positive) difference between the minimal tax rate of 15% and the effective tax rate of the constituent entity. In variant 1a, when the constituent entity is provided a tax exemption in the country where the statutory tax rate is 25%, it is shown that the effective tax rate is 0% and that the top-up tax is 150 (15% of 1,000). If the relief is lesser, and the effective rate is 10% (variant 1b), the top-up tax in the parent company’s residence country will be lower, as expected, at 50 (5% of 1,000).

Example 2 illustrates the effect of carve-out. In variants 2a and 2c, when tax exemption was provided and the top-up rate was 15%, we conclude that the greater the total substance-based carve-out (i.e. if the payroll costs and carrying value of the tangible assets of the constituent entity are greater), the lower the final top-up tax in the parent company’s residence country (115.50, as opposed to 27). Example 2b, compared to Example 2a, shows that with the same total carve-out the final top-up tax will be lower if the relief provided to the constituent entity is lower (38.50, as opposed to 115.50), which confirms the finding from Example 1.

Finally, from Example 3 we can deduce that such a “substance-based presence” in the constituent entity, which would lead to the carve-out equal to the GloBE income (1,000), would annul the top-up tax in the parent company’s residence country. Then the tax sparing credit could continue to fulfil its role, because the substance-based carve-out, whose application would prevent the parent company’s residence country from introducing a top-up tax based on its national law, would not derogate the norm of the tax treaty. It can be concluded that new non-neutrality would be incorporated in tax incentive law: the payroll costs and the carrying value of the tangible assets, and the recognised carve-out percentage (which should gradually decrease during the first ten years of the implementation of Pillar Two Model Rules) will determine how effective the tax sparing credit will be.

If a developing country were to agree to accept lower rates of withholding taxes during the negotiations on the treaty for the avoidance of double taxation (as compensation for the tax sparing credit clause), and the application of the income inclusion rule were to degrade its tax incentives policy to a great

extent and the top-up tax plays the same role that was previously (without the existence of the tax sparing clause) performed by tax credit as a method that the residence country applied in order to avoid double taxation (for tax sparing not to be a tax incentive but rather the revenue of the investor's residence country) – then it should reassess its further participation in such a tax treaty (Sharma 2022, 7). The question remains whether the other contracting country will accept to negotiate new solutions, and some other issues are also raised – primarily those arising from the bilateral investment treaty (Kostić, Jovanović, Ilić-Popov 2017, 483–504).

6. CONCLUSION

Regardless of whether the criticism is “mild” or “increased”, whether it primarily targets the institute of international tax treaty law or its “object of protection”, i.e. tax incentives, the tax sparing credit has demonstrated unexpected resilience. Coming under attack even before it had been first implemented in practice and ostracised in the policies of the leading OECD member state, the tax sparing credit has managed to survive for already 63 years. At the end of the 20th century it enjoyed significant support among many developed countries that believed they had the obligation to also use this method to support the efforts of developing countries to escape backwardness by attracting foreign direct investments through tax incentives. What followed was a period of reassessment – of the effectiveness of tax incentives in general, of the need to support such measures, and of the risks of abuse that lead to tax avoidance – and the number of tax treaties contracted between OECD members and developing countries that include a tax sparing clause has decreased in the 21st century. Emerging economies and many developing countries, including Serbia, have opted for tax sparing and continued to include the appropriate provisions in newer tax treaties, whenever the other party was willing to accept them – most often in reciprocal relations. We can conclude that the tax sparing credit has been transformed from a measure that manifests the fiscal “sacrifice” of the developed country benefitting the developing country (albeit, compensated by lower withholding tax rates and stricter permanent establishment rules) into a measure that confirms the fiscal sovereignty of the state exercising its right to tax, related to tax incentives, regardless of the level of development of the contracting states.

Even though an economic analysis of the effects on economic development of foreign direct investments in general, and tax treaties in particular, would be demanding, and certainly is beyond the scope of this paper, research has

shown that there is no firm link between the tax sparing credit clause and the country of origin of the most significant investors in Serbia. Even the high ranking of the Netherlands (with which Serbia has a tax treaty that includes a tax sparing clause) is more likely to be explained by its tax law system, favouring holding structures (owing to affiliation privilege) and broad network of tax treaties, which in the pre-BEPS world stimulated the founding of conduit companies, more so than the attraction of the clause itself. Had the tax sparing credit played a dominant role in the adoption of investment decisions, some other countries – with which it had been contracted – would have been closer to the top of the list of countries of origin of foreign direct investments. The literature gives the example of the increase in German investments in Brazil after the 1975 tax treaty between the two countries, which included a matching credit clause, ended in 2005 (Schoueri 2013, 115). Of course, it would be wrong to conclude that this tax treaty represented an impediment to German investments. Namely, the economic prosperity in 2006 and 2007 and increased activity in the large Brazilian market played a decisive role, therefore even the loss of the matching credit, i.e. termination of the treaty for the avoidance of double taxation, could not stop the expansion of German investment in Brazil. Barthel, Busse, and Neumayer (2010, 366–377) determined that there is a positive relationship between the tax treaty and foreign investments in the source country, but also asserted that a slightly different formulation of the econometric model and reliance on bilateral, as opposed to aggregate data on foreign direct investments, does not yield the same result. Speaking of relationship between the tax sparing credit and foreign investments, there is a study that shows that the tax sparing credit clauses are associated with a 97% higher stock of bilateral foreign direct investments (Azémar, Dharmapala 2019a, 5). The estimated effect is concentrated in the year after the treaty (containing such a clause) comes into effect, and was non-existent in prior years (Azémar, Dharmapala 2019b). However, whatever the results of the empirical studies and regardless of how much the OECD Committee on Fiscal Affairs distanced itself, there are states that still believe in the role of tax sparing credit, and treaties that include this clause are estimated to account for around 15% of all tax treaties currently in effect worldwide. For such countries this provision is not only a factor that helps stimulate foreign direct investments, but also confirmation of their fiscal sovereignty from the standpoint of tax incentive policy. It should be noted that despite the commitment to the tax sparing credit (which is confirmed by the presence of a tax sparing clause in 46% of all tax treaties), tax law circles in Serbia do not insist on its significance in the domain of fiscal sovereignty, stressing only the role as an incentive (Dabetić 2008, 185, 188; Popović 2021, 285–286). The reason for this is that Serbia had signed a Stabilisation and

Association Agreement with the European Communities and their member states,⁴⁷ even before gaining the status of candidate for membership in the European Union, and it has been in force since 1 September 2013. Article 100 para. 3 of this Agreement stipulates that Serbia will complete the network of bilateral tax agreements with the member states, along the lines of the latest update of the OECD Model Tax Convention on Income and on Capital, to the extent that the requesting member state subscribes to it. Since the newer versions of the OECD Model Tax Convention and its commentary do not support tax sparing credit (even though it has not been completely abandoned), the South American authors were apparently given a free hand to develop and defend the thesis of the protection of fiscal sovereignty, while back in 2005, without excessive vocalisation, Serbia had chosen to express the position on Art. 23 of the OECD Model Tax Convention that it maintains its right to include tax sparing credit provisions in its tax treaties, provided that the other contracting state consents.

The prolonged existence of the tax sparing clause will be seriously jeopardised by the BEPS 2.0 initiative – the measure that aims for a group of qualified multinational companies to pay at least a minimal tax on corporate profit based on the rule on income inclusion, that is reminiscent of the Serbian folk poem “What was passed up by the child Grujica (the residence country of the constituent entity), was snatched up by Old man (Starina) Novak (the residence country of the parent company)”. Based on our analysis, we can conclude that the national law norm on income inclusion is not compatible with the tax sparing credit clause, and that the foundations for the legitimisation of the supremacy of national law over international treaties were laid much earlier, in the justification of the application of domestic CFC rules. The conducted study showed that the efforts to explain in the commentary that it is in fact permitted to tax the profit of the other contracting state’s resident (provided there was no permanent establishment) was insufficiently persuasive, therefore a new formulation of the tax credit clause from Article 23B para. 1 was incorporated in the 2017 version of the OECD Model Tax Convention. In future tax treaties, which will adopt this formulation, the first named contracting state shall be required to provide that the tax credit not apply to situations when the provisions of the tax treaty permit taxation in the second contracting state solely because the income of the resident of the first named state is also the income achieved by the resident of the second state. Since the provisions of the national CFC legislation (or future income inclusion rules) tax the income of the controlled

⁴⁷ *Official Gazette of the RS* 83/2008; *Official Gazette of the RS – International Treaties* 12/2014 and 1/2022.

foreign company (or constituent entity), i.e. a different taxpayer, at the level of the shareholder (or the ultimate parent company), Article 23B para. 1 in the version from 2017, does not require a state to provide tax benefits for taxes paid in a different state, including for taxes that have not been paid, as referred to in the tax sparing credit clause. However, since Serbia has not opted for this new formulation of the tax credit in any of its tax treaties to date, the incompatibility of numerous tax sparing credit provisions and the GloBE rules will remain an open question when the implementation of the Pillar Two measures goes into effect. A circuitous solution, contained in the OECD Model Tax Rules in the form of a substance-based carve-out based on payroll costs and the carrying value of the tangible assets, will create administrative difficulties and pave the way for the calibration of the value of these two parameters, with the aim of annulling the difference between the minimal tax rate of 15% and the effective tax rate of the constituent entity enjoying tax incentives. If this is successful, the payment of a top-up tax in the parent company's residence country would be avoided and this would preserve the tax sparing credit from the tax treaty. However, in that case there would be a new form of circumventing the law, which could create new challenges for tax authorities.

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THE CONSTANT CHANGE OF EU CONSUMER LAW: THE REAL DEAL OR JUST AN ILLUSION?

EU consumer law is in a process of constant change. Over the past several decades EU consumer law has gone through many changes, reaffirming the statement by Greek philosopher Heraclitus: the only constant is change (Panta Rhei). This paper emphasizes the transformative nature of EU consumer law and its constant changes. Firstly, the paper addresses the changes in legal grounds and competences, as the roots of EU consumer law. Secondly, it presents the changes of the levels of harmonization and their impact on EU consumer directives and the national laws of the Member States. It continues by observing the impact of the CJEU's uniform and autonomous interpretation on the national case law of the Member States and consumer law enforcement. In conclusion, the paper accentuates the role of the transparency requirements and information duties in online 'business-to-consumer' (B2C) transactions as fundamental aspects affecting the future of EU consumer law.

Key words: *EU consumer law. – Harmonization. – CJEU. – Consumer protection. – Change.*

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1. INTRODUCTION

EU consumer law is in the process of constant change. Over the past few decades EU consumer law has gone through many changes, reaffirming the statement by the Greek philosopher Heraclitus that the only constant is change (*Panta Rhei*): from changes in the level of harmonization of EU consumer directives, changes affecting the legal grounds for adoption of these approximation measures, to changes in the CJEU's case-law interpretation. The development of EU consumer law and policy has experienced various phases, which prove that the change is constant,¹ which leads to another key aspect of EU consumer law related to its implementation and enforcement in legal orders of the Member States. It is here that the important changes are taking place. The goal of EU consumer law measures is to harmonize the Member States' legal rules to the benefit of both internal market and consumer protection. So far, this has been only partially achieved and the Union is still searching for the right solution. The constant changes that are occurring at the EU level occasionally have adverse effects on the legal orders of the Member States, causing legal fragmentation, enforcement issues and legal uncertainty in B2C (business-to-consumer) relationships.

Over the years, the effects of the changes in EU consumer law have had various forms: different legal solutions caused by the minimum harmonization, different definitions of important concepts (such as trader and consumer), different withdrawal periods in different Member States, and a variety of other issues related to consumer law enforcement (Schulte-Nölke, Twigg-Flesner, Ebers 2008). There have been many attempts to improve EU consumer law, through the introduction of maximum and full (targeted) harmonization, as well as through various initiatives and programmes, such as the Review of the Consumer Acquis,² DCFR (Bar, Clive, Schulte-Nölke 2009), REFIT, Fitness Check, the New Deal for Consumers, and the New Consumer Agenda.³ During the process of writing this paper,

¹ The legal scholarship addresses different aspects of change and transformation in EU consumer law. See Micklitz, Twigg-Flesner (forthcoming); Howells, Twigg-Flesner, Wilhelmsson (2018); Stuyck (2013, 385–402).

² Commission Green Paper on Review of the Consumer Acquis of 8 February 2007, COM (2006) 744 final.

³ European Commission, Evaluating and improving existing laws, REFIT; European Commission, Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive; European Commission, A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement; European Commission, Consumer policy – the EU's new 'consumer agenda'.

the European Commission launched yet another important initiative, titled 'Digital fairness – fitness check on EU consumer law', questioning three key consumer directives on unfair contract terms, consumer rights and unfair commercial practices.⁴ All of these initiatives intended or intend to offer better legislative solutions and introduce more effective enforcement of consumer law across the Union.

Rather than focusing on in-depth analysis of certain specific issue or concept of EU consumer law, this paper emphasizes the transformative nature of EU consumer law and its constant changes. EU consumer law is observed as it is, but from a different angle, and an overview of the process of changes that started long ago is provided. In order to do so, the paper follows a logical order of firstly addressing the changes affecting the very roots of EU consumer law, i.e., its legal grounds. Secondly, it presents the changes affecting EU consumer directives that are founded on these legal grounds, and thirdly it observes the changes resulting from directives' transposition into the laws of the Member States. The paper continues with an analysis of the CJEU case law offering uniform and autonomous interpretation of EU consumer law and its impact on national jurisprudence. In conclusion, the paper focuses on the role of the transparency requirements and information duties in online B2C transactions, as key aspects for the future development of the EU consumer law.

2. THE LEGAL GROUNDS OF EU CONSUMER LAW

Initially there was no recognition and only incidental mention of consumer protection in the provisions on agricultural and competition policies of the Treaty of Rome.⁵ Today, consumer protection presents one of the main EU policies. The consumer protection requirements are 'taken into account in defining and implementing other Union policies and activities' (Art. 12 TFEU).⁶ Under Art. 38 of the EU Charter of Fundamental Rights, the Union policies 'ensure a high level of consumer protection'.⁷ However, at the time consumer protection and B2C relationships were not in the sights of EU law,

⁴ European Commission, Digital fairness – fitness check on EU consumer law, 2022.

⁵ Treaty Establishing the European Economic Community, 25 March 1957, not published in OJ.

⁶ Treaty on the Functioning of the European Union (consolidated) [2016] OJ C 202/1.

⁷ Charter of Fundamental Rights of the European Union [2016] OJ C 202/391.

which focused on other barriers to trade (Schmidt-Kessel 2016, 280). In 1975 the consumer protection and fundamental consumer rights were included in the EEC Resolution on a Preliminary Programme for a Consumer Protection and Information Policy⁸ and in 1978 the ECJ (now CJEU) recognized consumer protection as a requirement in the *Cassis de Dijon* case.⁹

The discussion on the legal grounds for the approximation of laws was triggered almost ten years later by the 1985 White Paper on Completing the Internal Market.¹⁰ It resulted in the adoption of Art. 100a TEEC (now Art. 114 TFEU) as the legal grounds for the approximation of Member States laws related to the internal market. This provision, introduced by the Single European Act in 1987,¹¹ required that the Commission in its para. 3 apply a high level of protection in consumer legislative proposals. Once the Maastricht Treaty¹² introduced Art. 129a TEC (now Art. 169 TFEU) on consumer protection, the ‘internal market’ provision remained the main legal grounds for the adoption of the consumer law approximation measures. Article 129a, para. 1(a), TEC referred to ‘measures adopted pursuant to Article 100a in the context of the completion of the internal market’, meaning to the internal market legal grounds (*ex ex* Art. 100a TEEC, *ex* Art. 95 TEC, now Art. 114 TFEU) (Weatherill 2016, 68). This process of development of legal grounds was followed by several other changes. Although the Treaty provisions on the approximation of laws and consumer protection remained mainly unchanged, the Treaty of Amsterdam¹³ introduced the horizontal policy clause in *ex* Art. 153(2) TEC (Stuyck 2000, 379). The Treaty of Lisbon¹⁴

⁸ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ C 92/1 listed five fundamental consumer rights: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; and the right of representation (the right to be heard).

⁹ CJEU judgment of 20 February 1979, C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

¹⁰ Completing the Internal Market: White Paper from the Commission to the European Council, Milan, 28–29 June 1985, COM(85) 310, June 1985.

¹¹ Single European Act, OJ L 169, 29 June 1987.

¹² Treaty on European Union, OJ C 191, signed at Maastricht on 7 February 1992, 29 July 1992.

¹³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.

¹⁴ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17 December 2007.*

transferred the latter to Art. 12 TFEU, while its constitutional dimension was recognized in Art. 38 of the EU Charter of Fundamental Rights (Józson 2021, 319). The ‘internal market’ provision (Art. 114 TFEU) continued to play the most important role in the harmonization of consumer law and was placed before the less used unanimity rule of Art. 115 TFEU. The content of the Treaty provision on consumer protection (*ex ex* Art. 129a TEC; *ex* Art. 153 TEC) was literally transposed into the renumbered Art. 169 TFEU and remained overshadowed by Art. 114 TFEU. As rightly emphasized in Rösler (2009), the amendments introduced in the Treaty of Lisbon were a missed opportunity for the development of EU consumer law (Rösler 2009, 84). Nevertheless, the Treaty of Lisbon clarified the long-debated issue of competence in the area of consumer protection and established that both the internal market and consumer protection belong to competences shared between the EU and the Member States (Art. 4(2) TFEU).

The competence division was not always easy to understand and before the Treaty of Lisbon, the ECJ dealt with the issue in the renowned *Tobacco* cases.¹⁵ In *Tobacco Advertising I* the ECJ clarified that the Union does not have the general competence to regulate the internal market and emphasized that an approximation measure has to ‘genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market’.¹⁶ Under the so-called Tobacco test, the measures should actually contribute to the elimination of obstacles to fundamental freedoms and to the removal of competition distortions that must be ‘appreciable’.¹⁷ The ECJ also explained that the ‘recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws’.¹⁸ However, the emergence of such obstacles must be likely and the measure in question designed to prevent them.¹⁹ The next section of the paper therefore explores whether this is always the case with EU consumer protection directives.

¹⁵ Callies (2001, 311 *et seq.*).

¹⁶ CJEU judgment of 5 October 2000, C-376/98, *Germany v. Parliament and Council*, ECLI:EU:C:2000:544, paras. 83 and 84.

¹⁷ *Germany v. Parliament and Council*, paras. 95, 106, and 107.

¹⁸ *Germany v. Parliament and Council*, para. 86.

¹⁹ For more on the *Tobacco* cases see Delhomme (2017, 1).

3. THE LEVEL OF HARMONIZATION IN EU CONSUMER DIRECTIVES

Whether the consumer law measures are always successfully designed to prevent obstacles to trade and the internal market is a question worth discussing. This issue can be examined *inter alia* against the backdrop of the application of subsidiarity and proportionality principles. These principles underpin the adoption of approximation measures in areas of shared competences, such as the internal market and consumer protection (Miscenic 2016, 144). According to the subsidiarity principle, the Union may act in areas that do not fall under its exclusive competence ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’ and can be better achieved at the Union level (Art. 5(3) TEU). The proportionality principle, on the other hand, guarantees that the content and the form of the measure does not exceed ‘what is necessary to achieve the objectives of the Treaties’ (Art. 5(4) TEU). Despite of existing surveillance mechanisms, such as the orange and yellow card parliamentary procedures,²⁰ the realization of principles can be questioned in EU consumer law, in particular with respect to the level of harmonization of the approximation measures. The adoption of EU consumer directives as approximation measures is usually justified in their preambles by accentuating the benefits of the fair market competition, the proper functioning of the internal market, and the high level of consumer protection. For instance, the aim of Directive (EU) 2019/771²¹ on certain aspects concerning contracts for the sale of goods is ‘to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity’.²² This aim cannot be sufficiently achieved by the Member States and therefore the Union adopted the directive, in line with the principles of subsidiarity and proportionality.²³ Recital 70 emphasizes ‘the fact that each Member State individually is not in a position to tackle the existing fragmented legal framework by ensuring

²⁰ Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, OJ C 83/206.

²¹ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22 May 2019, 28–50.

²² Directive (EU) 2019/771, recital 2.

²³ Directive (EU) 2019/771, recital 70.

the coherence of its law with the laws of other Member States'. The recital goes on to explain that 'the principal contract law-related obstacles [will be removed] through full harmonisation'.²⁴

Similar reasoning can be found in many other EU directives, such as Directive 2011/83/EU on consumer rights²⁵ or Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.²⁶ Their preambles focus on the shortcomings of minimum harmonization, which enabled differences and legal fragmentation in the legal orders of the Member States. According to Directive (EU) 2019/771 these differences were caused by the Member States, which went beyond the regulated minimum standard in order to increase the level of consumer protection and 'acted on different elements and to different extents'.²⁷ Disparities between certain legal rules, such as the conformity criteria and legal remedies affect both businesses and consumers and cause legal fragmentation and legal uncertainty in B2C relationships.²⁸ What seems to be neglected in the directives' preambles is the fact that the Union introduced the minimum harmonization standard as a legislative option for the Member States.²⁹ The application of this principle and the results of it can hardly be seen as a 'failure' on the part of the Member States. Most of EU consumer directives adopted prior to 2000 followed the minimum harmonization approach, which resulted in a different set of rules across the Member States. Being aware of negative effects on the internal market and consumer protection, approximately 20 years ago, the EU legislator initiated the shift from the minimum to maximum and full harmonization.³⁰ Moreover, the

²⁴ Directive (EU) 2019/771, recital 70.

²⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011, 64–88.

²⁶ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22 May 2019.

²⁷ Directive (EU) 2019/771, recital 6.

²⁸ Directive (EU) 2019/771, recitals 6 and 7.

²⁹ The minimum harmonization formed part of the 'new strategy' proposed in the Completing the Internal Market: White Paper from the Commission to the European Council, Milan, 28–29 June 1985, COM(85) 310.

³⁰ This shift was first announced in the Communication from the Commission of 7 May 2002 – 'Consumer Policy Strategy 2000–2006', COM (2002)208 final. See Basedow (2021, 112); Weatherill (2012, 175); Reich (2010, 7–39); Wilhelmsson (2008, 225 *et seq.*).

EU legislation in force does not seem to offer much improvement either. According to the provisions of Directive (EU) 2019/771, full harmonization should guarantee a high level of consumer protection.³¹ However, under Directive (EU) 2019/771 the Member States may offer consumers to choose specific remedies under certain circumstances in cases of non-conformity (recital 19), regulate differently sellers' information obligations (recital 20), extend *ratione persone* to persons not covered by the definition of the consumer under the directive (recital 21), etc.³² Consequently, the Member States remain free to regulate 'differently' various legal aspects at the national level, thus enabling further discrepancies in the regulation, enforcement and the level of consumer protection.³³

The changes of the level of harmonization can be observed in many EU consumer directives. The repealed minimum harmonization Directive 87/102/EEC on consumer credit³⁴ was transformed into full (targeted) harmonization Directive 2008/48/EC on credit agreements for consumers.³⁵ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property³⁶ combines both minimum and several maximum harmonization provisions.³⁷ The same happened to repealed minimum harmonization Directives 97/7/EC and 85/577/EEC,³⁸ which

³¹ Directive (EU) 2019/771, recital 10.

³² See Franceschi, Schulze (2022); Morais Carvalho (2019, 194–201).

³³ Similar concerns are expressed in Milà Rafel (2016, 50–63).

³⁴ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42, 12 February 1987, 48–53, Art. 15.

³⁵ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008, 66–92, Art. 22(1).

³⁶ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (Text with EEA relevance), OJ L 60, 28 February 2014, 34–85, Art. 2.

³⁷ Under Art. 2(1) of Directive 2014/17/EU the Member States are allowed to maintain or introduce more stringent provisions in order to protect consumers, while under Art. 2(2) they are not permitted to maintain or introduce into their national law provisions diverging from those laid down in articles on standard pre-contractual information in the European Standardised Information Sheet (ESIS) and articles concerning the calculation of the annual percentage rate of charge (APRC). See Miscenic (2014, 219 *et seq.*).

³⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4 June 1997, 19–27, Art. 14; Council Directive 85/577/EEC of 20 December 1985

were replaced by the full (targeted) harmonization Directive 2011/83/EU on consumer rights.³⁹ The minimum harmonization Directive 94/47/EC on timeshare contracts⁴⁰ was transformed into full harmonization Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts.⁴¹ As acknowledged in various studies, green papers and proposals of measures, changing the level of harmonization is a direct consequence of the shortcomings of minimum harmonization.⁴² The latter caused differences between the main consumer protection instruments and definitions across the Member States, which prescribed different withdrawal periods for the same type of consumer contracts; subsumed different persons under the definition of the consumer, or applied harmonized national laws to different types of consumer contracts.⁴³ The inconsistent use of legal terminology describing the same person or a right with a different legal term or expression was another bonus to issues caused by the minimum harmonization standard. For instance, Directive 85/577/EEC used the legal terms 'right of cancellation' and 'right of renunciation', while Directive 94/47/EC used the 'right to withdraw' and the 'right of cancellation' as synonyms (Šarčević, Čikara 2009, 204–206; Mišćenić 2016a, 99). Consequently, the 'minimum level of protection' remained unrecognizable to 'average consumers', who are unaware they are a 'consumer' in another Member State (Leczykiewicz, Weatherill 2016).

to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31 December 1985, 31–33, Art. 8.

³⁹ Directive 2011/83/EU, Art 4.

⁴⁰ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29 October 1994, 83–87, Art. 11.

⁴¹ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33, 3 February 2009, 10–30, recital 4.

⁴² As stated in the Explanatory Memorandum to the Proposal for a Regulation on a Common European Sales Law (CESL), the Union initially started to regulate in the field of consumer law by means of minimum harmonization directives and 'this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level' (5, No. 2). The CESL confirmed that such solutions 'deter the exercise of fundamental freedoms [...] and represent a barrier to the functioning and continuing establishment of the internal market' (rec. 1). See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11 October 2011.

⁴³ The legal scholarship addressed these issues extensively, see in particular Howells, Twigg-Flesner, Wilhelmsson (2017).

The introduced changes, in the form of maximum and full targeted harmonization, however, continue to allow further discrepancies between the important concepts of EU consumer law at the national level of the Member States. Even now, options and exemptions offered to the Member States by EU consumer directives result in differences related to the main consumer law definitions and concepts, or create discrepancies with respect to the scope of application and content of harmonized national consumer law rules.⁴⁴ These differences are reflected differently, both legally and practically. Different legal solutions affect the legal certainty in B2C relationships, burden the traders with additional costs, which are necessary for the adjustment to the legal rules of the other Member States. According to the European Parliament Study ‘Legal obstacles in Member States to Single Market rules’ from 2020, differences in consumer protection impose burdens on the traders, in particular online merchants (Dahlberg *et al.* 2020, 135). Finally, they adversely affect consumers’ confidence in cross-border B2C transactions. As explained previously, divergent legal solutions also create barriers to trade and the internal market and therefore bring into question the above presented justification of the subsidiarity principle. It seems that the changes of the level of harmonization in EU consumer directives have not brought optimal and expected results, and they remained invisible or at least not visible enough to their addressees.

4. THE TRANSPOSITION OF EU CONSUMER DIRECTIVES INTO THE LAWS OF THE MEMBER STATES

Probably the best way to observe the process of changes of EU consumer law is when EU consumer directives are transposed into the national law of the Member States. It is at this moment that EU consumer law serves its purpose and becomes the harmonized national law. As emphasized in Lando (2000), the approximation of laws aims to remove or mitigate the diversities created by the national laws that ‘may be regarded as a non-tariff barrier to trade’ (Lando 2000, 61). However, despite of attempts to improve EU consumer legislation, the Union has not been very successful in eliminating barriers to trade, which are more of a private law nature. The transposition of minimum harmonization directives caused both systematic and substantive discrepancies between the laws of the Member States. Moreover, the guaranteed minimum standard of protection remained unrecognizable to an average consumer. For example, due to different withdrawal periods

⁴⁴ See the forthcoming books edited by Micklitz, Twigg-Flesner (2023); Franceschi, Schulze (2022).

for different consumer contracts in different Member States, the consumer from one Member State could not rely on making use of this right in another Member State (Loos 2009). Due to differences in the scope of application of national consumer rules, the very same consumer might not be considered as a consumer in another Member State or their contract might not fall under the scope of application of the national consumer rules of another Member State (Schulte-Nölke 2009, 133; Schulte-Nölke, Twigg-Flesner, Ebers 2008, 286 *et seq*). Nonetheless, the changes introduced by the shift to the so-called 'pure' maximum harmonization endangered the subsidiarity and proportionality principles and lowered the level of protection in some Member States. This approach in its purest form was abandoned soon after the adoption of Directive 2002/65/EC on distance marketing of financial services⁴⁵ and Directive 2005/29/EC on unfair business-to-consumer commercial practices (UCTD).⁴⁶ The very nature of these directives was against the approximation of laws and the definition of the directive itself, since their rigidity forced the national legislators to literally transpose the directives' provisions into the national law.⁴⁷ For example, the transposition of the UCTD was heavily discussed in the Croatian Parliament, because its members could not understand the concept of the maximum harmonization not allowing the proposed amendments, nor the meaning of some of the UCTD concepts and definitions (Čikara 2007, 1067). Therefore, the newly proposed Consumer Protection Act (CPA) in 2007 failed during the first reading, and it wasn't until the second reading that it was adopted.⁴⁸ However, the literal transposition of the directives' terms and concepts left its scars in the consumer law practice and case law, where it created resistance to these 'strange' new and unfamiliar concepts that differed from the national law.⁴⁹

⁴⁵ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9 October 2002, 16–24.

⁴⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ L 149, 11 June 2005, 22–39.

⁴⁷ There is extensive legal scholarly literature on the limitations of maximum harmonization, see Basedow (2021, 116); Faure, (2008, 433 *et seq*); Mak (2009, 55–73).

⁴⁸ Consumer Protection Act, OG Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, and 56/13 (not in force).

⁴⁹ On the possible conflict between the general clauses of the UCPD and the maximum harmonization see Vries (2011).

As confirmed by the results of the Fitness Check in 2017,⁵⁰ the transposed UCTD provisions remained neglected in the Croatian case law, despite of the widespread use of unfair commercial practices (Mišćenić, Mamilović 2019, 273–299; Mišćenić, Mrak 2018, 145–169).

The following changes attempted to soften the maximum harmonization approach through the introduction of the full (targeted) harmonization in EU consumer directives. This nowadays commonly accepted harmonization approach has, however, shown limitations, mostly due to numerous options and exemptions contained in the directives' provisions.⁵¹ For instance, when transposing the full harmonization Directive 2011/83/EU, the Member States could have decided to widen the *ratione personae* 'to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises'.⁵² As a consequence, the changes introduced by the transposition of the directive's provisions into the national consumer laws of the Member States resulted in different definitions of the notion of the consumer in different Member States. According the EU Commission Evaluation Study from 2017, the consumer is the natural person in some Member States (Belgium, Croatia, Bulgaria, Cyprus, Estonia, Finland, Italy), but it may be a legal entity in others (Austria, Denmark, France, Greece).⁵³ The definition of the consumer may also differ within the legal framework of a single Member State. This usually happens when different EU consumer directives are fragmentarily and unsystematically transposed into different national consumer acts.⁵⁴ For instance, in the Croatian legal system, the consumer is protected by the recently adopted CPA 2022 as *lex generalis*,⁵⁵ but also through a number of other legal acts, such as Obligations Act,

⁵⁰ Final report Part 3 – Country reporting, *European Commission Study for the Fitness Check of EU consumer and marketing law*, European Commission, 2017, 160.

⁵¹ E.g. Art. 3(4) and Art. 5(3) Directive 2011/83/EU. See Loos (2010/03).

⁵² Directive 2011/83/EU, recital 13.

⁵³ European Commission, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 2 Procedural Protection of Consumers, JUST/2014/RCON/PR/CIVI/0082, 2017.

⁵⁴ Hess, Law (2019, 217 *et seq*); Terryn (2016, 271).

⁵⁵ Consumer Protection Act, OG No. 19/22, in force since 28 May 2022, replaced the former Consumer Protection Act, OG Nos. 41/14, 110/15, and 14/19 (not in force).

Insurance Act, Consumer Credit Act, Credit Institutions Act, Insurance Act, Payment Services Act, General Product Safety Act, E-Commerce Act, Electronic Communications Act etc (Miscenic 2018, 191).⁵⁶

The transposition issues also occur with respect to the material scope of the application of EU consumer directives. For example, full harmonization Directives 2008/48/EC and 2011/83/EU allow the Member States to widen the *ratione materiae* and include contracts excluded from directives' material scope of application.⁵⁷ Under recital 13 of Directive 2011/83/EU, the Member States may include contracts that are not distance contracts within the meaning of the directive 'for example because they are not concluded under an organised distance sales or service-provision scheme' and remain competent to apply provisions to areas that do not fall within the scope of directive. However, both directives regulate that the Member States cannot deviate from the directives' rules, 'unless otherwise provided' by the directives.⁵⁸ Therefore, despite full harmonization, the main areas of regulation can be changed within the national legal orders.⁵⁹ In the *SC Volksbank România* case the CJEU concluded that 'the Member States may, in accordance with European Union law, apply provisions of that directive [2008/48/EC] to areas not covered by its scope'.⁶⁰ In reality, this leads to discrepancies not only between rules of the Member States, but also to unusual national legal solutions and legal fragmentation. For instance, the Croatian legislator used the mentioned option in the Consumer Credit Act⁶¹ to cover mortgage credit agreements, which are excluded from the material scope of Directive 2008/48/EC. However, during the transposition of its Twin sister, namely Directive 2014/17/EU, into the Mortgage Consumer

⁵⁶ Similarly, in the Austrian legal order the KSchG (Consumer Protection Act) is *lex generalis*, combined with other special laws, such as the FAGG (Distance and Off-Premises Contracts Act), the UWG (Unfair Competition Act), the VKrG (Consumer Credit Act), the TNG (Timeshare Act), the VRUG (Consumer Rights Implementation Act), and the AStG (Alternative Disputes Resolution Act).

⁵⁷ Directive 2008/48/EC, recitals 10 and 13; Directive 2011/83/EU, recital 13.

⁵⁸ Directive 2008/48/EC, Art. 22(1); Directive 2011/83/EU, Art. 4.

⁵⁹ According to the Report from the Commission on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, COM/2017/0259 final: 'With the exception of the limited areas still open to national regulatory choices, the CRD has largely removed such differences among Member States, thus contributing to increased legal certainty for traders and consumers, especially in the cross-border context.'

⁶⁰ CJEU judgment of 12 July 2012, C-602/10, *SC Volksbank România*, ECLI:EU:C:2012:443, para. 40.

⁶¹ Consumer Credit Act, OG Nos. 75/09, 112/12, 143/13, 147/13, 9/15, 78/15, 102/15, and 52/16.

Credit Act, it covered the very same types of contracts again and regulated that mortgage credit agreements covered by this Act are not subject to the Consumer Credit Act.⁶² In addition to the created legal fragmentation, caused by separate implementation of the two complementary directives,⁶³ a number of transposed directives' options and exemptions actually lowered the level of consumer protection related to mortgage credit agreements (Mišćenić 2017, 595–649).

Besides these, there are many other examples of legislative changes and challenges that occur once EU consumer law is about to be transposed into the national law of the Member States. The legislative technique chosen to transpose the directive, where the national authorities enjoy the choice of form and methods (Art. 288(3) TFEU), is an important factor that shapes the very change itself. All things considered, it is not surprising that instead of integrating EU legal terms into their national legal orders, the national legislators often use the 'copy-paste' technique and transpose EU directives literally. However, such an approach can create a conflict between the EU legal term to be transposed and the substantive meaning of the corresponding civil law concept. This can possibly also lead to the misinterpretation of the autonomous EU legal term at the national level and in the case law of the Member State. For instance, the notion of the 'credit agreement', from Art. 3(c) Directive 2008/48/EC or Art. 4(3) Directive 2014/17/EU, has a different meaning than the credit agreement or 'credit contract' defined in the Member States' civil law codifications. Directives use the above-mentioned term to define the material scope of application, while their national equivalents circumscribe the contractual parties and main elements of the credit contract (Miscenic 2014, 219). Another example is Art. 4(2) Directive 93/13/EEC on unfair contract terms (UCTD),⁶⁴ which contains the categories of terms related to 'the definition of the main subject matter of the contract' and 'the adequacy of the price and remuneration'. These are often interpreted in the spirit of national civil laws and equated with the essential elements of the contract (Lat. *essentialia negotii*) (Miscenic 2018, 131). As emphasised in the CJEU *Matei* case, these categories of terms 'must normally be given an autonomous and uniform interpretation throughout the European Union'.⁶⁵ By equating a linguistically corresponding EU legal

⁶² Mortgage Consumer Credit Act, OG No. 101/17, Art. 4(6).

⁶³ Directive 2014/17/EU, recital 20: 'the core framework of this Directive should follow the structure of Directive 2008/48/EC where possible'.

⁶⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993, 29–34.

⁶⁵ CJEU judgment of 26 February 2015, C-143/13, *Matei*, ECLI:EU:C:2015:127, para. 50.

term with the original national concept, national courts bring the consistent interpretation of EU directives and their *effet utile* into question (Bajčić 2021, 1433–1449). In another CJEU case, *Messner*, the German courts struggled with the interpretation of civil law provisions related to the legal consequences of the ‘termination’ of a contract, which were *mutatis mutandis* applicable to the consumer’s right of ‘withdrawal’ and return.⁶⁶ The CJEU found that Directive 97/7/EC precludes a national provision, which generally requires the payment of compensation in case of the consumer’s withdrawal from the contract. However, the compensation is allowed in cases where consumers use the goods in a manner ‘incompatible with the principles of civil law, such as those of good faith or unjust enrichment’.⁶⁷ The *Messner* case illustrates vividly how the change caused by an incorrect transposition of the EU consumer law concept and the right of withdrawal into the national law, caused another change in the form of an incorrect interpretation of a EU legal term at the national level, which was corrected by the autonomous and uniform interpretation of the CJEU.

5. THE INTERPRETATION OF EU CONSUMER LAW IN THE CASE LAW OF THE CJEU

The process of constant change of EU consumer law can also be observed from another interesting aspect related to the interpretation of EU consumer law. The CJEU case law presents a decisive thread between EU consumer protection measures and the Member States’ consumer laws and their enforcement in B2C relationships. The CJEU and national courts, as well as other enforcement bodies, are destined to cooperate, promote and guarantee effective enforcement of consumer law. The preliminary ruling proceeding under Art. 267 TFEU is one of the main tools that enables national courts to refer questions to the CJEU in cases of necessity or doubts related to consistent interpretation of EU law.⁶⁸ Within this process the CJEU both interprets and further develops EU law by providing uniform and autonomous interpretation of EU legal terms and concepts. In the *Leitner* case, for example, the CJEU clarified that the term ‘damage’, from former Directive 90/314/EEC on package travel, is to be interpreted as covering

⁶⁶ CJEU judgement of 3 September 2009, C-489/07, *Messner*, ECLI:EU:C:2009:502, para. 8.

⁶⁷ *Messner*, para. 30.

⁶⁸ CJEU judgment of 16 January 1974, C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3, para. 2.

both material and immaterial damage caused to the consumer.⁶⁹ In the *Quelle* and *Putz* cases, the CJEU interpreted the aim of the relevant EU legislation to make ‘the “free of charge” aspect of the seller’s obligation to bring goods into conformity an essential element of the protection afforded to consumers by the Directive’.⁷⁰ In doing so, the CJEU goes far beyond the uniform and autonomous interpretation of the notions in question, by further developing and sometimes even amending the substantive meaning of the EU legal term in question. The CJEU often clarifies sometimes vague and general EU legal concepts and helps the national courts to correctly interpret and apply the law.⁷¹ Nonetheless, the national courts of the Member States still face many difficulties related to the consistent interpretation of EU law in practice (Barnard, Mišćenić 2019, 111).

The principle of EU consistent interpretation, developed by the extensive CJEU case law, requires national courts to interpret the whole body of national law so far as possible in the light of the wording and the purpose of the directive (*effet utile*).⁷² In the *Faccini Dori* case, the ECJ recognized the importance of the duty of EU consistent interpretation as one of the main tools to achieve justice for the consumer, who was deprived of the right of withdrawal.⁷³ In judicial practice, the Member States’ courts still struggle with the understanding and application of the duty of EU consistent interpretation (Basedow 2021, 608; Brenncke 2018, 134). In the first Croatian collective redress proceeding on unfair contractual terms related to variable interest rates and currency clauses in Swiss Franc (CHF) loans (Miscenic 2020, 226), the national courts ignored the interpretation of the UCTD provisions given by the CJEU. The Croatian Supreme Court argued that

⁶⁹ CJEU judgment of 12 March 2002, C-168/00, *Leitner*, ECLI:EU:C:2002:163, para. 25.

⁷⁰ CJEU judgment of 17 April 2008, C-404/06, *Quelle*, ECLI:EU:C:2008:231, para. 33; CJEU judgement in joined cases of 16 June 2011, C-65/09 and C-87/09, *Gebr. Weber and Putz*, ECLI:EU:C:2011:396, paras. 45–46.

⁷¹ Many legal scholars address the issue of general clauses, see Grundmann, Mazeaud (2005); Vries (2012, 913–932).

⁷² CJEU judgment of 10 April 1984, C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para. 26; CJEU judgment of 13 November 1990, C-106/89, *Marleasing v. Comercial Internacional de Alimentación*, EU:C:1990:395, para. 8; judgment of 14 July 1994, C-91/92, *Faccini Dori v. Recreb*, ECLI:EU:C:1994:292, para. 26; judgment of 27 June 2000, CJEU joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 30; CJEU judgment of 5 October 2004, joined Cases C-397/01 to C-403/01, *Pfeiffer et al.*, ECLI:EU:C:2004:584, para. 115.

⁷³ *Faccini Dori v. Recreb*, para. 25.

the ‘factual differences’ between the Hungarian *Kásler and Káslerné Rábai*⁷⁴ case and the Croatian *Franak* case preclude the CJEU’s interpretation related to the transparency requirements.⁷⁵ This failure was eventually corrected by the Croatian Constitutional Court, which pointed at the duty of observing EU law, including the CJEU case law, and sent the proceeding to a renewed trial due to a violation of the right to a fair trial.⁷⁶ The Croatian jurisprudence was criticised in the 2017 EU Commission Evaluation Study, which stated that ‘Croatian courts, including the Supreme Court still do not see themselves as European courts.’⁷⁷ In the renewed proceeding, the regular courts observed the settled CJEU case law and applied the so-called ‘substantive transparency requirements.’⁷⁸ In terms of change, the renewed proceeding resulted in a significant change of both substantive and procedural aspects of the first Croatian collective proceeding on consumer protection by reaching a completely opposite result and finding the contractual term denominating the loans in the foreign currency of the CHF unfair and invalid (Mišćenić 2020, 226; Miscenic, Petrić 2020; Miscenic 2022, forthcoming).

This all leads to another inseparable aspect related to the effectiveness of judicial protection and the CJEU jurisprudence on the right of effective judicial protection in EU law.⁷⁹ By respecting the procedural autonomy of the Member States, the CJEU developed two principles setting the criteria for exercising effective judicial protection across the EU. According to the principle of effectiveness, the national procedural law rules should not make the application of EU law or exercise of rights conferred by it ‘impossible or excessively difficult’ before the Member States’ courts. The principle of equivalence on the other hand requires national rules not to be ‘less favourable’ than those governing similar domestic actions (Mancaloni, Poillot 2021, 7–16). The settled CJEU case law on consumer protection confirms that the principle of effectiveness is gaining more attention

⁷⁴ CJEU judgment of 13 April 2014, *Kásler and Káslerné Rábai*, C-26/13, ECLI:EU:C:2014:282.

⁷⁵ Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14–2, 22. For more information about the case see Miscenic (2016b, 184 *et seq.*).

⁷⁶ Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III-2521/2015 *et al.*, 20.

⁷⁷ EU Commission Evaluation Study, 61.

⁷⁸ Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ 2019/C 323/04, 24.

⁷⁹ Art. 19(1) TEU, Art. 47(1) EU Charter, Arts. 6 and 13 ECHR. See Arnull (2011, 51–70).

than the principle of equivalence.⁸⁰ In the *Duarte Hueros* case, the CJEU established that Spanish procedural law rules on *ne ultra petita*, *ne bis in idem* and *res iudicata* 'are liable to undermine the effectiveness of the consumer protection intended by the European Union legislature'.⁸¹ Once Ms. Hueros lost the case on non-conformity of goods against the seller, she was unable to initiate the same proceeding in the same matter (*ne bis in idem*). Moreover, the CJEU criticised the lack of possibility for the national court to recognise the right of the consumer of its own motion (Jansen 2014, 975). The duty of courts to observe the consumer law of its own motion contributes significantly to the effective protection of consumer rights (Beka 2018, 66 *et seq*). In the *Océano Grupo and Salvat Editores* case,⁸² the ECJ accentuated that 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'.⁸³ Over the years, the *ex officio* duty of the national courts to monitor the unfairness of contractual terms was conditioned with 'factual and legal elements' needed for the review of terms.⁸⁴ In the *Asturcom Telecomunicaciones* case, the CJEU interpreted that Art. 6 UCTD on the non-binding nature of unfair contractual terms 'must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy'.⁸⁵ This argument was abandoned in the later *Lintner* case,⁸⁶ where the CJEU required *ex officio* observance of the unfairness of only those contractual terms that were invoked before the court by the consumer (*ne ultra petita*).⁸⁷ So, the point is that the changes occurring within the constantly developing CJEU case law also affect the

⁸⁰ CJEU judgment of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paras. 39 and 49; CJEU judgment of 3 October 2013, C-32/12, *Duarte Hueros*, ECLI:EU:C:2013:637, paras. 33–34; CJEU judgment of 14 June 2012, C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para. 49; CJEU judgment of 14 March 2013, C-415/11, *Aziz*, ECLI:EU:C:2013:164, para. 53; CJEU judgment of 10 September 2014, *Kušionová*, C-34/13, ECLI:EU:C:2014:2189, para. 52; CJEU judgment of 18 December 2014, *CA Consumer Finance SA*, C-449/13, ECLI:EU:C:2014:2464, paras. 23 and 25.

⁸¹ *Duarte Hueros*, para. 39.

⁸² CJEU judgment of 27 June 2000 in the joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores*, ECLI:EU:C:2000:346.

⁸³ *Océano Grupo and Salvat Editores*, para. 26.

⁸⁴ CJEU judgment of 4 June 2009, C-243/08, *Pannon GSM*, ECLI:EU:C:2009:350, para. 32; *Asturcom Telecomunicaciones*, para. 53.

⁸⁵ *Asturcom Telecomunicaciones*, para. 52.

⁸⁶ CJEU judgment of 11 March 2020, C-511/17, *Lintner*, ECLI:EU:C:2020:188, para. 50.

⁸⁷ *Lintner*, para. 50.

national jurisprudence and the effectiveness of judicial protection at the level of the Member States. The 2017 EU Commission Evaluation Study confirmed the existence of issues and misunderstandings of the national courts' duty related to *ex officio* observance of mandatory consumer law rules.⁸⁸ These are, of course, not only reserved for the procedural aspects, since the effectiveness of judicial protection can clearly be seriously affected by the substantive misinterpretation of important EU legal terms and concepts and therefore lead to an unwanted, but also unjust outcome for the consumer. Despite of abundant guidance on the interpretation and application of EU consumer directives, the national courts and other competent authorities find it difficult to follow the changes occurring in the interpretation of the CJEU case law. For instance, the CJEU case law makes a clear distinction in the interpretation of Art. 4(2) UCTD on the exemption of contractual terms from the unfairness test in cases such as *Andriuc*,⁸⁹ in which the loan is to be repaid in the same foreign currency in which it was contracted, from cases such as the *Kásler and Káslerné Rábai*,⁹⁰ in which the loan is only denominated in the foreign currency. If not recognized or understood properly, changes such as these have the potential to directly affect the work and results of judicial and other national authorities, as well as the effectiveness of judicial protection and enforcement of consumer law (Miscenic 2019, 129).

6. INFORMATION DUTIES AND TRANSPARENCY REQUIREMENTS

To most striking changes affecting EU consumer law in this new era are undoubtedly fast-developing digitalization and the increase of B2C transactions in online marketplaces. Speedy development of digital technologies has fostered e-commerce and online shopping, which completely transformed B2C transactions and the consumer behaviour as we know it, while the line between the two worlds, offline and online, has gradually faded (Durovic, Tridimas 2021; Mišćenić 2018a, 219 *et seq.*). A number of studies, agendas, new directives and other consumer law

⁸⁸ EU Commission Evaluation Study, 208.

⁸⁹ CJEU judgment of 20 September 2017, C-186/16, *Andriuc et al.*, ECLI:EU:C:2017:703, paras. 39–41.

⁹⁰ *Kásler and Káslerné Rábai*, para 58: 'the exclusion cannot apply to terms that [...] merely determine the conversion rate of the foreign currency in which the loan agreement is denominated'.

measures have been adopted at the EU level.⁹¹ The *Digital Single Market Strategy for Europe*⁹² ensures a high level of consumer protection in online B2C transactions and the recent Eurostat statistics confirm a significant increase in online shopping by private individuals, in particular during the COVID-19 pandemic.⁹³ However, this high standard of consumer protection in online B2C transactions is ‘ensured’ through a variety of different EU legal acts. When ‘shopping’ online, consumers rely on the national provisions harmonized with the E-Commerce Directive, Directive 2011/83/EU, the Omnibus Directive (EU) 2019/2161, the UCTD, the UCPD, Directive (EU) 2019/770 and Directive (EU) 2019/771, the ADR/ODR rules,⁹⁴ or directly applicable regulations, such as the famous P2B Regulation (EU) 2019/1150⁹⁵ and many others. The complex setup of the EU consumer legal framework and the high level of legal fragmentation of measures protecting consumers in online marketplaces renders the practical enforcement of consumer law difficult in practice (Synodinou, Jogleux, Markou, Prastitou 2020). For instance, the European Commission ‘sweep’ actions from January 2020 confirm that more than 70% of traders engaged in online shopping are in violation of information duties towards consumers.⁹⁶

Now more than ever, the transparency requirements and information duties play an utmost important role in the protection of consumers. When making online purchases, the consumers need to be properly informed about all relevant elements of online contracts. The Regulation on consumer ODR defines online contracts in B2C relationships, as contracts to sales or

⁹¹ Commission’s Communication on Shaping Europe’s digital future Communication, Shaping Europe’s digital future, COM(2020) 67 final, Brussels, 19 February 2020; European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers.

⁹² Communication from the Commission: A Digital Single Market Strategy for Europe, COM(2015) 192 final.

⁹³ Eurostat, Internet purchases by individuals (2020 onwards), Last update: 30 March 2022, available at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ib20&lang=en.

⁹⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18 June 2013, 63–79.

⁹⁵ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 July 2019, 57–79.

⁹⁶ European Commission, Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law, 31 January 2020.

services ordered on the traders website or by other electronic means.⁹⁷ In distance and online contracts, the traders' information duties towards consumers are regulated extensively by Art. 6(1)(a)-(t) Directive 2011/83/EU, extended by Art. 6.a of the Omnibus Directive providing 'additional specific information requirements for contracts concluded on online marketplaces'.⁹⁸ Pre-contractual information, which traders are obliged to provide to consumers prior to the contract conclusion, do not preclude information from the E-Commerce Directive or any additional information imposed by the national legislation, and the burden of proof regarding the compliance with the information duties is on traders.⁹⁹ The transparency of provided information is guaranteed in many forms, not only by making the information available in the first place, but also by offering information that is substantively understandable to an average consumer. Different EU consumer directives use different formulations in order to guarantee transparency in B2C relationships. According to Directive 2011/83/EU,¹⁰⁰ all information must be provided to the consumer in a 'clear and comprehensible manner' and the trader 'shall give the information' or 'make that information available' to the consumer in a way appropriate to the used means of distance communication and in 'plain and intelligible language'.¹⁰¹ Nonetheless, the CJEU case law in cases such as *Content Services*, *Messner*, *Kamenova*, *VKI v. Amazon*, *Planet49 GmbH*, and many others,¹⁰² reveal that the high level of consumer protection is not so high when it comes to the transparency requirements and information duties. The 'informed choice' of the consumer transformed into a 'mouse click', by which the consumer

⁹⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18 June 2013, Art. 4(1)(e).

⁹⁸ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18 December 2019, 7–28.

⁹⁹ Directive 2011/83/EU, Art. 5(4) and Art. 6(9).

¹⁰⁰ Directive 2011/83/EU, Art 8(1).

¹⁰¹ On the breaches of information duties and transparency requirements see Tigelaar (2019, 27–57); Mak (2020, 144–146).

¹⁰² CJEU judgement of 5 July 2012, C-49/11, *Content Services*, ECLI:EU:C:2012:419; CJEU judgement of 3 September 2009, C-489/07, *Messner*, ECLI:EU:C:2009:502; CJEU judgement of 4 October 2018, C-105/17, *Kamenova*, ECLI:EU:C:2018:808; CJEU judgement of 28 July 2016, C-191/15, *Verein für Konsumenteninformation*, ECLI:EU:C:2016:612; CJEU judgement of 1 October 2019, C-673/17, *Planet49 GmbH*, ECLI:EU:C:2019:801.

accepts the traders' 'terms and conditions' available on the website. In some cases, this leads to an illegal waiver of the right of withdrawal, such as in the *Content Services* case. In others, like in the *Planet49 GmbH* case, it results in 'explicit' and allegedly 'informed' consent to the processing of personal data, despite the GDPR requirements.¹⁰³

Therefore, in online marketplace practice, the traders' information duties are very often 'fulfilled' by the consumer's acceptance of the general terms and conditions available online, which *nota bene* form part of the B2C contract (Loos 2017, 54–59). The terms and conditions usually include or refer to some of the pre-contractual information and to the consumers' right of withdrawal, but fail to provide information about certain relevant features of the product or service purchased online and about basic consumer rights (Lodder, Morais Carvalho 2022, 537–556). The insertion of pre-contractual and contractual information into business terms and conditions, which are only available online and can be unilaterally altered at any moment, is likely to lead to the violation or circumvention of consumer protection rules. Such practices risk the transparency and information requirements from the above-mentioned EU consumer legal framework and protection measures. As argued in the *Content Services* case or the recent *Tiketa* case,¹⁰⁴ pre-contractual and contractual information must in any case be provided to consumers in a valid form, meaning on a durable medium. Although there are substantive differences between the two cases, they both address the transparency and information requirements arising from EU consumer directives. By interpreting the provisions of former Directive 97/7/EC, in the *Content Services* case the CJEU reached the conclusion that an active conduct in the form of a mouse click is not required from the consumer in order to acquaint themselves with the information.¹⁰⁵ In the *Tiketa* case the CJEU found it acceptable for the consumer to tick the box containing pre-contractual information in terms and conditions of the intermediary's website: 'provided that that information is brought to the consumer's attention in a clear and

¹⁰³ According to recital 42 GDPR the subject's consent on data processing 'should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment'. Pre-formulated declaration of consent 'should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms' in accordance with the UCTD. See also the Opinion of Advocate General Richard de la Tour of 2 December 2021, C-319/20, *Meta Platforms Ireland*, ECLI:EU:C:2021:979 and therein referred paper Mišćenić, Hoffmann (2020, 44–61).

¹⁰⁴ Judgement of 24 February 2022, C-536/20, *Tiketa*, EU:C:2022:112.

¹⁰⁵ *Content Services*, paras. 33 and 35.

comprehensible manner’.¹⁰⁶ The CJEU emphasized though that ‘such a means of providing information cannot act as a substitute for providing the consumer with the confirmation of the contract on a durable medium’ within the meaning of Directive 2011/83/EU.¹⁰⁷ In both of the cases, the CJEU confirmed that a durable medium is an adequate replacement for paper and that the website does not correspond to the definition of a durable medium ‘since it does not mean that that information is addressed to that consumer personally, it does not ensure that its content is not altered and that the information is accessible for an adequate period, and does not allow the consumer to store that information or to reproduce it unchanged’.¹⁰⁸

The presented CJEU case law only confirms the need for the better enforcement and strengthening of transparency and information requirements in online B2C transactions. There are of course other existing legal mechanisms in place, such as the UCPD or the UCTD, the role of which has been proven as extremely important in the protection of consumer rights (Helberger, Lynskey, Micklitz, Rott, Sax, Strycharz 2021, 47). The UCPD provisions fight non-transparency, for example, by qualifying the traders’ hiding or providing of unclear, unintelligible, ambiguous material information about the product as misleading omissions (Djurovic 2019, 29–42). The UCTD provisions, on the other hand, present an important tool for protecting consumers from unfair and usually non-transparent contractual terms. The findings from the settled CJEU case law on the ‘substantive transparency requirements’ under Arts. 5 and 4(2) UCTD are adequately applicable to business terms and conditions used on traders’ web-sites and in online marketplaces (Gardiner 2022; Miscenic 2018b, 131). The provisions of the Omnibus Directive (EU) 2019/2161 promise a more effective sanctioning mechanism for violations of consumer rights and traders’ obligations, in particular in the online surrounding.¹⁰⁹ Nonetheless, change is needed. Due to extensiveness and complexity of information to be provided in B2C relationships, transparency will be undermined even if consumers receive and read all the information. The ‘information overload’ effect is opposed to the ‘informed choice’ of the consumer and adversely affects the concept of transparency (Howells, Wilhelmsson 2003, 370 *et seq.*). An average consumer, who is reasonably well informed, reasonably observant and circumspect,¹¹⁰

¹⁰⁶ *Tiketa*, para. 54.

¹⁰⁷ *Tiketa*, para. 54.

¹⁰⁸ *Tiketa*, para. 51; by analogy *Content Services*, paras. 41, 42, 43 and 50.

¹⁰⁹ Directive (EU) 2019/2161, Arts. 1, 8, 13. See Đurović (2020, 62–79); Prastitou Merdi (2020, 347 *et seq.*).

¹¹⁰ On the position and role of an average consumer see Elizalde (2021, 29).

cannot truly understand all the listed complex information and recognize what is 'essential'. The EU legislator should adapt to speedy development of online marketplaces, digitalization and e-commerce, and recognize the need for rewriting and reenforcing of consumer-related EU legal rules on the information duties and transparency requirements. These basic consumer protection rules should be reformulated in a manner that is transparent to an average consumer and the change should result in simplification of information and reduction to only the information that is 'essential' to consumers when buying online (Segger-Piening 2021, 96 *et seq.*; Schaub 2017, 25–27; Oehler, Wendt 2017, 179).

7. CONCLUDING REMARKS

EU consumer law is characterised by constant changes happening at all possible levels: from changes to the legal grounds for the adoption of EU consumer directives, changes in the level of harmonization, changes resulting from the transposition of directives into the Member States laws, changes in the constantly developing CJEU case law, changes caused by digitalization and developing online marketplaces, etc. Over the years, these have been followed by numerous initiatives, agendas, reports, projects and programmes either attempting to change the existing legal regulation and proposing new solutions or just verifying the current state of legislation and enforcement of consumer law. However, what appears as the change on the surface of EU consumer law, does not in fact present a change in real life. Despite of constant changes, some of the main consumer issues remain unsolved: a high degree of legal fragmentation, variations between the main concepts and definitions, differences between harmonized consumer protection rules in different Member States, practical ineffectiveness of consumer rights and consumer protection tools, such as the information and transparency requirements. All of these issues have an adverse effect on the enforcement of EU consumer law (Micklitz, Saumier 2018).

Therefore, the real question is: how to 'change' the constantly changing EU consumer law, in order to make it more effective, to the benefit of both consumers and traders? Of course, there is no simple answer to such a difficult question nor a simple legal solution to complex consumer issues. Many legal scholars have tried or are still trying to contribute to EU consumer law by offering new legal proposals and different suggestions that would improve its enforcement (Micklitz 2021, 234; Howells, Twigg-Flesner, Wilhelmsson 2018). However, the purpose of this paper is not to solve the impossible task and provide answers to all of the obstacles standing in the

way to the proper functioning of EU consumer law. Its main purpose is to acknowledge the ever-growing tree of EU consumer law and the constant changes affecting its growth and development. By telling the story of the constant changes occurring in EU consumer law, the paper points to the various attempts at improving EU consumer law and gives a short overview of the achieved results and legal consequences. These should be observed in light of the events happening at the global level, such as the expansion of EU internal market, the development of digital technologies, the COVID-19 pandemic and many other important developments (Alderman *et al.* 2020). However, this kind of analysis would go far beyond the scope of this paper and therefore remains to be investigated in further research.

Nonetheless, there are some important lessons to be learned from observing the constant changes in EU consumer law. It seems to the author that yet another change is needed in order to improve EU consumer law and its enforcement, and this time, it is a change of perspective, which would allow a different legal approach to the regulation of EU consumer law. Instead of focusing primarily on the legal and economic consequences of consumer issues, more attention should be given to the very cause of these issues. Legal regulation that would be more focused on preventing the causes of consumer issues would contribute significantly to the better enforcement of consumer law. The change is therefore needed both in terms of better regulation and better enforcement of EU consumer law, as something that has been recognised by EU institutions long ago (Valant 2015, 1–24). By achieving more sustainable legal solutions for consumer issues, the *acquis* would experience a change that actually matters to traders and consumers. However, in order to achieve this, the EU consumer law needs to change from the inside out and not the other way around.

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CREDITOR PROTECTION IN CROSS-BORDER CONVERSIONS, MERGERS AND DIVISIONS**

This paper elaborates on the protection of creditors in cross-border conversions, mergers and divisions, according to Directive 2019/2121/EU as regards these cross-border operations. After presenting the protection mechanisms available to creditors in cross-border operations prior to the adoption of the 2019 Directive, as well as the risks faced by creditors in such events, the author presents the system of creditor protection introduced by the Directive. Both creditor protection mechanisms in the broader sense (which are not designed exclusively for creditors) and the ones in the narrower sense (which are created only for their protection) are presented in the central portion of the paper. Among the latter group, the general protection mechanisms available for each cross-border operation are analysed, followed by the mechanisms that are specific to individual operations.

Key words: *Creditors. – Protection of creditors. – Cross-border merger. – Cross-border division. – Cross-border conversion.*

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1. INTRODUCTION

Creditor protection is an important part of the legal framework for cross-border conversions, mergers and divisions. Creditors need to be protected regardless of the reasons for carrying out the specific operation. It is the cross-border element of the operation that makes the issue of creditor protection in the event of the restructuring of the debtor particularly complex. In any case, a cross-border restructuring, in the form of a cross-border conversion, merger and division, may be the result of adjusting to the economic factors or to a changed business framework, the aspiration to improve business activity or an effort to prevent bankruptcy (see Teichmann, 278). Therefore, it may be a tool for preserving and/or expanding the business or a mere strategy for its survival. Restructuring, as an answer to facing insolvency or being on the verge of insolvency, is especially relevant for creditors and thus requires special attention.

The long history of the harmonisation of legal rules on corporate restructuring in EU law dates back to 1978 and the enactment of the Third Company Law Directive on domestic mergers of public companies.¹ Soon after, in 1982, the Sixth Company Law Directive regulating domestic divisions of public companies was adopted.² Subsequently, the Member States were not obliged to permit divisions under their own jurisdiction, but if they opted for it, the division had to be carried out in accordance with that Directive.³ Later on, the starting focus of the European legislator moved from the domestic restructuring of public limited liability companies to cross-border operations applicable to both public and private limited liability companies. This process culminated in 2005 with the adoption of the Tenth Company Law Directive on cross-border mergers of limited liabilities companies – the Cross-Border Merger Directive (see also Teichmann, 280–282).⁴ Afterwards, the general rules on domestic mergers, domestic divisions and cross-border mergers all became part of Directive 2017/1132 – the codification Directive. Finally, a huge and, for now, final step forward considering the legal framework

¹ Third Council Directive 78/855/EEC based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, OJ L 295 of 20/10/1978.

² Sixth Council Directive 82/891/EEC based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, OJ L 378 of 31/12/1982.

³ See Directive 2017/1132/EU relating to certain aspects of company law (codification), OJ L 169 of 30/6/2017, Art. 135 (former Art. 1 of the repealed Sixth Council Directive 82/891).

⁴ Directive 2005/56/EC on cross-border mergers of limited liability companies, OJ L 310 of 25/11/2005.

of restructuring was taken in 2019 when Directive 2019/2121 as regards cross-border conversions, mergers and divisions amending the codification Directive (the new 2019 Directive) was adopted.⁵ The significance of this action may easily be demonstrated by the recognition that harmonised general rules on cross-border conversions and cross-border divisions were adopted for the first time.⁶ At any rate, creditor protection was an important driver for the long-awaited and heavily discussed harmonisation of cross-border corporate mobility in the EU.

The lack of unified procedures for cross-border conversions and cross-border divisions prior to 2019 was an obstacle for performing these operations, due to the legal uncertainty that surrounded them.⁷ As put in the executive summary of the study drawn up by Ernst & Young (2018, 5), the companies involved were pushed to abandon the transfer of registered seat or to undertake this operation while accepting the legal uncertainty for the company and its stakeholders. Furthermore, the study of Ernst & Young reveals that carrying out the transfer of registered seat under those circumstances results in the increase of cost and duration of the procedure, regardless of whether it might have been performed directly or indirectly through other operations, for example, via a conversion into a *Societas Europaea* – *SE*. In the case of cross-border divisions, the possibilities were even more limited. As referred to in the abovementioned summary (Ernst & Young 2018, 7), companies were pushed to abandon the said operation or to perform it indirectly, for example by creating a new company in the host Member State and transferring assets and liabilities to it subsequently. Thus, the adoption of the new Directive is an enormous achievement in facilitating the undertaking of cross-border operations, protected under the freedom of establishment, which significantly improved the level of legal certainty for all interested persons, including the creditors. However, the overprotection of interested parties may have some negative effects. Companies faced with too many requirements may choose not to undertake the cross-border operation. Therefore, balancing between the protection of the stakeholders and the companies' rights to convert, merge and divide was quite a challenge for the drafters of the new Directive.

⁵ Directive 2019/2121/EU amending Directive 2017/1132/EU as regards cross-border conversions, mergers and divisions, OJ L 321 of 12/12/2019.

⁶ The new Directive provides for the rules on divisions involving the formation of new companies, while the cross-border division by acquisition is not regulated. See Directive 2019/2121, recital 8.

⁷ See Directive 2019/2121, recital 5.

This paper proceeds as follows: Part 2 presents the protection of creditors prior to the adoption of the new 2019 Directive. The risks faced by creditors are elaborated in Part 3. The newly adopted system of creditor protection is explained in Part 4. Creditor protection mechanisms in the broader sense are analysed in Part 5. The analysis of protection mechanisms in the narrower sense follows in Part 6. Part 7 concludes the paper.

2. PROTECTION OF CREDITORS PRIOR TO THE ADOPTION OF THE NEW 2019 DIRECTIVE

Before the adoption of the new Directive, only limited protection of creditors was available in the case of cross-border mergers, in accordance with the Cross-Border Merger Directive, on the one hand, while protection was provided by other rules in the case of formation by a cross-border merger and transfer of seat of a European Company (*Societas Europaea* – *SE*) and a European Cooperative Society (*Societas Cooperativa Europaea* – *SCE*), on the other hand. The former set of rules are general rules on creditor protection, while the latter rules are special. The latter are still applicable.

The Cross-Border Merger Directive provided a general rule regarding the protection of creditors.⁸ A limited liability company that participates in a cross-border merger has to comply with the provisions and formalities of the national law to which it is subject, as long as the rules are applicable to the cross-border nature of the merger.⁹ To put it differently, the rules on cross-border mergers refer to the national rules on the protection of creditors. The national legislator's choice to provide mandatory creditor protection in general likely depends on the prevailing domestic model of corporate governance – the protection of the stakeholder model of corporate governance is expected to lead to the mandatory protection of creditors (see Mucciarelli 2020, 58).

Rules on creditor protection in domestic mergers are only partially harmonised (Winner 2019b, 62). According to the rules on the protection of creditors in the case of domestic mergers of public limited liability companies, the Member States need to provide an adequate system of protection of creditors whose claims antedate the publication of the draft

⁸ Directive 2005/56 was repealed by Directive 2017/1132, which was subsequently amended by the new 2019 Directive.

⁹ See Directive 2017/1132, Art. 121 (1) (b) and (2) (former Art. 4 (1) (b) and (2) of Directive 2005/56).

terms of the merger and have not fallen due at that time.¹⁰ The system of protection may be different for creditors of the acquiring company and for those of the company being acquired. This is allowed due to the fact that the interests of the creditors of the disappearing company are naturally in greater danger than those of the creditors of the surviving company (see Raaijmakers, Olthoff 2008, 37).¹¹ Namely, the Member States have to at least provide that creditors are entitled to obtain adequate safeguards if the following two conditions are met. First, only the creditors who do not already have such safeguards are entitled to obtain adequate safeguards, and second, obtaining these safeguards has to be necessary considering the financial situation of the company.¹² Creditors who may credibly demonstrate that the satisfaction of their claims is at stake due to a merger and that they did not obtain adequate safeguards from the company are entitled to apply to the competent authority for adequate safeguards. The same system of protection applies to the debenture holders of the merging companies, except when the merger is approved by a meeting of the debenture holders or by them individually.¹³ Some authors (see, for example, Raaijmakers, Olthoff 2008, 35) consider these provisions on creditor protection too vague and thus not providing adequate guidance.

Creditors in cross-border mergers were generally protected through the rules on disclosure. Information regarding the evaluation of the assets and liabilities transferred to the company resulting from the cross-border merger are part of the common draft terms.¹⁴ Moreover, the indications of arrangements that are made for the exercise of creditor rights, as well as the address at which complete information may be obtained free of charge, had to be published in the national gazette of the Member State whose national law applied to the merging company.¹⁵ The management or administrative body was required to explain in its report the implications of this cross-border operation not only to the members and employees, but also to the creditors.¹⁶ Although these rules are intended to enable creditors

¹⁰ See Directive 2017/1132/EU, Art. 99 (1).

¹¹ See Directive 2017/1132, Art. 99 (3).

¹² See Directive 2017/1132, Art. 99 (2).

¹³ See Directive 2017/1132, Art. 100.

¹⁴ See Directive 2017/1132 before the 2019 amendments, Art. 122 (k) (former Art. 5 (k) of Directive 2005/56).

¹⁵ See Directive 2017/1132 before the 2019 amendments, Art. 123 (2) (c) (former Art. 6 (2) (c) of Directive 2005/56).

¹⁶ See Directive 2017/1132 before the 2019 amendments, Art. 124 (former Art. 7 of Directive 2005/56).

to understand the consequences of the cross-border operation on their interests, they are not enough since no specific creditor rights are provided in these rules.

According to the study conducted by Bech-Bruun and Lexidale (2013, 53), the rules on creditor protection in the Cross-Border Merger Directive resulted in the adoption of different procedures regarding creditor protection by the Member States (e.g. dissimilar commencement dates, duration consequences, and procedure of the protection), which created an obstacle for carrying out cross-border mergers. Furthermore, some Member States prescribed additional provisions on creditor protection in cross-border mergers, in addition to the rules on creditor protection available in the domestic mergers (Winner 2019b, 63). This was in accordance with the line of thinking that the Member States are authorised to prescribe these additional rules, although that possibility was not expressly mentioned in the Cross-border Merger Directive and therefore might lead to the opposite conclusion – that it was not permitted (Winner 2019b, 63). Unlike the situation with regard to creditors, it was clear from the wording of the Directive that prescribing rules on additional protection for shareholders was an available option.¹⁷ The dilemma of whether the general rule refers to creditor protection in a domestic merger or whether the Member States may adopt additional provisions on creditor protection in a cross-border merger was resolved by the decision of the CJEU in the *KA Finanz AG* case, when the former interpretation prevailed: it was only in reference to the provisions on creditor protection in domestic mergers (Schmidt 2016, 18).¹⁸

Special rules on creditor protection are prescribed in the case of the cross-border transfer of seat of an SE or an SCE and the formation of these entities by a cross-border merger.¹⁹ In the event of the transfer of seat of an SE, creditors are protected through the disclosure of the transfer proposal and the management or administrative report, as well as through the issuance of the certificate by the competent authority of the Member State where the SE has its registered office. The transfer proposal contains any rights provided to the protection of creditors, while the report of the management or administrative body has to explain, amongst others, the implications of

¹⁷ See Directive 2017/1132 before the 2019 amendments, Art. 121 (2).

¹⁸ CJEU, Case 483/14, *Ka Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group*, ECLI:EU:C:2016:205, paras. 60–62.

¹⁹ See Council Regulation (EC) No. 2157/2001 on the Statute for a European Company – EC, OJ L 294 of 10/11/2001, Art. 8 and Arts. 17–31; Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society – SCE, OJ L 207 of 18/8/2003, Art. 7, and Arts. 19–34.

the transfer to the creditors.²⁰ The creditors may examine these documents and obtain copies of them free of charge. The competent authority where the SE has its registered office issues the certificate if, amongst others, the interests of the creditors are adequately protected.²¹ Namely, the creditors are protected in accordance with the national law requirements of the Member State where the SE has its registered office prior to the transfer of seat. This refers to the liabilities that arise prior to the publication of the transfer proposal, although it may be extended to include the liabilities that arise or may arise prior to the transfer, if the Member States choose to do so. Finally, the SE Regulation prescribes jurisdiction continuity for the claims arising before the transfer of seat (see Fuentes Naharro 2019, 43).²² All these creditor protection mechanisms also exist in the case of the transfer of seat of an SCE.²³

The rules on the protection of creditors and holders of bonds of merging companies, prescribed by the law of the Member States governing each merging company in the case of the merger of public limited liability companies, apply also in the case of the formation of an SE by a cross-border merger, taking into account its cross-border nature.²⁴ The indications of arrangements regarding the creditors, together with the address at which complete information may be obtained free of charge, have to be published in the national gazette of that Member State.²⁵ In the case of the formation of an SCE by a cross-border merger, the system of protection of creditors of the cooperative is the same as the one provided in the case of the formation of an SE by a cross-border merger. Namely, the creditors of the merging cooperatives are protected by the rules on creditor protection prescribed by the laws of the Members States involved, as in the case of mergers of public limited liability companies, while the indications of arrangements regarding the creditors, together with the address at which complete information may be obtained free of charge, have to be published in the national gazette of the Member State of which the actual cooperative is a subject.²⁶

²⁰ See Regulation No. 2157/2001, Arts. 8 (2) and (3).

²¹ See Regulation No. 2157/2001, Art. 8 (7).

²² See Regulation No. 2157/2001, Art. 8 (16).

²³ Regulation No. 1435/2003, Arts. 7 (2) (e), (3), (4), (7), and (16).

²⁴ See Regulation No. 2157/2001, Art. 24 (1) (a) and (b).

²⁵ See Regulation No. 2157/2001, Art. 21 (c).

²⁶ See Regulation No. 1435/2003, Art. 24 (1) (c) and Art. 28 (1).

3. RISKS FACED BY CREDITORS

Carrying out a cross-border operation affects the creditors of the company performing or participating in the cross-border operation. One of the consequences of a cross-border conversion is that the assets and liabilities of the company that carried out the conversion become those of the converted company; a cross-border merger by acquisition results in, amongst others, the transfer of assets and liabilities of the company being acquired to the acquiring company, while in the case of cross-border mergers by formation of a new company, the liabilities and assets of the merging companies are transferred to the new company; in the case of cross-border full divisions, the assets and liabilities of the company being divided are transferred to the recipient companies in accordance with the allocation stated in the draft terms, while in the case of partial divisions or divisions by separation, part of the assets and liabilities are transferred to the recipient company or companies, whereas the remaining part continues to be that of the company being divided.²⁷ It is evident that a change of debtor – or at least of the debtor’s financial situation – may be a result of the cross-border operation. Also, the applicable company law may change.

A change of the applicable company law is a serious risk faced by creditors and thus this is a justified reason for prescribing special provisions regarding creditor protection in cross-border operations. Namely, the debtor may be governed by a different company law (Winner 2019b, 61). Generally speaking, the rules in the framework of contract law, company law, insolvency law, and accounting law all form a system of creditor protection (see Fleischer 2006, 30). Although creditor protection is not a specificity of company law, commonly at least some creditor protection rules are a part of it. However, these rules vary in different Member States (Gerner-Beuerle *et al.* 2016, 221). The wider the protection of creditors provided in the company law framework, the greater the likelihood that the change of the applicable company law will negatively affect them (Gerner-Beuerle *et al.* 2016, 221).

²⁷ See Directive 2017/1132, Art. 86r (a), Art. 131 (1) (a) and (2) (a), Art. 160r (1) (a), (2) (a) and (3) (a). Furthermore, there is a special rule for the assets and liabilities of the company being divided that are not allocated under the draft terms and where the interpretation of the draft terms does not make the decision on the allocation possible. In the case of a cross-border full division, they are allocated to all recipient companies, and in the case of a partial division or a division by separation, to all the recipient companies and the company being divided, in proportion to the share of net assets allocated to each of them in accordance with the draft terms. See Directive (EU) 2017/132, Art. 160r (4).

Another considerable risk connected to the cross-border operation is the change of jurisdiction and the applicable law in the case of insolvency (see Winner 2019b, 62). Namely, a change of insolvency law to the benefit of the shareholders and to the detriment of the creditors might follow the change of the location of the registered office and centre of main interest (Bech-Bruun, Lexidale 2013, 52). To conclude, creditors may be negatively affected not only by the different rules on creditor protection in the scope of company law (e.g. capital requirements, directors' liability, member's liability, distribution of profits, lifting the corporate veil), but also by the procedural rules regarding jurisdiction, i.e. change of defendant's domicile and change of presumption of debtor's centre of main interest (Garcimartín, Gandía 2019, 32–33; Davies *et al.* 2019, 208; Enriques, Gelter 2006, 433; Jevremović Petrović 2021, 73).

Even in cases where neither the change of applicable company law nor the change of the debtor occurs, protection may still be needed because of the change in the financial situation of the debtor when creditor interests may be at risk, via the change of the asset base and composition of creditors (see Winner 2019a, 50). This risk is limited to cross-border mergers and divisions: in a cross-border merger, the base of the assets increases as well as the number of creditors, whereas in a cross-border division, the exact opposite happens – the asset base decreases as well as the number of creditors (see Winner 2019a, 50–51). Therefore, cross-border divisions are considered more detrimental to creditors compared to cross-border mergers, bearing in mind that the intensity of the negative effects depends on the financial situation of each of the successor companies (Winner 2019a, 51). The interests of creditors have to be protected, since the assets are divided and allocated to debtors against whom different groups of creditors hold claims, while they have no influence on the distribution of assets and liabilities (Davies *et al.* 2019, 208).

The negative effects are not the same for the creditors of all the companies participating in the cross-border operation. They depend on the solvency and indebtedness of the actual debtor before and after the cross-border operation. Winner (2019a, 50) suggests that some creditors may not be at risk at all, but rather the operation may even affect them positively (e.g. the creditors of a company which merged with a much sounder company). However, if both companies are sound, sharing the increased asset base between all the creditors in the case of cross-border mergers will probably not be detrimental to any of them (see Winner 2019a, 50). Since the financial situation does not change in the cross-border conversion, this operation is less dangerous than a cross-border merger (Davies *et al.* 2019, 208). In fact, it is the least dangerous of the three cross-border operations, regarding

creditors in this sense. The most dangerous one is a cross-border division, when the creditor protection issue is particularly delicate. This is especially true for cross-border division by acquisition. In this case, there are also the dangers related to the cross-border division by formation of new companies, regarding the ratio between the assets and liabilities and the level of liquidity of the successor companies (Alexandropoulou, Winner 2021, 590). Yet, in addition to this, the creditors of the company being divided will also share the same assets with the creditors of the recipient company (Alexandropoulou, Winner 2021, 590). However, the 2019 Directive does not regulate this type of cross-border division.²⁸

In any case, the risks dictate the decision on which creditors should be protected. It is clear that these risks differ according to the cross-border operation at issue. In addition, it is also relevant whether the creditors are voluntary or involuntary. Voluntary creditors may be able to mitigate these risks since they can protect their interest through negative covenants in the lending contract (see Bratton 2006, 55). These creditors may require the debtor to not perform the operation without their approval (commitment clause) or stipulate the acceleration of the loan (acceleration clause) or stipulate the raising of the interest rate as a penalty for performing the operation (Enriques, Gelter 2006, 432–33). Also, the disclosure of the draft terms may influence a potential creditor when deciding whether to enter into a relationship with the company. Therefore, it is important to consider whether the voluntary creditors knew or might have known about the company's intention to undertake a cross-border operation. Unlike voluntary creditors, involuntary (tort) creditors cannot protect themselves in the way mentioned above. Furthermore, even some of the voluntary creditors, especially the smaller ones who are not professionals, may not be able to protect themselves with those covenants. (Winner 2019a, 52). Finally, the interests of the creditors may be in conflict with the interests of other stakeholders. Any distribution to the shareholders who exercised their rights connected to a cross-border operation also creates a risk for the creditors (Winner 2019b, 52–53). Therefore, even overprotection of the minority shareholders may constitute a risk for the creditors.

²⁸ See Directive 2019/2121, recital 8.

4. CREDITOR PROTECTION SYSTEM IN THE NEW 2019 DIRECTIVE

The protection of creditors is deeply rooted in the company law tradition of many Member States; therefore, it is not surprising that it found its way into the 2019 Directive. The system of creditor protection is available only to creditors of the limited liability companies that are formed in accordance with the laws of a Member State and that have their registered office, central administration or principal place of business within the Union, when these companies carry out the cross-border operation. Some of these companies are excluded or may be excluded from the scope of the Directive, which depends on the decision of the Member States. For example, the rules of the Directive do not apply to companies in liquidation when asset distribution to their members has already begun, while the Member States may decide not to apply the rules on cross-border operations – including the ones regarding creditor protection – to companies that are subject to insolvency proceedings or preventive restructuring frameworks.²⁹ The Directive Proposal was stricter in this regard, since it prescribed that companies are not allowed to carry out cross-border operations when they are subject to insolvency proceedings or preventive restructuring proceedings, which are initiated due to the likelihood of insolvency, and during suspension of payment.³⁰ Therefore, the Directive Proposal prevented companies that are insolvent or on the verge of insolvency from carrying out these operations, because of the vulnerability of the creditor interests (see Fuentes Naharro 2019, 44). In this regard, the Proposal was more favourable to creditors.

The new Directive does not provide the explicit protection of debenture holders or holders of securities, other than shares as a special type of creditors in its separate provisions, contrary to the regulation in the case of domestic mergers and domestic divisions, where this is the case (Alexandropoulou 2021, 17).³¹ The lack of a reference to these types of creditors may be interpreted in two ways: that the protection mechanisms available to creditors in general are available to these creditors as well, or that only the protection measures that are available to them in national law apply (Alexandropoulou 2021, 17). Still, some types of creditors are mentioned in the Directive in order to clarify that they may be protected

²⁹ See Directive 2017/1132, Arts. 86a (3) and (4), 120 (4) and (5), and 160a (4) and (5).

³⁰ Directive Proposal, Art. 86c (2) (a), (b) and (c), Art. 120 (4) (a), (b) and (c), and Art. 160d (2) (a), (b) and (c).

³¹ See Directive 2017/1132, Arts. 100, 101, and 146 (5), and Art. 147.

by the provided mechanisms of protection. Namely, the Member States may include current and former employees with occupational vested pension rights and persons receiving occupational pension benefits in the range of protected creditors.³² Also, the interest of public creditors is especially taken into account in the process of issuing the pre-operation certificate. Furthermore, it seems that the EU legislator tends to especially provide protection for voluntary creditors. Recital 24 of the new Directive uses the phrase “creditors who entered into a relationship with the company”. This wording implies that the voluntary creditors are the ones who should be entitled to the right to adequate safeguards. Furthermore, the provision of the Directive sets two conditions regarding the system of protection of creditors, while neither of them is related to the types of voluntary creditors. However, they are indirectly related to the limitation regarding the protection of tort creditors. It may be concluded that the protection is not limited to voluntary creditors who are not debenture holders or holders of securities other than shares. Yet, if debenture holders and holders of securities other than shares were not covered by the new Directive, they would still be protected by the rules of national laws in the case of cross-border mergers or cross-border divisions of a public limited liability company, according to the decision in the *KA Finanz AG* case (Alexandropoulou 2021, 18). Bearing in mind that this protection is limited to creditors of public limited liability companies (although Member States may extend the application of these rules to other companies as well), and that the new Directive does not contain the mentioned limitation, the broader interpretation (i.e. that the protection is available also to these creditors) should be accepted.

Most creditor protection mechanisms are available for each of the three cross-border operations. These may be called general protection mechanisms. Others are intended only for specific cross-border operations, due to their characteristics, and thus may be addressed as special protection mechanisms. The rule on jurisdiction in cross-border conversions and the rule on joint and several liability in cross-border divisions belong to the category of special protection mechanisms. The remaining protection mechanisms are available for each of the cross-border operations.

Besides this criterion of whether or not a creditor protection mechanism is available for each of the operations, there are other criteria that are also relevant for their classification. In legal theory, the protection of creditors is divided between institutional and individual protection, depending on whether any action by a creditor is required. According to Winner (2019b, 55–56), on the one hand, institutional creditor protection does not expect

³² See Directive 2019/2121, recital 24.

any action by the creditors (e.g. capital maintenance rule as a general rule in the framework of company law). On the other hand, individual creditor protection requires action by the individual creditor before or after a specific date (Winner 2019b, 56–57). In general, the EU legislator has opted for the individual protection of creditors in cross-border operations.

Based on the time criterion, the protection mechanisms that may be applied before a specific date are *ex ante* mechanisms of protection, while the ones available after that moment are *ex post* protection mechanisms. The dividing line may be the date when the cross-border operation takes effect or the general meeting of shareholders (Winner 2019b, 57). To put it differently, *ex ante* protection means that protection starts prior to the general meeting with the publication of the draft terms, while in the *ex post* system of protection, the protection commences after the date of the general meeting at which the decision was delivered or after the date when the operation takes effect (Truli 2016, 38). For example, the rule on jurisdiction in a cross-border conversion is applicable after the operation takes effect, as prescribed by the new Directive. Also, the rule on joint and several liability is an *ex post* creditor protection mechanism. On the other hand, the right to obtain adequate safeguards may be exercised within three months from the disclosure of the draft terms and thus should be classified as an *ex ante* mechanism of protection, although it depends on whether the operation took effect or not (Winner 2019a, 56). The new Directive does not prescribe the strongest *ex ante* protection mechanisms – the creditors’ right to block the cross-border operation, nor the exit right to creditors. Although the exit strategy is mostly related to shareholders, creditors may use it as well, if allowed. This implies the immediate reimbursement of their claims but it is not accepted as a mandatory protective provision in the new 2019 Directive (see Biermeyer 2015, 339). Both *ex ante* and *ex post* protection have certain advantages and disadvantages. *Ex ante* protection provides certainty regarding the operation, since the company will know what to expect after the operation takes effect, but this certainly goes hand in hand with delays because it is time consuming (Winner 2019b, 57; Papadopoulos 2012, 535). However, others (Binard, Schummer 2019, 34) suggest that turning to *ex ante* rules on the protection of creditors may lead to greater uncertainty when implementing operations in general. It is irrefutable that *ex post* protection generates no delays, but may create uncertainty for the creditors, who may only take action subsequently (see Papadopoulos 2012, 535–536). Moreover, *ex post* protection may even become available too late for them (Winner 2019b, 57). Furthermore, the duration of the protection period is also an important issue. It is well established that uncertainty and practical problems may arise, particularly if the companies participating in the cross-border operation are situated in Member States that apply different systems

regarding the commencement and duration of the protection (see Truli 2016, 38). The new Directive contains the time framework for the application of creditor protection mechanisms.

Creditor protection mechanisms may be mandatory or optional. If a protection mechanism is mandatory, the Member State has to subscribe to it. On the contrary, the Member States may choose not to prescribe creditor protection mechanisms that are optional. The only optional protection mechanism in the new Directive is the issuance of declaration of solvency.

Some creditor protection mechanisms are not intended only for creditors. These protection mechanisms should be regarded as additional or as a precondition for the protection of creditors in the narrower sense. Moreover, they may be part of the procedure when a company undertakes the cross-border operation, which serves for the protection of all stakeholders and therefore should be addressed as creditor protection mechanisms in the broader sense. These are disclosure rules, the right to be consulted, and the issuance of a pre-operation certificate.

Mechanisms that are created only for creditor protection may be qualified as mechanisms of creditor protection in the narrower sense. The EU legislator set these rules in a single article on creditor protection per each of the cross-border operation separately. These mechanisms are the right to adequate safeguards, the solvency declaration, the rule on jurisdiction in cross-border conversions, and the rule on liability in the terms of cross-border divisions. The protection mechanisms in the broader sense are going to be analysed before the ones in the narrower sense, bearing in mind that the former are needed for the application of the latter. Creditor protection mechanisms in the narrower sense may be divided in two groups: the ones available for all the operations, and the ones available only for a particular operation. The general protection mechanisms will be elaborated before the special ones.

Finally, it is not entirely clear whether the rules on creditor protection are minimum harmonisation rules, i.e. whether the Member States may broaden the range of protected creditors and whether they may provide additional protection mechanisms that are not provided for in the Directive. Winner (2019a, 54) states that the Member States may introduce or maintain other protection mechanisms bearing in mind that the rules on creditor protection are minimum harmonisation rules. Garcimartín and Gandía (2019, 33 n. 56) raise some doubts although they admit that this conclusion may be drawn from the explanatory memorandum that accompanied the Directive Proposal.³³ They explain that this interpretation may lead to the different

³³ See Explanatory Memorandum to the Directive Proposal, 19.

treatment of creditors and thus undermine the purpose of the Directive, as well as that justifying the additional measures of protection would be difficult under the test of proportionality. The Directive's provisions on creditor protection do not contain the words "at least" when defining the range of protected creditors. On the contrary, these words are used when the protection of shareholders is prescribed, which undoubtedly leads to the conclusion that the range of protected shareholders may be broadened. Furthermore, the conditions regarding the range of protected creditors that are prescribed by the adopted Directive did not exist in the Proposal. Therefore, the range of protected creditors is narrowed in the adopted text. Moreover, the Directive contains one optional protection mechanism. This may be an indication that other additional protection mechanisms may not be provided by the national legislators. European Company Law Experts (the ECLE) also consider these rules as minimum harmonisation rules, although they failed to understand why the EU legislator empowered the Member States to provide an optional mechanism of protection if this is the case (Davies *et al.* 2019, 206). Winner (2019a, 54) opines that by prescribing the rules on optional protection mechanisms, the EU legislator intended only to push the Member States to include it in their legislation. Nonetheless, it should not be disregarded that the explanatory memorandum clearly mentions that the Member States may provide additional safeguards, which is a more flexible solution. Providing additional safeguards may comprehend both the range of protected creditors and the mechanism for their protection. Although it is far from clear from the adopted provisions of the new Directive, this interpretation should be accepted.

5. CREDITOR PROTECTION MECHANISMS IN THE BROADER SENSE

There are three creditor protection mechanisms in the broader sense: the rules on disclosure, the right to be consulted, and the issuance of the pre-operation certificate. All three are part of the procedure of the cross-border operation, which may be regarded as pre-conditions for exercising creditor rights in the narrower sense.

5.1. Disclosure

Generally speaking, disclosure is a common creditor protection mechanism. Its protective function is well known and broadly accepted (see, for example, Merkt 2006, 99). Nevertheless, disclosure itself is not enough

for the proper protection of creditors and is thus accompanied by special protection rules. Creditors are protected through the disclosure of the draft terms of the actual cross-border operation – a document which is drawn up by the administrative or management body. The disclosure of the draft terms is a means of informing the creditors about the proposed operation.³⁴ It is a precondition for submitting the comments on the draft terms by the creditors and thus an *ex ante* mechanism of protection. However, protection through disclosure is available not only to creditors but also to other stakeholders. Therefore, it is a general protection mechanism.

The draft terms contain the information relevant to the creditors. Namely, the draft terms of each of the cross-border operations include, amongst others, any safeguards offered to creditors.³⁵ Guarantees and pledges are examples of safeguards that are explicitly mentioned in the 2019 Directive. Creditors who are not satisfied with the protection in the draft terms are expected to try to find a solution with the company before applying for a safeguard to the appropriate authority. Nevertheless, there are other pieces of information that are important to creditors in the case of cross-border mergers or cross-border divisions, aside from the abovementioned content. These elements of information are connected to changes regarding assets and liabilities. The draft terms need to contain the information on the evaluation of the assets and liabilities that are transferred to the company resulting from the merger, or that are going to be allocated to each company involved in the cross-border division, as well as the dates of the merging companies' accounts used to establish the conditions of the merger, or the date of the accounts of the company being divided in the case of cross-border divisions.³⁶ Furthermore, the draft terms of a cross-border division consist of the precise description of the assets and liabilities of the company being divided, together with the statement regarding their allocation between the recipient companies or the retaining of those by the company being divided in the case of partial divisions or divisions by separation, as well as information on the treatment of assets and liabilities that are not explicitly allocated.³⁷

With regard to the cross-border division, the requirement regarding the detailed information mentioned above is at least in part the result of the recognised increased risks for the creditors. Settling the issue of assets and

³⁴ See Directive 2121/2019, recital 12.

³⁵ See Directive 2121/2019, Art. 86d (f), Art. 122 (n) and Art. 160d (q).

³⁶ See Directive 2017/1132, Art. 122 (k) and (l) and Directive 2019/2121, Art. 160d (m) and (n).

³⁷ See Directive 2019/2121, Art. 160d (l).

liabilities that are not included in the draft terms is particularly important in the event of the insolvency of any of these companies. Creditors need all the information related to the assets and liabilities of their debtor, since their interests are reflected in the company's ability to repay the debt once it becomes due. This crucial information is necessary in order for them to decide whether to apply for additional safeguards. The situation in a cross-border conversion is different, since the assets and liabilities remain the same. Still, creditors should be protected because of the change of applicable company law in the case of cross-border conversions.

The protection of creditors through disclosure was more comprehensive in the Directive Proposal compared to the adopted solution.³⁸ Unlike the adopted 2019 Directive, which contains only one mechanism of creditor protection in relation to disclosure, the Directive Proposal also included an additional one. In addition to the protection through the disclosure of the draft terms, creditors were also protected by the disclosure of the independent expert report. According to the Directive Proposal, creditors were presumed not to be prejudiced by the cross-border operation if the independent expert concluded that there was no reasonable likelihood that the rights of creditors would be unduly prejudiced.³⁹ The report containing this conclusion was to be disclosed together with the draft terms. When such conclusion is missing, it may be a signal to creditors that they should apply for adequate safeguards. This solution was abandoned and, therefore, the role of the independent expert is not significant for the protection of creditors.

5.2. The Right to be Consulted

Creditors have a right to be consulted in the form of submitting their comments on the draft terms to the company, no later than five working days before the date of the general meeting.⁴⁰ The company has to disclose the notice regarding this right at least one month prior to the general meeting. The right to be consulted is a creditor protection mechanism in the broader sense, since it is not created for their specific needs and is also

³⁸ Proposal for a Directive Amending Directive (EU) No. 1132/2017 as regards cross-border conversions, mergers and divisions, COM/2018/241 final – 2018/0114 (COD), Brussels, 25 April 2018.

³⁹ See Directive Proposal, Art. 86k (3) (a), Art. 126b (3) (a), and Art. 160m (3) (a).

⁴⁰ See Directive 2017/1132, Art. 86g (1) (b), Art. 123 (1) (b), and Art. 160g (1) (b).

available to shareholders and employees. This is the weakest mechanism of creditor protection. It is unlikely that shareholders will be influenced by the creditors' comments to such a degree that the comments will affect the shareholders' decision regarding the voting on the cross-border operation. Shareholders are naturally concerned about the impact that the operation may have on their rights, and not about the specific claims that creditors may hold vis-à-vis the company. Therefore, the relevance of this protection mechanism is manifested only in the company receiving notice that the creditors are unsatisfied, which would leave enough time for the company and its management to find a solution and ensure the protection of their rights. Also, this may be an early indication that the creditors will likely apply for additional safeguards.

5.3. Issuance of The Pre-operation Certificate

The issuance of the pre-operation certificate is a part of the procedure of each cross-border operation. The competent authority of the Member State will scrutinise the legality of the cross-border operation regarding the parts of the procedure that are governed by its law and issue a certificate if all the conditions are met and all the procedures and formalities are completed. The issuance of the pre-operation certificate is particularly important for public creditors, since the competent authority may check whether there are any unfulfilled obligations towards them and whether these obligations are sufficiently secured, if this is part of the procedure and formalities.⁴¹ As stated in recital 39 of the Directive, its aim is to ensure that the operation does not prejudice the creditors. Also, the proceedings initiated by the creditors may have consequences on the issuance of the pre-certification of the actual operation.⁴² However, it is primarily connected to the public interest and only indirectly to the interests of the different stakeholders (see Alexandropoulou 2021, 11). All in all, this protection mechanism is not far reaching when it comes to creditor protection in general.

⁴¹ Directive 2019/2121, recital 39, and Directive 2017/1132, Art. 86m (1), Art. 127, and Art. 160m (1).

⁴² See Directive 2019/2121, recital 37.

6. CREDITOR PROTECTION MECHANISMS IN THE NARROWER SENSE

Creditor protection mechanisms in the narrower sense are concentrated in the provisions of the 2019 Directive which regulate solely the protection of creditors. Of the four mechanisms, two are available for all cross-border operations, while two are applicable only to one of these operations. Applying for safeguards and the issuance of a solvency declaration are general protection mechanisms that are available for every cross-border operation. One of the special protection mechanisms relates to jurisdiction in the case of cross-border conversions, while the other is the rule on liability that is available only for cross-border divisions.

6.1. The Right to Adequate Safeguards

Safeguards do not have to be provided to the creditors but if they are, the related information must be included in the draft terms. Some doubts regarding the interpretation of the Directive Proposal provision on the content of the draft terms regarding safeguards were raised by the ECLE. Nevertheless, the ECLE concluded that the words of the Directive Proposal should be interpreted as indicating that offering safeguards to creditors is not mandatory (see Davies *et al.* 2019, 206). Bearing in mind that this provision corresponds and is almost identical to the one in the adopted Directive, this position is also valid for the interpretation of the provision of the new Directive regarding the information on safeguards included in the draft terms.

Dissatisfied creditors, i.e. creditors who are not content with the safeguards provided by the company in the draft terms – if provided at all – may apply for adequate safeguards. These creditors should inform the company that they plan to apply to the appropriate authority for adequate safeguards.⁴³ The notification requirement enables them to find a solution with the company, which would make the application for adequate safeguards to the competent authority unnecessary. The Directive left it to the Member State to decide whether the appropriate authority should be administrative or judicial. The distinction between these possibilities should not be underestimated. Court proceedings are usually longer and more expensive compared to

⁴³ See Directive 2019/2121, recital 23.

administrative ones (Kyriakides, Fournari 2020, 214–15). Nevertheless, the Member States should take into account the tradition and particularities of the country at issue when making such decisions.

Still, not all creditors have the right to apply for adequate safeguards. The 2019 Directive sets two conditions regarding the claims of dissatisfied creditors that need to be met in order for them to be entitled to apply for adequate safeguards. The claim has to antedate the publication of the draft terms of the cross-border operation and not to have fallen due at that time. The range of protected creditors is narrowed in comparison with the Proposal, which did not include any of these conditions.⁴⁴

The first requirement tends to exclude persons who became creditors after the disclosure of the draft terms, since they knew about the intended cross-border operation and still decided to enter into agreement with the company (Radović 2018, 652). Clearly, this explanation is limited to voluntary creditors and thus cannot be applied to tort creditors. The second requirement excludes from the system of protection creditors whose claims have fallen due at the said time. The underlying rationale is that they are able to ask for performance at once while being protected by the rules of enforcement (Radović 2018, 653). This requirement indirectly excludes the tort creditors from the range of protected creditors. Namely, their claims are generally considered due from the moment when the damage occurred (Vizner 1978, 832–834) To put it differently, the claims of tort creditors that antedate the disclosure of the draft terms have fallen due before the time of such disclosure. Therefore, the conditions set in this provision limit the range of protected voluntary creditors only in relation to the time criteria, while they indirectly exclude the tort creditors from the system of protection if according to the national law their claims are considered due from the moment when the damage occurred.

Creditors must apply for adequate safeguards within three months of the disclosure of the draft terms of the actual operation.⁴⁵ The competent authority should compare the value and credit quality of the claim against the company before and after the cross-border operation, since these should be equal, while taking into account whether the claim may be brought in the

⁴⁴ See Directive Proposal, Art. 86k (2), Art. 126b (2), and Art. 160m (2).

⁴⁵ See Directive 2017/1132, Art. 86j (1), Art. 126b (1), and Art. 160j (1). The deadline was shorter in the Directive Proposal since creditors were supposed to petition for adequate safeguards within one month of the disclosure of the draft terms. See Directive Proposal, Art. 86k (2), Art. 126b (2), and Art. 160m (2).

same jurisdiction. For their claims to be awarded, creditors need to credibly demonstrate that the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the company.

Credible demonstration appears not to be easy to deliver by creditors. This is particularly true for proving that the satisfaction of creditors is at stake. The new Directive does not reveal what that means. Although this requirement may not be connected to the financial situation of the company in the case of cross-border conversions, since the assets and the liabilities of the company remain the same, it should be interpreted as such in cross-border mergers and divisions. This interpretation is in accordance with the rules on domestic mergers and divisions, where the financial situation is explicitly mentioned. Namely, creditors are protected if the protection is necessary due to the financial situation of the merging company, or of the company being divided and of the company to which the obligation is to be transferred.⁴⁶ It may be concluded that the wording “at stake” should be understood as referring to the financial situation of the company at issue, in cases of cross-border mergers and cross-border divisions. For example, the claims may be at stake when the basic capital of the company undergoing the cross-border operation is going to be decreased as a result of the cross-border division, or when a company merges with another whose financial situation is comparatively worse (see Radović 2018, 655). A credible demonstration that the creditors did not obtain adequate safeguards should include the presentation of the information regarding the safeguards provided in the draft terms, if there is one, followed by the description of the claim and the security, if it exists, together with an explanation why the additional safeguard is needed. Furthermore, obtaining the safeguard depends on whether the cross-border operation has taken effect or not. Namely, the safeguard may be obtained only if the cross-border operation takes effect.⁴⁷ To conclude, the decision will depend on the result of comparing the financial situation of the debtor before and after the operation. This explanation regarding the words “at stake” is not too helpful with regard to cross-border conversions, so it can be expected that creditors will hardly succeed in complying with

⁴⁶ See Directive 2017/1132, Art. 99 (2) and Art. 146 (2).

⁴⁷ The date on which the cross-border operation takes effect is determined by the law of the departure Member State in the case of cross-border conversions, by the law of the Member State to which the company resulting from the cross-border merger is a subject in the case of cross-border mergers, and by a Member State to which the company being divided is subject in the case of cross-border divisions. See Directive 2017/1132, Art. 86q, Art. 129, and Art. 160q.

this request in that specific cross-border operation. This is especially the case bearing in mind that the special rule on jurisdiction is a protection mechanism available to creditors only for this operation.

Finally, the adopted text of the Directive differs significantly from the one of the Proposal. The right to adequate safeguards was not available to creditors, i.e. they were considered not to be prejudiced in two alternative situations.⁴⁸ First, the creditors were presumed not to be prejudiced if the independent expert concluded that there was no reasonable likelihood that the rights of creditors would be unduly prejudiced when the company disclosed the report together with the draft terms. Second, creditors may not be awarded the additional safeguard when they are offered a right to payment and if the right to payment is of at least an equivalent value to the original claim, if it may be brought forward in the same jurisdiction as the original claim and if its credit quality is at least commensurate with the original claim. As noted by the ECLE, the Proposal did not indicate who should assess the credit quality and this exception is not suitable for cross-border conversions, since the change of assets and number of creditors does not occur (Davies *et al.* 2019, 207). This concept was abandoned.

6.2. Solvency Declaration

The solvency declaration is a statement of the management or administrative body of the company carrying out a cross-border operation declaring that they are not aware of any reason why the company after the conversion takes effect in the case of cross-border conversions, the company resulting from the merger in the case of cross-border mergers, or any recipient company in the case of full divisions and the company being divided in the case of partial divisions, would not be able to meet its liabilities or the liabilities allocated to them in accordance with the draft terms. Generally, this mechanism of protection tends to protect creditors from the risk of insolvency after the cross-border operation.⁴⁹ It is a declaration regarding the financial status of the company being converted, or of each of the merging companies or of the company being divided, no earlier than one month before the disclosure of that declaration.⁵⁰ The statement has to be based on the information available to the management or the administrative body at

⁴⁸ See Directive Proposal, Art. 86k (3) (a) and (b), Art. 126b (3) (a) and (b), and Art. 160m (3) (a) and (b).

⁴⁹ See Directive 2019/2121, recital 25.

⁵⁰ See Directive 2121/2019, Art. 86j (2), Art. 126b (2), and Art. 160j (3).

the date of the declaration. The body competent to issue the declaration is required to make reasonable inquiries in order to determine the financial status of the company.

As previously mentioned, this protection mechanism is optional. If the Member State opts to require the drafting of a solvency declaration, the company has to publish it together with the draft terms no more than one month before the general meeting. Furthermore, in the case of cross-border mergers, the solvency statement should be the same for all merging companies, bearing in mind that it should be published together with the common draft terms (Jevremović Petrović 2020, 269). If the laws of the Member States to which the merging companies are subjects have chosen different approaches, in a manner that this protection mechanism is not available in each of the Member States, the issuing of a solvency declaration would still be required. The wording of the Directive is clear – the Member States may require this from each of the merging companies. If this requirement is not met, it might be considered a lack of the procedure. Also, this is in accordance with the private international law rule on cumulative application of national laws (Jevremović Petrović 2020, 269).

Bearing in mind that the solvency declaration may be inaccurate or misleading, the Member States should provide rules on liability of the members of the management or administrative bodies. These rules should be detailed, which is especially important in the case of cross-border mergers, where this declaration is the same for all merging companies. Although the directors of one company may not know enough about the financial status of the other merging company, they may still be liable (see Jevremović Petrović 2020, 269). However, the provisions of the 2019 Directive do not set any rules regarding liability. Yet, in recital 25, the Directive provides the general instruction that penalty and liability have to be effective and proportionate in accordance with the EU law.⁵¹

Finally, opting for this protection mechanism may also produce some negative effects. The directors may decide not to proceed with the operation in order to avoid possible liability connected to the signing of the declaration

⁵¹ The rules on the liability of directors where there is a likelihood of insolvency are not harmonised. Nevertheless, the rule regulating the duties (but not the liability) of the directors regarding their actions during that period is set in Article 19 of Directive 2019/1023 (Directive 2019/1023/EU on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive 2017/1132/EU (Directive on restructuring and insolvency), OJ L 172 of 26/6/2019).

of solvency (Alexandropoulou 2021, 19). However, this deterring effect may be regarded as positive from the point of view of the creditors. Furthermore, proceeding with the operation while providing protection for the directors will lead to the increase of costs connected to the fees for consultants and D&O insurance policies (Alexandropoulou 2021, 19). In conclusion, its optional nature and the under-regulation regarding liability make this protection mechanism weak and not too attractive for the Member States.

6.3. Jurisdiction

The creditors of a company performing a cross-border conversion are additionally protected by the special rule on jurisdiction. There is only one requirement regarding the creditor's claim that has to be met – the claim needs to antedate the disclosure of the draft terms of the cross-border conversion. All creditors whose claims antedate the disclosure of the draft terms may institute proceedings against the company in the departure Member State within two years of the cross-border conversion takes effect.⁵² To put it differently, creditors may sue the company in the Member State of its origin. This protection mechanism applies to all creditors whose claims became due in the period of two years from the cross-border conversion taking effect (same as Alexandropoulou 2021, 19). This is significant for smaller creditors who did not protect themselves by choice-of-forum clauses (Winner 2019a, 60).

This possibility should be without prejudice to the rules on jurisdiction set in Union law, national law, or arising from a contract. It is an additional rule to other rules on the choice of jurisdiction. Creditors may not use this protection mechanism when jurisdiction is exclusive according to Regulation (EU) No. 1215/2012 (Alexandropoulou 2021, 20).⁵³ The reason why this protection mechanism is available only in cross-border conversions may be that the EU legislator considered this operation more dangerous than others since the applicable law may change without the transfer of assets (Winner 2019a, 60).

⁵² See Directive 2019/2121, Art. 86j (4).

⁵³ Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20/12/2012 (Brussels I-bis Regulation).

6.4. Joint and Several Liability

In the case of cross-border divisions, a special protection rule is provided for creditors whose claims are not settled by the company to which the obligation is allocated. This mechanism of protection is designed to counteract the specific risks faced by creditors in the case of cross-border divisions performed by their debtors. The draft terms of the cross-border division have to contain the information on which company is liable to which creditor. Namely, if a creditor of the company being divided does not obtain satisfaction from the company to which the liability is allocated, the other companies involved – i.e. the recipient companies in a full division and the company being divided in the case of partial division and divisions by separation, will be jointly and severally liable with the company to which the subsidiary liability is allocated.⁵⁴ Therefore, the creditor needs to try to settle with the main debtor – the company to which the liability is allocated – before demanding fulfilment from the other debtors. Only if the main debtor fails to fulfill its obligation, the creditor may receive satisfaction from the other liable companies. The maximum amount of joint and several liability of any company involved in this cross-border operation is limited to the value of the net assets allocated to it at the date on which the division takes effect.

Unlike in the case of domestic divisions of public limited liability companies where many different options were available, the EU legislator decided to prescribe two mandatory creditor protection mechanisms in cross-border divisions: the right to obtain safeguards, and the rule on joint and several liability of the companies involved in the cross-border division, when the obligation is not fulfilled by the main debtor (subsidiary liability), plus the optional mechanism regarding the solvency declaration.⁵⁵ Also, the legislator did not refer to the complicated system of protection in domestic divisions, where the right to obtain the additional safeguard may be combined with the rule on joint and several liability when the main debtor does not fulfill its obligation or with the rule on joint and several liability of the recipient companies for the liabilities of the company being divided, which is not a subsidiary liability. Bearing in mind the complicated system of creditor protection in national divisions, the adopted system of creditor protection in cross-border divisions should be welcomed.

⁵⁴ See Directive 2019/2121, Art. 160j (2).

⁵⁵ Compare Directive 2019/2121, Art. 160j (2), and Directive 2017/1132, Art. 146.

7. CONCLUSION

Previous rules on cross-border mergers were improved by the new Directive while completely new rules were prescribed for the other two cross-border operations. Nevertheless, the rules of the 2005 Directive on cross-border mergers were a foundation for future development regarding the rules on all three cross-border operations. The European legislator chose a technique of regulating them one by one while not combining domestic with cross-border operations. The protection of creditors is mandatory in all three cross-border operations. The protection is individual, since creditor should take action in order to be protected. Some of these mechanisms are *ex ante* protection mechanisms, while others are *ex post* mechanisms of protection. All the potential risks for creditors connected to the cross-border operations are clearly considered by the EU legislator. Namely, as a result of a cross-border operation, the debtor and/or its financial situation may be changed, as well as the applicable company law. Regarding the range of protected creditors, it is not completely clear whether the rules on creditor protection cover all types of creditors. On the one hand, the protection is not limited to voluntary creditors who are not debenture holders or holders of securities other than shares while, on the other hand, it seems that the tort creditors are indirectly excluded from the system of protection. The interpretation of the provisions of the Directive, in their linguistic meaning, leads to the conclusion that the range of protected creditors may not be broadened and that additional protection mechanisms not provided for in the Directive may not be prescribed by the national legislators. Nevertheless, the explanatory memorandum of the Directive Proposal makes it clear that this was not the intention of the EU legislator. The linguistic interpretation should not prevail, i.e. the range of protected creditors may be broadened and additional safeguards may be provided.

Creditor protection mechanisms provided for in the Directive may be divided into protection mechanisms in the broader sense and the ones in the narrower sense. The former are not intended only for creditors and they serve as pre-conditions exercising of creditor rights. These are the rules on disclosure, the right to be consulted, and the issuance of the pre-operation certificate. The procedure of the cross-border operation itself comprises of the creditor protection mechanisms in the broader sense. Protection through disclosure relates only to the disclosure of the draft terms. Although the disclosure itself is not enough for the proper protection of creditors, it is the most important mechanism in the broader sense, since it is a precondition for the application of other protection mechanisms. Protection through the

right to be consulted is the weakest among them. The creditors' comments may be a way to inform the company that they are not satisfied with the offered safeguards, which would leave enough time for the company to find an adequate solution that is acceptable to the creditors. The issuance of the pre-operation certificate by the competent authority is an indirect protection mechanism, which is relevant mostly for public creditors. Therefore, the main protection mechanisms are the latter – the protection mechanisms in the narrower sense – which are created exclusively for the protection of the interest of the creditors. Most of these mechanisms are general, since they are available in all three cross-border operations. However, some apply only to particular ones.

Protection in the form of applying for safeguards is provided only if certain conditions are met. Namely, claims should antedate the disclosure of the draft terms and they should not have fallen due at the time of disclosure, while their satisfaction should be at stake. Only the creditors who did not obtain an adequate safeguard from the company may be awarded this protection. Besides being not secured or being not secured enough, the satisfaction of their claims needs to be at stake, i.e. threatened or at risk by the cross-border operation. This should be credibly demonstrated by the creditors. The meaning of the words “at stake” is particularly problematic in the case of cross-border conversions and that is why it may be expected that this protection mechanism will not be very helpful, at least in such cases. Protection in the form of the issuance of the solvency declaration is the weakest mechanism of protection in the narrower sense, because it is optional, while no detailed rules regarding the liability of the administrative or management body are provided. The special rule on jurisdiction, which enables creditors to initiate the proceedings in the Member States of the company's origin, within two years of the operation taking effect, is available only in cross-border conversions. This is possible when jurisdiction is not exclusive and where the prorogation clause is not prescribed in the contract. Therefore, it is considered useful for small and non-professional creditors, who might be exposed to costs and thus be unwilling to sue in a different country. Finally, the last protection mechanism available only in cross-border divisions is subsidiary joint and several liability of other recipient companies with the company to which the liability is allocated, in the case of full divisions, and of companies being divided, in the case of partial divisions or divisions by separation. Unlike the complex rules on joint and several liability in domestic divisions, this rule is clear and should thus be welcomed.

Although there is room for improvement regarding the protection of creditors, and especially regarding the need for clarification concerning the range of protected creditors and the meaning of the words “at stake”,

with regard to the satisfaction of claims in cross-border conversions, it is undeniable that the adopted system of protection is well designed. To conclude, the interests of creditors are well protected in each of the cross-border operations.

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NESAGLASNOST RODITELJA O PROMENI PREBIVALIŠTA DETETA – PROCESNOPRAVNE DILEME I MOGUĆA REŠENJA

U slučaju kada roditelj koji ne vrši roditeljsko pravo nije saglasan sa promenom prebivališta deteta, odnosno preseljenjem u inostranstvo sa roditeljem koji samostalno vrši roditeljsko pravo, naši sudovi, po pravilu, zauzimaju stav da isključivo zbog toga što nije dao saglasnost roditelja koji ne vrši roditeljsko pravo treba delimično lišiti roditeljskog prava i time omogućiti da o promeni prebivališta drugi roditelj odlučuje samostalno. U teoriji porodičnog prava takva praksa je kritikovana kao neprihvatljiva, pa se nameće potreba da se istraže i druge procesne mogućnosti u tim situacijama. U ovom radu se analiziraju razlike predmeta spora u postupku za delimično lišenje roditeljskog prava i predmeta spora u slučaju kada nema saglasnosti

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o promeni prebivališta, ispunjenost uslova za vođenje postupka u sporu za zaštitu prava deteta koji je predviđen Porodičnim zakonom i vrsta zaštite koja bi bila primerena rešenju tih sporova.

Ključne reči: *Delimično lišenje roditeljskog prava. – (Ne)saglasnost roditelja sa promenom prebivališta deteta. – Postupak. – Sudska zaštita.*

1. UVOD

Zbog ekonomske krize, otežanog zapošljavanja i finansijskih teškoća koje iz toga proizilaze, sve je češća pojava preseljenja deteta/dece u inostranstvo sa roditeljem koji samostalno vrši roditeljsko pravo. Ne treba, međutim zanemariti ni okolnosti lične prirode – zaključenje novog braka ili zasnivanje nove vanbračne zajednice roditelja ili želju za povezivanjem sa porodicom. Pravno, a posebno procesnopravno, u tim slučajevima je sporno kada se preseljenju (promeni prebivališta) protivi roditelj koji ne vrši roditeljsko pravo jer se u praksi naših sudova u tim situacijama pribegava delimičnom lišenju roditeljskog prava roditelja koji to pravo ne vrši kao jedinoj alternativni. Takav pristup sudske prakse zapažen je i kritikovan u našoj pravnoj teoriji desetak godina unazad (videti, na primer, Draškić 2012, 366–381; Draškić 2020b, 264–266; Arsić, Banić 2018, 156–157). Pri tome, preseljenje deteta u drugu državu neuporedivo nepovoljnije utiče na održavanje ličnih odnosa roditelja koji ne vrši roditeljsko pravo i deteta, kao i na pravo na poštovanje porodičnog života u odnosu na promenu prebivališta u okviru države ili u slučaju putovanja deteta bez promene prebivališta – iz turističkih ili zdravstvenih razloga, zbog ekskurzija, takmičenja i sl. Deca koja su navršila 15. godinu života i koja su sposobna za rasuđivanje imaju pravo da odluče sa kojim će roditeljem živeti¹, pa je predmet analize u radu preseljenje dece mlađe od tog uzrasta.

U procesnim odredbama Porodičnog zakona Republike Srbije mogu se prepoznati adekvatniji, manje rigidni pristupi razrešenju problema nesaglasnosti sa preseljenjem u odnosu na pristup sudova koji se svodi na delimično lišenje roditeljskog prava roditelja koji to pravo ne vrši. Naj-prihvatljivije rešenje je primena pravila o posebnom parničnom postupku za zaštitu prava deteta (PZ, čl. 261–273), koji je i predviđen kao procesni mehanizam zaštite onih prava koja PZ priznaje detetu, a nisu zaštićena

¹ Porodični zakon – PZ, *Službeni glasnik RS* 18/2005, 72/2011 – dr. zakon i 6/2015, čl. 60, st. 4.

primenom pravila drugih postupaka. Kako se, međutim, roditelju koji vrši roditeljsko pravo ne može uskratiti pravo na podnošenje tužbe za delimično lišenje roditeljskog prava, neophodno je razmotriti i procesni položaj, odnosno mogućnosti kojima tuženi (roditelj koji ne vrši roditeljsko pravo) raspolaže u ovom slučaju. Jedna od mogućnosti je i iniciranje preispitivanja (izmene) načina vršenja roditeljskog prava. Takođe, moraju biti razmotrena i uzeta u obzir i oficijelna ovlašćenja suda, odnosno odstupanje od dispozitivne maksime. Sve to upućuje na neophodnost sagledavanja problema u širem, materijalnopravnom i procesnopravnom kontekstu. Predložena rešenja, pak, moraju pružati adekvatnu zaštitu deci, odnosno biti u najboljem interesu deteta, ali i roditelja koji su u sporu, odnosno ne mogu postići saglasnost, ne samo o promeni prebivališta, već i o drugim pitanjima koja bitno utiču na život deteta (PZ, čl. 78, st. 3).

2. VRŠENJE RODITELJSKOG PRAVA, NADLEŽNOST ZA REŠAVANJE SPOROVA I (NE)SAVESNOST

Osnovni princip vršenja roditeljskog prava koji je usvojen u zakonima koji regulišu materiju porodičnopравnih odnosa jeste zajedničko i sporazumno vršenje. Taj model PZ bezuslovno prihvata odredbom člana 75, st. 1 u okolnostima kada roditelji vode zajednički život. U stavu 2 istog člana takav pristup se predviđa i u situaciji kada roditelji ne vode zajednički život, ali uz uslov da su zaključili sporazum o zajedničkom vršenju roditeljskog prava i da je sud utvrdio da takav sporazum odgovara ostvarenju principa najboljeg interesa deteta. Ni u uslovima u kojima jedan roditelj vrši roditeljsko pravo (PZ, čl. 77) drugi roditelj nije potpuno lišen prava i dužnosti koje čine sadržinu roditeljskog odnosa. Naime, na osnovu odredbe člana 78, st. 3 roditelj koji ne vrši roditeljsko pravo i dalje ima pravo i obavezu da izdržava dete, da sa detetom održava lične odnose i da sa roditeljem koji samostalno vrši roditeljsko pravo zajednički i sporazumno odlučuje o pitanjima koja bitno utiču na život deteta. U članu 78, st. 4 navode se neka od tih pitanja – obrazovanje deteta, preduzimanje većih medicinskih zahvata nad detetom, promena prebivališta deteta i raspolaganje imovinom deteta velike vrednosti, a iz stilizacije zakonskog teksta sledi da je nabranjanje *exempli causa* te da sud može *in concreto* da ocenjuje, kao faktičko pitanje, šta je od bitnog značaja za život deteta (Draškić 2020a, 287).

Ukoliko roditelji ne mogu da postignu sporazum o bilo kojem od pitanja koja bitno utiču na život deteta, primarno se primenjuju pravila PZ o preventivnom i korektivnom nadzoru nad vršenjem roditeljskog prava od organa starateljstva (PZ, čl. 79–80). Međutim, u teoriji se ističe da, prema PZ,

postoji samo jedna situacija u kojoj organ starateljstva u okviru preventivnog nadzora može da donese odluku o pitanju koje bitno utiče na život deteta – može odlučiti o imenu deteta kada roditelji ne mogu da se sporazumeju (PZ, čl. 344, st. 4; Vlašković 2018, 211). Istovremeno, dobrovoljnost primene posredovanja ograničava domete tog postupka.² Ukoliko takvi zakonom predviđeni metodi ne budu dali rezultat, odnosno ako se ne postigne sporazum, spor koji postoji između roditelja i koji se (kao i u drugim situacijama) negativno odražava na ličnost i razvoj deteta, njegova prava i interese, rešavaće se sudskim putem.

Pribegavanje delimičnom lišenju roditeljskog prava roditelja koji ne vrši roditeljsko pravo isključivo zbog toga što odbija da dâ saglasnost za promenu prebivališta deteta svakako je problematično. Naime, prema odredbi čl. 82, st. 1 PZ, delimično lišenje je posledica nesavesnog vršenja prava ili dužnosti iz sadržine roditeljskog prava. Savesnost, kao pravni standard u vršenju roditeljskog prava, mogla bi se odrediti kao postupanje roditelja u skladu sa dužnostima i obavezama na način prihvatljiv u konkretnim okolnostima i prema shvatanju sredine. Kako je nesavesnost u vršenju roditeljskih prava i dužnosti uslov za delimično lišenje roditeljskog prava, sud je dužan da *in concreto* ispita da li su odnos roditelja prema detetu i način njegovog vršenja roditeljskih dužnosti i prava pre svega u skladu sa zakonskim pravima deteta i njegovim mogućnostima.³ Na osnovu odredaba PZ i odgovarajućih normi međunarodnog prava, pre svega Konvencije o pravima deteta, svako dete ima, uz zakonska ograničenja, brojna prava iz kojih proizilazi obaveza roditelja da, u skladu sa svojim mogućnostima, obezbede detetu uslove za ostvarivanje tih prava, što podrazumeva i ulaganje dodatnih napora radi stvaranja uslova za pravilan rast i razvoj deteta.

Nesavesnost u vršenju roditeljskih prava se ne pretpostavlja već je dokazuju roditelji ili druga lica ovlašćena za pokretanje postupka za lišenje roditeljskog prava (PZ, čl. 264, st. 2). Primena istražnog načela uslovljava obavezu suda da samostalno istražuje i činjenice koje stranke nisu iznele u postupku, pa i kada se tiču (ne)savesnosti roditelja (PZ, čl. 205). Kako se pravni standard savesnosti u vršenju roditeljskog prava konkretizuje, odnosno dobija određenu sadržinu u praksi sudova, to podrazumeva svestran, sveobuhvatan pristup sudova i nesporno utvrđivanje svih činjenica koje se odnose na

² Prema čl. 80, st. 2, t. 2 PZ, organ starateljstva upućuje na posredovanje. Zakon o posredovanju u rešavanju sporova, *Službeni glasnik RS* 55/14, govori o posredovanju u porodičnim sporovima (čl. 3, st. 2), a dobrovoljnost je određena u članu 2.

³ Rešenje Višeg suda u Požarevcu 1 GžZ 7/19, 20. februar 2019, *Bilten Višeg suda u Požarevcu* 7/2019, Intermex, Beograd.

pristup vršenju roditeljskog prava. Savesno i brižljivo postupanje roditelja u vršenju roditeljskog prava podrazumeva ulaganje posebnog napora i truda da „lični kontakt sa detetom bude adekvatan, prilagođen potrebama i uzrastu maloletnog deteta, želi deteta da bude voljeno i prihvaćeno u sredini u kojoj živi“.⁴ Predmet procene suda je i privrženost roditelju (roditeljima), bliskost, otvorenost, neposrednost, iskrenost i nežnost u odnosu roditelja i deteta i uzajamna ljubav i toplina.⁵ Posebno se moraju procenjivati motivi roditelja za određeno ponašanje, na primer, da je autentičan motiv oca da se detetu zabrani da poseduje putnu ispravu bio da nastavi sukob sa majkom deteta, a ne želja da dete ostane u Srbiji.⁶ Posedovanje ličnih i roditeljskih kapaciteta da se odgovori razvojnim potrebama deteta u skladu sa uzrastom, postavljanje granica i pravila ponašanja, istrajnost u zahtevima koji se postavljaju detetu, fleksibilnost u postupanju uz uvažavanje ličnosti deteta i konteksta u kome dete pokazuje određeno ponašanje, prepoznavanje razvojnih i individualnih potreba deteta i osetljivost na njih, obezbeđenje optimalno stabilne sredine za razvoj kapaciteta deteta, spremnost roditelja da razvija svoje kompetencije u ostvarenju te uloge, samo su neki od kriterijuma o kojima se mora voditi računa kada se odlučuje o savesnosti u vršenju roditeljskog prava.⁷ Odluku o delimičnom lišenju roditeljskog prava sud može doneti isključivo ako nesporno utvrdi da roditelj zanemaruje ili nesavesno vrši roditeljske dužnosti i time ugrožava dobrobit deteta u određenom domenu života.⁸

3. PRAKSA SUDOVA U REPUBLICI SRBIJI

Sudovi u Republici Srbiji, što je već pomenuto, skoro bez izuzetka zauzimaju stav da se u slučaju spora roditelja o promeni prebivališta deteta roditelj koji ne vrši roditeljsko pravo „mora“ delimično – u odnosu na pravo na promenu prebivališta, lišiti roditeljskog prava kako bi se drugom roditelju omogućilo da samostalno donese odluku o tome. Pri tome se u tužbama najčešće i kao jedini razlog lišenja navodi okolnost odbijanja davanja saglasnosti, a u odlučivanju se polazi od odredbe čl. 82, st. 4 PZ, koja „omogućava“ delimično

⁴ Presuda Vrhovnog kasacionog suda Rev. 2249/2017, 26. oktobar 2017.

⁵ Presuda Vrhovnog kasacionog suda Rev. 3228/2019, 18. septembar 2019.

⁶ Presuda Vrhovnog kasacionog suda Rev. 3120/2017, 27. decembar 2017.

⁷ Presuda Vrhovnog kasacionog suda Rev. 6201/2020, 20. januar 2021.

⁸ Presuda Vrhovnog kasacionog suda Rev. 3200/2017, 27. decembar 2017.

lišenje roditelja koji ne vrši roditeljsko pravo u pogledu održavanja ličnih odnosa sa detetom i prava da odlučuje o pitanjima koja bitno utiču na život deteta, kada razlozi za lišenje budu nesporno utvrđeni.

U jednoj od ranijih odluka u postupku po reviziji⁹, koja je analizirana i kritikovana u literaturi (Draškić 2012, 366–381), Vrhovni kasacioni sud je izričito naveo da „sud nije ovlašćen da umesto roditelja odlučuje o prebivalištu maloletnog deteta ili da donosi odluke koje zamenjuju zajedničke odluke roditelja o bitnim pitanjima vršenja roditeljskog prava – koja utiču na život maloletnog deteta, a preventivni i korektivni nadzor nad vršenjem roditeljskog prava obavlja organ starateljstva, a ne sud“. Pri tome Vrhovni kasacioni sud nije odbio pružanje sudske zaštite¹⁰ već je vratio pravnu stvar na ponovno odlučivanje prvostepenom sudu, uz nalog da otkloni nedostatak, odnosno „naloži uređenje tužbe u pogledu zahteva protivtužbe koji može biti usmeren na delimično lišenje roditeljskog prava, a ne na donošenje odluke koja zamenjuje saglasnost roditelja za odvođenje maloletnog deteta u inostranstvo ili da o delimičnom lišenju roditeljskog prava odluči po službenoj dužnosti“.¹¹ Isti stav Vrhovni kasacioni sud je zauzeo i u odgovoru na sporno pravno pitanje iz 2017. godine (Apelacioni sud u Novom Sadu 2018, 34–35).¹²

⁹ Rešenje Vrhovnog kasacionog suda Rev. 2557/06, 1. mart 2007.

¹⁰ Bilo je i slučajeva odbacivanja tužbe jer zahtev koji glasi da se tuženi obavezuje da da saglasnost za napuštanje teritorije Srbije ne uživa sudsku zaštitu (videti, na primer, Rešenje Višeg suda u Novom Sadu Gž2. 36/10, od 11. oktobra 2010, u kojem se navodi: „Prvostepeni sud nije imao zakonskih mogućnosti da udovolji zahtevu tužilaca, jer tako postavljeni tužbeni zahtev ne može biti predmet sudske zaštite.“).

¹¹ Postavlja se, međutim, pitanje zašto se zahteva „uređenje“ zahteva tužbe, odnosno protivtužbe, kada sud može da odlučuje o tom pitanju *ex officio*, a onda i o kakvom „uređenju“ je reč kada se potpuno menja tužbeni (protivtužbeni) zahtev, odnosno nalaže pravo objektivno preinačenje? O tome Poznić, Rakić Vodinelić 2015, 325.

¹² Suprotan stav iznet je, prema Draškić (2020b, 265 fn. 581), u projektu jedne uticajne evropske nevladine organizacije: „Kada među roditeljima nema saglasnosti o nekom važnom pitanju koje se tiče deteta, a za čije rešavanje je potrebna saglasnost oba roditelja, nadležno telo (sud) će pokušati da se među roditeljima postigne sporazum ako je to ikako moguće, u suprotnom, nadležni organ ovlastiće jednog od roditelja da donese odluku ili će odluku doneti sam organ (princip 3.14.3)“. Takođe, prema Preporuci CM/rec(2015)4 (*Recommendation CM/Rec(2015)4 of the Committee of Ministers to member States on preventing and resolving disputes on child relocation*, Committee of Ministers of the Council of Europe, 11 February 2015, Dispute resolution [6]): „Roditelji ili drugi koji imaju roditeljske odgovornosti imaju pravo da iznesu bilo koji nerešen spor u vezi preseljenja deteta pred nadležni organ kako bi odlučio.“ Pod „nadležnim organom“ se, pak, podrazumeva sud ili administrativni organ – Definitions (c). <https://rm.coe.int/16807096c9>, poslednji pristup 20. februara 2022.

Nešto šire obrazloženje tog stava nalazimo u Rešenju Apelacionog suda u Novom Sadu¹³ koje je doneto u postupku po žalbi, u kojem se navodi: „Sud odlučuje o pravima i dužnostima iz sadržine roditeljskog prava roditelja koji ne vrši roditeljsko pravo samo ako su ispunjeni uslovi da se u tom delu roditelj liši roditeljskog prava ili pozove na vršenje tih prava i dužnosti, da je pravo roditelja koji ne vrši roditeljsko pravo izvorno zakonsko pravo i sud o tom pravu ne treba da donosi odluku, ako nisu ispunjeni uslovi da se u tom delu roditelj liši roditeljskog prava ili pozove na vršenje tih prava i dužnosti što bi bio predmet sudskog odlučivanja. Stoga, sud o ovim pravima i dužnostima ne treba da odlučuje, kada nisu kompromitovana, jer izviru iz Porodičnog zakona i podrazumevaju se ali, nasuprot navodima žalbe, tuženi to pravo i dužnost ima, a intervencija tužilje, kao roditelja koji vrši roditeljsko pravo, može da se odnosi samo na situacije kada bi tuženi nesavesno vršio ili zanemarivao vršenje tog prava.“

Najvažniji zaključak tih primera je da naši sudovi smatraju da nisu nadležni da svojom odlukom „zamene“ sporazum roditelja. Iz obrazloženja odluka zaključuje se da su sudovi u sporu po tužbama za delimično lišenje roditeljskog prava procenjivali šta je u najboljem interesu deteta, što im je i obaveza. Tako je, na primer, ocenjeno da protivljenje davanju saglasnosti nije u najboljem interesu deteta zato što je „dete u potpunosti upućeno na majku, u dobrim odnosima sa njenim sadašnjim suprugom i adaptirano na novu životnu sredinu“¹⁴, pa je stoga promena prebivališta u najboljem interesu deteta, odnosno da nad svim drugim interesima i težnjama preteže interes maloletnog deteta. Takav pristup je, međutim, moguće primeniti isključivo u situacijama kada stvarno postoje razlozi za delimično lišenje roditeljskog prava, ali ne i u suprotnim. Ako u pomenutoj situaciji dete nije isključivo upućeno na roditelja koji samostalno vrši roditeljsko pravo, ako se nije dobro prilagodilo novoj sredini ili, uopšteno, nema razloga za delimično lišenje, pa se problem ne rešava nalogom da se tužba „uredi“ tako da zahtev glasi na delimično lišenje. I dalje nema odluke o promeni prebivališta jer je zahtev za lišenje odbijen.

Okolnosti na koje se sudovi pozivaju u obrazloženjima odluka ne upućuju nesporno na nesavesnost roditelja koji ne vrši roditeljsko pravo, ali ga ipak delimično lišavaju roditeljskog prava u odnosu na promenu prebivališta. Tako se, na primer, u jednoj odluci¹⁵ izričito konstatuje da „upravo imajući

¹³ Rešenje Apelacionog suda u Novom Sadu Gž2. 716/2013, 10. decembar 2013.

¹⁴ Presuda Vrhovnog kasacionog suda Rev. 3200/17, 27. decembar 2017.

¹⁵ Presuda Apelacionog suda u Beogradu Gž. 359/11, 11. maj 2011, *Bilten Apelacionog suda u Beogradu* 3/2011, 156–158.

u vidu najbolji interes deteta i protivljenje tuženog da mal. K. sa majkom otputuje i boravi određeni period u SAD, ukazuje na nesavesnost tuženog u vršenju roditeljskog prava“. Sud je zapravo oslobodio tužilju obaveze da dokaže nesavesnost tuženog, a nije je nesporno utvrdio ni primenom istražnog načela. Ili, kako je u teoriji uočeno (Draškić 2020 b, 265), sud je isključivo na osnovu protivljenja oca izveo zaključak da je on nesavestan roditelj iako je imao legitimno pravo da se protivi promeni prebivališta, odnosno preseljenju maloletnog deteta u drugu državu i izneo argumente u prilog svom protivljenju.

Nižestepeni sudovi, ali i Vrhovni kasacioni sud u postupku po reviziji, na identičan način su odlučivali u velikom broju slučajeva, što ukazuje na već formiranu, ustaljenu i ujednačenu praksu.¹⁶ Okolnost da sudovi utvrđuju šta je u najboljem interesu deteta nije, naime, dovoljna jer je suština postupka delimičnog lišenja roditeljskog prava da sud nesporno utvrdi da je roditelj nesavesno vršio roditeljska prava. I Vrhovni kasacioni sud u nekim odlukama po reviziji prihvata da tuženi roditelj ne procenjuje najbolji interes deteta na identičan način kao drugi roditelj, a da sud o tome mora nezavisno da zaključuje kao krajnji arbitar u primeni tog principa, te da uskraćivanje davanja saglasnosti ne znači *per se* da roditelj nesavesno vrši roditeljsko pravo i da ga zbog toga treba delimično lišiti tog prava.¹⁷

4. VRSTA PRAVNE ZAŠTITE U SLUČAJU NEPOSTOJANJA SAGLASNOSTI ZA PROMENU PREBIVALIŠTA DETETA

4.1. Uvodne napomene

Problem nepostojanja saglasnosti o promeni prebivališta deteta već na prvi pogled je povezan i sa roditeljskim pravom i sa pravima dece. U teoriji se ističe da su u tim spornim situacijama suprotstavljeni pravo na slobodu kretanja jednog i pravo na porodični život drugog roditelja i da je u takvim okolnostima veoma teško utvrditi šta je najbolji interes deteta (Cashmore,

¹⁶ Tako Vrhovni kasacioni sud u odluci Rev. 200/12, prema Milutinović 2012, 82–84; presuda Apelacionog suda u Novom Sadu Gž. 441/16, 28. jul 2016; presuda Apelacionog suda u Novom Sadu Gž. 157/13, 20. mart 2013; presuda Vrhovnog kasacionog suda Rev. 3120/17, 27. decembar 2017; presuda Apelacionog suda u Beogradu Gž2 139/18, 9. mart 2018, kojom je odlučeno o žalbi protiv presude Drugog osnovnog suda u Beogradu P2 br. 864/17, 6. decembar 2017; presuda Vrhovnog kasacionog suda Rev. 92/20, 30. januar 2020.

¹⁷ Presuda Vrhovnog kasacionog suda Rev. 3229/19, 18. septembar 2019.

Parkinson, 2016, 152). Ukoliko je reč o problemu vršenja roditeljskog prava, sudski put zaštite, prema PZ, bio bi postupak za vršenje roditeljskog prava, a ako se problem postavi sa aspekta prava deteta, moguć je, u određenim uslovima, postupak u sporu za zaštitu prava deteta.¹⁸ Optiranje za jedan od ta dva postupka uslovljeno je stavom da li je reč o pravu deteta na promenu prebivališta ili je pravo roditelja da sporazumno o tome odluče njegova suština.

Nesporno je da odbijanjem davanja saglasnosti roditelja koji ne vrši roditeljsko pravo za promenu prebivališta deteta, ovde za preseljenje u inostranstvo, nastaje spor iz porodičnopravnih odnosa¹⁹, koji je, prema odredbama Zakona o parničnom postupku (čl. 1)²⁰, u nadležnosti redovnih sudova. Nesporno je i da su i postupak u sporu za zaštitu prava deteta i postupak za vršenje roditeljskog prava posebni parnični postupci.

Postupak u sporu za zaštitu prava deteta supsidijaran je u odnosu na sve druge postupke predviđene u PZ (Poznić, Rakić Vodinec 2015, 563). U domaćoj teoriji porodičnog prava prihvaćen je kao adekvatan put zaštite u slučaju da ne postoji saglasnost o promeni prebivališta deteta (Ponjavić, Vlašković 2019, 284; Draškić 2012, 381; Kovaček Stanić 2012, 85), uz obavezu suda da nesporno zaključi da li ta promena ima pozitivne efekte na razvoj deteta – fizički, mentalni, duhovni, moralni, psihološki i socijalni (Draškić 2020a, 260).

Za određenje predmeta spora u postupku za vršenje roditeljskog prava relevantne su odredbe čl. 75–78 PZ, kojima se kao načini vršenja predviđaju zajedničko i samostalno, što je nesumnjivo ograničavajuća odredba. Isto važi i za odredbu čl. 272, st. 2 PZ: „Ako roditelji nisu zaključili sporazum o vršenju roditeljskog prava ili sud proceni da njihov sporazum nije u najboljem interesu deteta, odluku o poveravanju zajedničkog deteta jednom roditelju, o visini doprinosa za izdržavanje od strane drugog roditelja i o načinu održavanja ličnih odnosa deteta sa drugim roditeljem donosi sud.“ Time je, naime, određeno o čemu sud odlučuje po pravilima postupka za vršenje roditeljskog prava (Vlaškić 2018, 212).

¹⁸ Pravila tih postupaka sadržana su u odredbama čl. 261–273 PZ.

¹⁹ Reč je o tzv. relokacijskim sporovima, više o tome u Dželetović 2021, 85–89.

²⁰ Zakon o parničnom postupku – ZPP, *Službeni glasnik RS* 72/2011, 49/2013 – odluka US, 74/2013 – odluka US, 55/2014, 87/2018 i 18/2020.

S druge strane, pokretanje postupka u sporu za zaštitu prava deteta zakonom je dvostruko uslovljeno – prvo, zahtev se mora odnositi na zaštitu prava deteta koje je predviđeno odredbama PZ i, drugo, da zaštita takvog prava nije obezbeđena odredbama nekog drugog postupka normiranog ovim zakonom.²¹

Na osnovu odredaba u kojima se pominje prebivalište deteta može se zaključiti da se u PZ pravo deteta na prebivalište ne samo pominje već i unekoliko reguliše. Tu, pre svega, mislimo na odredbu čl. 76, st. 2, kojom se propisuje da sastavni deo sporazuma roditelja o zajedničkom vršenju roditeljskog prava mora biti i sporazum o tome šta se smatra prebivalištem deteta. I taj sporazum je predmet procene suda sa aspekta najboljeg interesa deteta, što implicira da sud ima obavezu da, ukoliko sporazum ne odgovara najboljem interesu deteta, odlučujući o načinu vršenja roditeljskog prava, odlučuje i o prebivalištu deteta.²² Ukoliko oceni da je samostalno vršenje u interesu deteta, poveravanjem deteta roditelju koji će samostalno vršiti roditeljsko pravo sud takođe odlučuje i o njegovom prebivalištu. Takođe, ako je odlukom suda već rešeno o načinu vršenja roditeljskog prava (samostalno u slučaju koji se ovde analizira), uz konstataciju da dete ima pravo na promenu prebivališta koje je uslovljeno ili saglasnošću roditelja ili ocenom suda da je to u najboljem interesu deteta, logika nalaže vođenje postupka u sporu za zaštitu prava deteta. Mada u teoriji porodičnog prava ima mišljenja da je pravo na razvoj upravo jedno od prava za koja se u PZ ne predviđa poseban postupak zaštite i da nesaglasnost roditelja o promeni prebivališta deteta može ugroziti to pravo (Ponjavić, Vlašković 2019, 284), čini se da ima opravdanja da se zaštita pruža neposredno pravu na promenu prebivališta (ili prodaju imovine veće vrednosti, preduzimanje većih medicinskih zahvata i dr.), zavisno od procene najboljeg interesa deteta.

Mada to ne može biti ključni argument za određivanje vrste postupka čija bi primena bila adekvatna u slučaju koji analiziramo, napomenimo da je u postupku u sporu za zaštitu prava deteta u odnosu na postupak u sporu za

²¹ Tako, kada je reč o pravu stanovanja (*habitatio*) koje je izričito predviđeno odredbom čl. 194 PZ, a ne štiti se ni u jednom drugom postupku, dileme nema (Milutinović 2006, 451–464), kao ni kada je reč o pravu na održavanje ličnih odnosa sa bliskim srođnicima (Tasić 2022, 45).

²² To je još jedan od argumenta u prilog stavu da sud ima mogućnost da o prebivalištu, odnosno promeni prebivališta deteta odlučuje, bez obzira na to što formulacije tužbi da se odlukom suda zameni saglasnost nisu prihvatljive, kako je već napomenuto.

vršenje roditeljskog prava krug aktivno legitimisanih lica proširen na javnog tužioca (PZ, čl. 263, st. 1 i čl. 264, st. 1 i 2), a predviđena je i naročita hitnost postupka²³, što utiče na efikasnost zaštite prava dece.

4.2. Prva alternativa – izdejtšovati izjavu volje

Postupkom za zaštitu prava deteta nisu ograničene vrste zaštite pa bi, praktično, bile moguće sve tri vrste tužbi koje su tipične za parničnu proceduru – kondemnatorna, preobražajna i deklarativna. Međutim, kako je predmet spora ocena da li je promena prebivališta u najboljem interesu deteta u kontekstu okolnosti konkretne pravne stvari i nepostojanja saglasnosti roditelja, to pokazuje da sud donosi odluku o promeni koja se odnosi na jedno od prava dece, što nije tipično za „pravu“ kondemnaciju. Jedna od novijih odluka Osnovnog suda u Novom Sadu²⁴, kojom je roditelju koji vrši roditeljsko pravo naloženo da dâ saglasnost za putovanje deteta u inostranstvo izjavom kod javnog beležnika, a ako roditelj to odbije, presuda suda će „zameniti“ nedostatak saglasnosti, upućuje, analogijom, na moguću vrstu tužbe, odnosno zaštite koja bi se mogla pružiti i u situaciji koju u radu analiziramo.

Kada tužilac želi da ostvari jedno svoje pravo na promenu tako što će izdejtšovati usvajanje svog zahteva, reč je o preobražajnim (konstitutivnim) tužbama (Poznić 2009, 397).²⁵ Promena se, prema materijalnopравnim (ređe i procesnopравnim) propisima, može postići isključivo tužbom čiji je zahtev preobražajnopравne prirode i presudom kojom se usvaja takav tužbeni zahtev. Preobražajnom presudom se tužiočevo pravo na promenu ostvaruje kada se taj cilj ne može postići jednostranom izjavom volje ili saglasno,²⁶ što korespondira sa problemom koji je predmet analize u ovom radu. To je svakako situacija kada dete pokreće postupak za zaštitu svog prava na

²³ Skraćivanjem rokova za zakazivanje prvog ročišta (osam dana od prijema tužbe u sudu) i obavezom drugostepenog suda da o žalbi odluči u roku od 15 dana od dana kada mu je dostavljena žalba.

²⁴ Osnovni sud u Novom Sadu P-351/2017, 1. mart 2019.

²⁵ Preobražajna tužba je procesnopравni pandan materijalnim preobražajnim ovlašćenjima (Jakšić 2021, 353). Više o vrstama preobražajnih prava videti u Poznić, Rakić Vodinelić 2015, 305–306.

²⁶ Triva i Dika (Triva, Dika 2004, 408) izričito navode da se preobražajnom tužbom može postići zaštita i u situacijama kada se određena promena u pravnom odnosu ne može postići samo jednostranom izjavom volje već je za to potrebna saglasnost stranaka, a ona je izostala. Izričito i Poznić 2009, 398

promenu prebivališta, ali i kada tužbu pokreće jedan od roditelja, ukoliko se pođe od premise da dete ima položaj stranke u svakom postupku u kome se odlučuje o njegovim pravima, što, bez obzira na okolnost da u PZ ne postoji izričita odredba o tome, obezbeđuje najviši nivo zaštite prava dece.²⁷ Tužbeni zahtev bi, međutim, u ovim situacijama glasio da se tuženi obaveže da dâ izjavu volje²⁸ – da drugi roditelj dâ saglasnost za promenu prebivališta deteta izjavom kod javnog beležnika. U nauci građanskog procesnog prava nema potpune saglasnosti o pravnoj prirodi tužbi čiji zahtev glasi da se dâ izjava volje zato što tužilac, zapravo, predlaže obavezivanje na činidbu, ali presuda kojom se takva obaveza izriče ne izvršava se prinudno. Zakon, naime, propisuje fikciju da je pravnosnažnošću presude izjava data što se smatra argumentom u prilog preobražajnog karaktera ovih presuda.²⁹ Usvajanjem ovakvog zahteva uz ocenu svih relevantnih okolnosti, a posebno najboljeg interesa deteta, u konkretnom slučaju, roditelj bi bio obavezan da dâ izjavu kojom se saglašava sa promenom prebivališta maloletnog deteta u konkretnom slučaju, odnosno izjavu o saglasnosti za preseljenje deteta u određeni grad/državu. Drugim rečima, ne obavezuje se roditelj koji ne vrši roditeljsko pravo na davanje generalne, načelne saglasnosti za promenu prebivališta deteta već će za eventualnu svaku buduću promenu morati da se vodi poseban postupak, što opravdavaju promenjene okolnosti, odnosno izmenjen činjenični osnov tužbe.

Izreka takve presude ima, dakle, i obavezujući deo, koji ukazuje na to da je reč o tzv. mešovitoj – preobražajno-kondemnatornoj presudi. Kako kondemnatorni (obavezujući) elemenat takvih presuda podleže prinudnom izvršenju (Poznić, Rakić Vodinelić, 436; Dika 2009, 323–324), ali se u ovom slučaju roditelj koji ne vrši roditeljsko pravo obavezuje na davanje izjave volje, primenjivala bi se pravila iz čl. 390 Zakona o izvršenju i obezbeđenju³⁰, odnosno fikcija da je izjava data u momentu nastupanja pravnosnažnosti presude. To je jedno od sredstava izvršenja radi prinudnog ostvarenja nenovčanog potraživanja izvršnog poverioca (ZIO, čl. 54, st. 3) kada je izjava volje pravna radnja koju duuguje izvršni dužnik. Obaveza koja se sastoji u

²⁷ Videti čl. 7, st. 1 Nacrta zakona o pravima deteta i zaštitniku prava deteta. <https://www.paragraf.rs/dnevne-vesti/070619/070619-vest15.html>, poslednji pristup 16. maja 2022.

²⁸ Mogućnost tzv. izdejstvovanja izjave volje u postupku izvršenja odluka o zaštiti prava deteta prihvata i Tasić 2022, 107.

²⁹ O ovome videti Poznić, Rakić Vodinelić (2015, 307).

³⁰ Zakon o izvršenju i obezbeđenju – ZIO, *Službeni glasnik RS* 106/2015, 106/2016 – autentično tumačenje, 113/2017 – autentično tumačenje, 54/2019, 9/2020 – autentično tumačenje.

davanju izjave volje ne može se ostvariti upotrebom sredstava prinude i zbog toga zakonodavac propisuje navedenu fikciju, odnosno da u toj situaciji nije potrebno voditi postupak izvršenja.³¹

Kako je odluka o vršenju roditeljskog prava podložna izmenama u novom sudskom postupku, s obzirom na izmenjene okolnosti, tuženi roditelj u postupku za zaštitu prava deteta može da podnese i protivtužbu za izmenu načina vršenja roditeljskog prava i da iznese da preseljenje, odnosno promena prebivališta nije u najboljem interesu deteta ili navede i neke druge, nove okolnosti. Ili da sud o tome odluči *ex officio*. To znači da nema zabrane da roditelj koji ne vrši roditeljsko pravo, znajući da roditelj koji vrši roditeljsko pravo ima nameru da sa detetom otputuje, da promeni prebivalište deteta, sam podnese tužbu za izmenu načina vršenja roditeljskog prava. U tom slučaju tuženi, opet usled koneksiteta predmeta spорова³², može reagovati protivtužbom za zaštitu prava deteta. Ista vrsta postupka po tužbi i protivtužbi, što je jedan od uslova dopuštenosti protivtužbe, nije u tim situacijama problematična jer su svi postupci iz porodičnopravnih odnosa posebni parnični postupci, a u prilog mogućih varijanti protivtužbe su i oficijelne mogućnosti suda iz odredbe čl. 273 PZ.

Konačno, da li se može zaključivati prema analogiji na situaciju nedavanja saglasnosti za prodaju imovine veće vrednosti, u kojoj bi, ukoliko je roditelj koji vrši roditeljsko pravo bez saglasnosti drugog roditelja već otuđio imovinu, ovaj mogao tužbom zahtevati poništaj ovako zaključenog pravnog posla? Iz ovako primenjene analogije bi proistekla mogućnost da se, u slučaju kada je roditelj doneo odluku o promeni prebivališta samostalno, bez saglasnosti drugog, tužbom zahteva poništaj takve odluke (takođe preobražajna po pravnoj prirodi). Takvo zaključivanje je, međutim, problematično kada nema nikakvog formalno zaključenog pravnog posla niti formalno date izjave volje. Ako postoji zahtev za izdavanje putne isprave za dete kao dokaz samostalno donete odluke roditelja koji vrši roditeljsko pravo, to ne omogućava podnošenje pomenute tužbe, a i uslovi za njeno izdavanje su drugačiji nego za promenu prebivališta. Izvršena promena prebivališta, odnosno preseljenje u inostranstvo, s druge strane, bez saglasnosti drugog roditelja, ukoliko bi do nje došlo, asocira na otmicu, što takođe podrazumeva drugačiji pristup.

³¹ Više o izdejstvovanju izjave volje vid. Stanković, Palačković, Trešnjev (2020, 1288–1290).

³² O protivtužbama, posebno koneksnoj, više u Stanković, Boranijašević (2020, 353–355); Jakšić (2021, 445); Poznić, Rakić Vodinelić (2015, 350).

4.3. Druga alternativa – utvrditi pravo deteta na promenu prebivališta

Deklarativna zaštita, čiji je smisao deklarisanje da jedno pravo (ili pravni odnos) postoji, načelno bi bila mogućnost za pokretanje postupka u sporu za zaštitu prava deteta u analiziranom slučaju. No, presuda kojom se u slučaju osnovanosti usvaja zahtev takvih tužbi nije podobna za prinudno izvršenje (Stanković, Boranijašević 2020, 445; Poznić, Rakić Vodinelić 2015, 302). Usvajanje tužbenog zahteva značilo bi da se utvrđuje da dete ima pravo na promenu prebivališta jer je to u njegovom najboljem interesu. Postojanje prava moralo bi biti, međutim, konkretno povezano sa okolnostima pravne stvari, odnosno moralo bi da se utvrdi da dete ima pravo na promenu prebivališta u konkretnom slučaju, kao i u prethodno analiziranoj preobražajno-kondemnatornoj odluci, a ne generalno. Istovremeno, nastupanje pravnosnažnosti presude kojom se zahtev usvaja i utvrđuje pravo na promenu prebivališta bilo bi osnov za roditelja koji vrši roditeljsko pravo da se preseli sa detetom u inostranstvo. Odbijanjem tužbenog zahteva, odnosno odlukom da na osnovu okolnosti konkretne pravne stvari dete nema pravo na promenu prebivališta, opet zbog toga što to nije u njegovom najboljem interesu, značilo bi da nije bilo potrebe za zaštitom prava deteta te da nema potrebe ni za traženjem saglasnosti roditelja koji ne vrši roditeljsko pravo. PZ, međutim, ne predviđa izričito mogućnost podnošenja deklarativne tužbe u analiziranom slučaju pa bi obaveza tužioca bila da učini verovatnim postojanje pravnog interesa za utvrđenje. Ipak, u teoriji se smatra da takav interes postoji naročito kada se položaj tužioca pokazuje nesigurnim prema tuženom, a zaključak o tome moguće je izvesti upravo iz ponašanja tuženog (Poznić, Rakić– Vodinelić 2015, 303). Nepostojanje sporazuma roditelja svakako ukazuje na nesigurnost položaja kako roditelja koji podnosi pozitivnu deklarativnu tužbu, tako i onog koji ne vrši roditeljsko pravo, ali legitimno smatra da promena prebivališta nije u najboljem interesu deteta. Ovakva situacija svakako se reperkutuje i na nesigurnost položaja deteta. Okolnosti koje iznosi tužilac imaju upravo za cilj da uvere sud da jeste/ nije preseljenje u najboljem interesu deteta (zavisno od toga da li je zahtev deklarativne tužbe pozitivno ili negativno formulisan), što bi, čini se, bilo dovoljno za dokazivanje postojanja pravnog interesa. Novoj tužbi kojom bi se odlučivalo o pravu na promenu prebivališta bilo bi i ovde mesta usled promene činjeničnog osnova tužbe, što po pravilu znači okolnosti povezanih sa najboljim interesom deteta (Poznić, Rakić Vodinelić 2015, 313–316).

Zahtev bi bio formulisan zavisno od toga ko od aktivno legitimisanih lica po zakonu može da podnese tužbu. Naime, roditelj koji samostalno vrši roditeljsko pravo podnosio bi pozitivnu deklarativnu tužbu, bilo u svoje ime

bilo u ime deteta, kao njegov zastupnik, dok bi roditelj koji ne vrši roditeljsko pravo postupak pokretao negativnom deklarativnom tužbom. Dete bi, pak, formalnopravno moglo da podnese obe vrste tužbi. Međutim, suštinski, kako je njegov zastupnik roditelj koji samostalno vrši roditeljsko pravo, u praksi bi to bila pozitivna deklarativna tužba jer je u ime deteta podnosi roditelj koji želi promenu prebivališta.³³

5. UMEMTO ZAKLJUČKA

Analiza izvršena u radu, a pre svega izneta argumentacija, pokazuju, pre svega, da je neprihvatljivo da se odluka o lišenju, u slučaju kada roditelj koji vrši roditeljsko pravo podnese tužbu protiv drugog roditelja sa zahtevom da se taj drugi roditelj delimično liši roditeljskog prava u pogledu prava na promenu prebivališta deteta, donese isključivo na osnovu te okolnosti. Ma koliko, prema odredbama PZ, bilo prihvatljivo da se i takva tužba podnese, tek procenom brojnih relevantnih okolnosti, kao što su razlozi obe stranke i najbolji interes deteta, sud se može opredeliti i odlučiti da li je zahtev osnovan. Razlozi navedeni u ovom radu upućuju, međutim, na zaključak da je podnošenje tužbe za zaštitu prava deteta ispravan procesnopravni put u slučaju kada roditelj koji ne vrši roditeljsko pravo odbija da se saglasi sa promenom prebivališta deteta zbog toga što smatramo da su za to ispunjeni uslovi (razlozi) koji su predviđeni odredbama PZ. Između ostalog, takvo zaključivanje opravdava i okolnost da sud u tom postupku može po službenoj dužnosti da odluči i o vršenju i lišenju roditeljskog prava. Takođe, nesporno je da zahtev tužbe ne može da glasi da presuda zameni saglasnost roditelja, ali procesni mehanizmi čijom primenom se može obezbediti zaštita svakako postoje. Postupanje bilo po preobražajnoj bilo po deklarativnoj tužbi mora obezbediti pravilno zaključivanje o tome da li promena prebivališta ima ili nema pozitivne efekte za ukupan razvoj deteta, odnosno da li preseljenje jeste ili nije u najboljem interesu deteta. U konkretnom slučaju neophodno je razmotriti pitanje da li se preseljenjem stvaraju novi, bolji uslovi za život, obrazovanje, zdravstvenu zaštitu deteta, bolja finansijska situacija za roditelja (ne i kao primarni kriterijum), a time i za dete, kako promena utiče na kvalitet održavanja ličnih odnosa i sl. U teoriji se opravdano ističe da najpre, „kroz prizmu savesnosti i opravdanosti“, treba proceniti razloge za preseljenje i razloge za protivljenje preseljenju (Novaković 2020, 293). U slučaju da nema opravdanih razloga za preseljenje,

³³ Treba imati u vidu odredbe PZ o postavljanju kolizijskog staratelja ili privremenog zastupnika, prema čl. 265 i 266, i o njihovim dužnostima, prema čl. 267.

odnos deteta i drugog roditelja bi bio prekinut ukoliko do preseljenja dođe, a dozvoljavanje preseljenja bi imalo karakter povrede prava na porodični život deteta i roditelja koji ne vrši roditeljsko pravo (Novaković 2020, 23). Nije sporno da u sudskom postupku predmet ocene mora biti i da li je roditelj koji traži preseljenje savestan, odnosno da li preseljenjem isključivo želi da onemogući održavanje ličnih odnosa između deteta i drugog roditelja ili to nije slučaj. Suprotno tome, mora se izvesti nesporn zaključak i da li je razlog za protivljenje drugog roditelja preseljenju isključivo motivisan namerom da onemogući roditelja koji traži preseljenje da zasnuje novi brak, pronade bolje radno mesto ili da se vrati u svoju primarnu porodicu, a ne brigom za blagostanje deteta (Novaković 2020, 293). Ili, sud je nesporno u obavezi da utvrdi motive oba roditelja, a u tim okvirima su relevantni i interesi oba roditelja. To, dalje, implicira suštinsku procenu kako i da li interesi roditelja konvergiraju najboljem interesu deteta. Ako sud nesporno utvrdi da je roditelj nesavestan, to vodi delimičnom lišenju roditeljskog prava u pogledu prava deteta na promenu prebivališta po službenoj dužnosti.

S obzirom na to da je, dakle, dete centralna figura postupka u sporu za zaštitu prava deteta (kao i u svim drugim postupcima u sporovima iz porodičnopravnih odnosa u koje je dete uključeno potrebom za najvišim mogućim stepenom zaštite njegove ličnosti, prava i pravom zaštićenih interesa), sud mora nesporno da utvrdi *in concreto* sve okolnosti relevantne za najbolji interes deteta. Osim okolnosti koje u postupku iznose roditelji kao stranke, to su i one koje sud utvrđuje primenom istražnog načela. Posebno se mora obezbediti, pod uslovima iz PZ, da dete koje je sposobno da formira svoje mišljenje dobije sve informacije koje su mu u tom procesu neophodne i da svoje mišljenje izrazi. U tom procesu je posebno važna uloga kolizijskog staratelja i privremenog zastupnika, koja je definisana odredbama PZ. U dokaznom postupku, osim dokaza koje su predložile stranke, sud je *dužan* da pre donošenja odluke zatraži nalaz i stručno mišljenje od organa starateljstva, porodičnog savetovališta ili druge ustanove specijalizovane za posredovanje u porodičnim odnosima.

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**PARENT'S DISAGREEMENT TO CHANGING THE CHILD'S
PERMANENT RESIDENCE – PROCEDURAL DILEMMAS AND
POSSIBLE SOLUTIONS**

Summary

In the case when the parent who does not exercise parental rights does not agree with the change of permanent residence of the child, i.e., doesn't agree with the child moving abroad with a parent who independently exercises parental rights, courts in Serbia, as a rule, take the position that only because they did not give consent, the parent who does not exercise parental rights should be partially deprived of the parental rights and thus enable the other parent to independently decide on the change of permanent residence. In the theory of family law, this practice has been criticized as unacceptable, therefore there is a need to explore other procedural possibilities in such situations.

Key words: *Partial deprivation of parental rights. – (Dis)agreement of a parent with change of permanent residence of the child. – Procedure. – Court protection.*

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O POVEZANOSTI ALKOHOLA I UBISTAVA U UZORKU OSUĐENIH U BEOGRADU

Autori se u radu bave pitanjem povezanosti zloupotrebe alkohola i ubistava. Prvi deo rada ukazuje na rasprostranjenost zloupotrebe alkohola u nasilničkom kriminalitetu i ubistvima. Autori potom analiziraju kriminološke teorije kojima se objašnjava ta povezanost. Predmet teorijskog dela rada je i izlaganje o različitim tipologijama ubistava. Drugi deo članka čini empirijska analiza koja je izvršena na uzorku od 84 pravnosnažna sudska predmeta Višeg suda u Beogradu. Osim utvrđivanja rasprostranjenosti zloupotrebe alkohola, autori analiziraju i značaj prisustva alkohola u različitim klasifikacijama ubistava. Ispitali smo da li alkohol češće zloupotrebljavaju muškarci ili žene, da li je alkohol zastupljeniji u ubistvima čije su žrtve poznate ili bliske učiniocu ili onim učinjenim protiv nepoznatih. Posebnu pažnju smo usmerili na podelu

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ubistava na konfliktna, osvetnička, među partnerima i ubistva izvršena zajedno sa razbojništvom/razbojničkom krađom. Osim kod učinilaca, analizirali smo i da li je i u kojoj meri zastupljena zloupotreba alkohola i kod žrtava.

Ključne reči: *Ubistva. – Zloupotreba alkohola. – Empirijska analiza. – Tipologija ubistava.*

1. UVOD

Prema istraživanjima, nasilna krivična dela su u više od 50% slučajeva povezana sa zloupotrebom alkohola. Ta psihoaktivna supstanca ima veći doprinos u razumevanju nasilnih krivičnih dela, uključujući i ubistva, u poređenju sa opojnim drogama čije je prisustvo kod nasilnika po nekim procenama zastupljeno u manje od 10% slučajeva (Nash Parker, Auerhahn 1998, 294). Michelle Cubellis (2014, 1212) navodi da se u američkoj literaturi može naći podatak da značajan broj dela vrše lica koja su pod dejstvom intoksikacije. Prema statistici Biroa za pravosuđe (U.S. Department of Justice) između 1997. i 2008. godine alkohol je doprineo vršenju 19–37% krivičnih dela u SAD. Iako je, kako se navodi u literaturi (Rand *et al.* 2010, 41), poslednjih decenija taj procenat u opadanju, još uvek se značajan deo kriminalnih aktivnosti vrši u alkoholisanom stanju.

Procenat ubica koji je u trenutku izvršenja krivičnog dela pod dejstvom alkohola kreće se u rasponu 40–70%, što zavisi od korišćenih kriterijuma u istraživanju¹ (Bye 2012, 236). Tako je, na primer, u jednoj studiji u Australiji, čiji se uzorak sastojao od 300 lica osuđenih za ubistvo, utvrđeno da 38,8% respondenata u velikoj meri zloupotrebljava alkohol, dok je umereno korišćenje alkohola registrovano kod 23,9% ispitanika (Eriksson *et al.* 2020, 621).

Treba imati u vidu da u mnogim slučajevima nije samo ubica bio pod dejstvom psihoaktivnih supstanci u trenutku izvršenja krivičnog dela već i žrtva. U metaanalizi koja je obuhvatila 61 studiju iz 16 različitih država utvrđeno je da je u proseku 48% svih žrtava bilo pozitivno na prisustvo alkohola. Pijanstvo je registrovano u trećini slučajeva, pri čemu je korišćena granica od 80 mg/dl. Takođe je ustanovljeno da su istraživanja u kojima je korišćen test na prisustvo

¹ Utvrđivanje prisustva alkohola u urinu ili krvi može biti problematično jer se uzorci uzimaju posle nekog vremena od samog događaja. Takođe, problematično može biti i oslanjanje na iskaze svedoka o alkoholisanom stanju učesnika događaja (Darke 2010, 205).

alkohola i u urinu i u krvi pokazala veće učešće te psihoaktivne supstance kod žrtava. Alkohol je bio prisutniji kod starijih žrtava i u većoj meri kod žena nego kod muškaraca (Kuhns *et al.* 2010, 68–72).

Ispitivanje povezanosti alkohola i ubistava bilo je predmet analize i domaćih autora. Tako, na primer, Pešić na osnovu uzorka od 1.000 ubistava u SFRJ navodi da je u 13% slučajeva ubistvo učinjeno pod dejstvom alkohola, uz konstataciju da je taj udeo sigurno veći, ali se ne može pouzdano utvrditi jer u mnogim krivičnim predmetima nije bilo podataka o toj okolnosti. Ubistva su u 96,4% slučajeva vršili muškarci, a osim u jednom slučaju svi ubijeni su takođe bili muškarci (Pešić 1972, 63–64). U istraživanju o ubistvima u Beogradu za period 1985–1993. ustanovljeno je da je 42,5% bilo u alkoholisanom stanju, dok je kod 7,3% ustanovljeno postojanje alkoholizma. Takođe, utvrđena je i alkoholisanost žrtava (39%), a muškarci žrtve češće su bili pod dejstvom alkohola (48,8%) nego učinioci (Simeunović Patić 2003, 132–133, 145).

Da bismo uočili značaj pomenutih procentualnih učešća ubistava povezanih sa psihoaktivnim supstancama, moramo ih uporediti sa opštom populacijom. Podaci za Evropsku uniju pokazuju da je bar jednom mesečno ekscesivno (u jednoj prilici minimalno 60 gr čistog etanola) pije četvrtina ispitanika (Eurostat). Prema rezultatima istraživanja obavljenog 2019. godine, u Srbiji svakodnevno pije 3,1% populacije, pri čemu muškarci osam puta više nego žene. Bar jednom nedeljno ekscesivno je pilo (više od šest alkoholnih pića u jednoj prilici) 1,7% stanovništva Srbije, dok je jednom mesečno ekscesivno pilo 10,9% stanovništva (Istraživanje zdravlja stanovništva Srbije 2021, 73–75).

2. TEORIJSKA OBJAŠNENJA

Pre izlaganja o teorijskim objašnjenjima, treba napraviti razliku između zloupotrebe psihoaktivnih supstanci i zavisnosti. Dok zloupotreba podrazumeva hroničnu upotrebu psihoaktivnih supstanci, zavisnost određuju prvenstveno dva elementa: tolerancija, što znači da je svaki sledeći put potrebna veća količina supstanci da bi se postigao isti efekat, i izazivanje promena fizičkih i kognitivnih sposobnosti (Mattson, Pietz 2015, 51).

Postoje različita gledišta o povezanosti alkohola i ubistava. Prema jednom, često osporavanom, postoji direktna veza. Prema drugom, alkohol ima posrednu ulogu između ubistava i drugih faktora, dok je prema trećem verovatnije da postoje zajednički faktori koji utiču na zloupotrebu alkohola i ubistvo (Bye 2012, 232). Goldstein (1985, 170) navodi da postoje bar tri

načina povezanosti alkohola, odnosno opojnih droga i nasilnih krivičnih dela. Prvi je psihofarmakološki model (nasilno delo je rezultat dejstava koje na pojedince imaju psihoaktivne supstance), drugi je ekonomsko-kompulzivni (cilj je da se dođe do materijalnih dobara, najčešće novca) i sistemski model koji se odnosi na nasilje koje je rezultat sukoba u vezi sa trgovinom narkoticima. Za ubistva povezana sa zloupotrebom alkohola navodi se da se češće vrše prema prijatelju ili nekadašnjem prijatelju, da su rezultat svađe ili sukoba i da se ne koristi vatreno oružje. S druge strane, žrtve ubistava povezanih za zloupotrebom opojnih droga češće su poznanici, motiv je koristoljublje i pre će biti izvršena upotrebom vatrenog oružja (Brookman 2010, 229).

Fagan je dao jedno od sveobuhvatnijih teorijskih objašnjenja povezanosti psihoaktivnih supstanci i agresivnog ponašanja.² Klasifikacija obuhvata biološki, psihološki i sociološki pristup razumevanju te povezanosti, s tim što treba napomenuti da je autor obuhvatio sve psihoaktivne supstance, a ne samo alkohol.

Biološka shvatanja uglavnom eksperimentalnim istraživanjima pokušavaju da ustanove uticaj psihoaktivnih supstanci na centralni nervni sistem, na endokrini sistem ili ispituju genetski uticaj na povezanost između zloupotrebe psihoaktivnih supstanci i agresije (Fagan 1990, 250–253). Međutim, nije uspostavljena direktna povezanost između psihofizioloških promena uzrokovanih psihoaktivnim supstancama i agresije, a rezultati eksperimentalnih studija dovode se u pitanje i zbog kontrolisanih uslova za ispoljavanje agresije i zbog učesnika istraživanja koji se neretko biraju među studentskom populacijom (Fagan 1990, 249). I među psihološkim shvatanjima moguće je uočiti različite pravce. Najčešće se pominje model dezinhibicije koji podrazumeva da alkohol i druge psihoaktivne supstance „slabe inhicije“, smanjuju samokontrolu, oslobađaju emocije i impulse koji su inače kontrolisani (Pernanen 1976, 394). Eksperimentalna istraživanja pokazuju da se dezinhibicioni model može kritikovati imajući u vidu da rezultati testiranja pokazuju da reakcija i ponašanje u alkoholisanom stanju zavise od lične percepcije i očekivanja. Naime, ispostavilo se da agresivnost ispoljavaju i učesnici eksperimenta koji su dobili placebo doze jer su imali predstavu o načinu kako bi trebalo da se ponašaju pod dejstvom alkohola, a to je socijalno i kulturološki uslovljeno (Rumgay 1998, 43–44). Osim slabljenja moralnih ili naučenih granica ponašanja, pokazuje se i da zloupotreba psihoaktivnih supstanci može uticati na kognitivne sposobnosti. Subjekti pod dejstvom alkohola imaju poteškoća u doživljavanju sredine, mogućih

² Razlika između pojmova agresije i nasilja vrši se na osnovu različitih kriterijuma (Ignjatović 2011, 180–181).

negativnih posledica agresivnog ponašanja i zato i reaguju agresivnije nego što to zahteva postojeća pretnja (Fagan 1990, 268–269; Darke 2010, 203). Za razliku od opisanih situacija u kojima zloupotreba psihoaktivnih supstanci utiče na psihičke funkcije, postoje i mišljenja da ona povećava mogućnost ispoljavanja agresije lica sa određenim psihičkim karakteristikama, a najčešće se kao primer navode alkoholičari (Pernanen 1976, 424). Iako je teško ustanoviti da li su određene psihičke karakteristike alkoholičara postojale i pre razvijanja zavisnosti (Rumgay 1998, 26), u istraživanjima je utvrđeno da je 26% pojedinaca kojima je dijagnostikovana zavisnost od alkohola imalo i trajni poremećaj raspoloženja, 32% anksiozni poremećaj, a 28–64% antisocijalni poremećaj ličnosti (Mattson, Pietz 2015, 54). Zbog preklapanja različitih oblika poremećaja u literaturi se izdvojio jedan fenotip poznat kao eksternalizacija, koji povezuje zloupotrebu supstanci, antisocijalno ponašanje, impulsivnost i agresivnost (Mattson, Pietz 2015, 56).

No, biološki i psihološki modeli trpe kritike zbog činjenice da je zloupotreba alkohola znatno rasprostranjenija nego ispoljavanje agresije, odnosno činjenje nasilnih krivičnih dela u stanju intoksikacije. Takođe, komparativne kriminološke studije pokazuju da ne mora značiti da će u državama u kojima je rasprostranjenija upotreba alkohola istovremeno biti veća i stopa nasilnih krivičnih dela. Kao primer možemo navesti Dansku. Prema podacima za 2019. godinu, ta država se nalazila u samom vrhu evropskih država prema procentu stanovnika (28,7%) koji su najmanje jednom mesečno u jednoj prilici konzumirali šest ili više alkoholnih pića (Eurostat 2019). S druge strane, prema podacima Evropskih izvornika o kriminalitetu i krivičnom pravosuđu za poslednju dostupnu godinu (2016), stopa osuđenih za ubistva u Danskoj bila je 1,0 (Aebi *et al.* 2021, 176). Poređenja radi, prema istim izvorima u Srbiji je 9,2% stanovnika bar jednom mesečno ekscesivno konzumiralo alkohol, dok je stopa presuđenih ubistava 2016. godine bila 2,5. Shodno tome, neophodno je uzeti u obzir i sociološka objašnjenja.

U literaturi se često ukazuje na značaj koji bi mogle imati teorija o društvenom pritisku, teorija o socijalnoj dezorganizaciji i teorije o potkulturama. Za teoriju društvene dezorganizacije i teoriju o društvenom pritisku zajedničko je isticanje apsolutnih deprivacija u vidu siromaštva kao jednog od objašnjenja (McCall *et al.* 2012, 141). Teorija društvenog pritiska ukazuje i na značaj koji relativne deprivacije imaju za razumevanje ubistava, a brojna istraživanja pokazuju da društvene nejednakosti u velikoj meri koreliraju sa stopom ubistava (Santos *et al.* 2018, 374). Fiona Brookman (2010, 222) ukazuje na to da su stope ubistava najviše u državama koje karakteriše neoliberalna ekonomija, u kojima nasilnost izazivaju nivo

nejednakosti, relativna deprivacija i (neželjena) nezaposlenost.³ Ona navodi i da određeni autori dovode u vezu stopu ubistava u državi sa brojnošću mladih muškaraca u njenoj populaciji.⁴

Društveni pritisak je, smatra Robert Merton, oličen u nemogućnosti ostvarivanja društveno usvojenih ciljeva legalnim sredstvima, dok Robert Egnju proširuje stimulse koji mogu delovati kao pritisak tako da, osim pozitivno vrednovanih (na primer ekonomski uspeh), u obzir dolaze i negativni stimulusi (na primer, iskustvo viktimizacije) i uklanjanje pozitivnog (na primer, gubitak posla). Tako se, na primer, navodi da će agresiji biti manje sklona lica iz srednjih i viših društvenih slojeva koja istovremeno zlopotrebljavaju alkohol (Fagan 1990, 275), da je intoksikacija bekstvo od siromaštva (Rumgay 1998, 30–31) i da se pije zbog različitih pojava poput usamljenosti, problema i stresa na poslu, nezaposlenosti, porodičnih problema (Dragišić Labaš 2017, 70). Činjenica je da većina ubica pripada nižim društvenim slojevima, da su manje obrazovani, često nezaposleni i bez prihoda (Volfgang, Ferakuti 2012, 135–136), ali je tačno i da se ne vrše sva ubistva iz koristoljublja. Ako se pritisak shvati šire, tako da, osim materijalne koristi, pritisak može biti oličen i u statusu koji se želi postići, dobićemo širu teorijsku osnovu za razumevanje ubistava. Zbog toga bi pažnju trebalo posvetiti i teorijama o potkulturama. Potkulture nasilja inače mogu biti povezane i sa konceptom socijalne dezorganizacije jer je u takvim sredinama zbog niskog validiranja konformističkih vrednosti moguće očekivati stvaranje normi kojima se podržava nasilje (Wilcox, Swartz 2018, 47). Tako i Brookman (2010, 222) ističe stav jednog autora (McAlister 2006, 259–265) koji smatra da učestalost činjenja ubistava u određenoj sredini može biti povezana sa kulturnim razlikama koje se odnose na prihvatljivost moralnog opravdanja dela ubistva i sa načinom na koji pravosuđe u toj zajednici reaguje na takva dela.

Među predstavnicama teorija o potkulturama ističu se, na primer, Milerov koncept o kulturi niže klase i potkultura nasilja o kojoj su pisali Volfgang i Ferakuti. Kultura niže klase (prema Ignjatović 2009, 74–75) inverzna je etici dominantnog društva i počiva na sopstvenim vrednostima koje su označene kao „fokusna interesovanja“. Primer tih interesovanja su sukobi sa policijom, tuče, okupiranost fizičkom veštinom i snagom; razvoj crta muškosti udružen

³ Istovremeno, kako bi pokazala da u kriminologiji nema gvozdene zakonitosti, ukazuje na izuzetak – stopa ubistva u Finskoj je izuzetno visoka iako je to jedna od poznatih socijalnih država. Slična je situacija i sa dostupnošću vatrenog oružja građanima u državama u razvoju, koje nije imalo značajnijeg uticaja jer je njihov zdravstveni sistem unapređen.

⁴ I opet navodi Japan kao izuzetak od tog pravila.

sa neispoljavanjem emocija, prepredenost, sklonost ka snažnim nadražajima putem alkohola, seksa, kocke ili napuštanja boravišta, osećaj da se na sudbinu ne može uticati, jaka želja da se oslobodi svih oblika kontrole (nadređenih, supruge, birokratske vlasti), ali, s druge strane, postoji stalna potreba za sigurnošću (stalan posao, supruga puna razumevanja).

Na osnovu uzorka sastavljenog od više od 500 ubistava u Filadelfiji, Wolfgang i Ferakuti zaključuju da su učinioci tih dela pre svega mlađi muškarci sa srednje, niže i najniže društvene lestvice, među kojima su naročito zastupljeni pripadnici radničke neobrazovane populacije. Suprotno tome, oni koji pripadaju višoj ili višoj srednjoj klasi neće učiniti ubistvo ne samo zbog straha od gubitka položaja u slučaju kazne već (prema mišljenju tih kriminologa) u velikoj meri zato što pripadaju kulturnom sistemu u kome se ne odobrava nasilje. Suprotno, u potkulturi nasilja se u određenim situacijama nasilje toleriše, očekuje ili čak i zahteva (Wolfgang, Ferakuti 2012, 136–137). Na primeru Engleske, Lejton (prema Brookman 2005, 109) objašnjava da se generalno niža stopa ubistava može objasniti uspešnim civilizacijskim procesom još od 13. veka, ali i da u određenim segmentima radničke klase taj proces nije uspeo. Ti pojedinci su najmanje obrazovani, imaju malo toga da izgube, dok Kurtis navodi da je veličanje muškosti karakteristika tih potkultura čiji su pripadnici spremni da upotrebe nasilje radi odbrane nekih vrednosti u situacijama koje bi za većinu bile označene kao trivijalne (Brookman 2005, 109). Možemo videti da više autora ukazuje na značaj koji se u tim potkulturama pridaje muškosti i želji za dominacijom i kontrolom, a alkohol je vrlo pogodno sredstvo za ostvarivanje tih ciljeva (Gačić 1985, 25).

Mnogi autori navode da je za potpunije razumevanje ubistava izvršenih pod dejstvom alkohola neophodno uzeti u obzir i situacione okolnosti o kojima se izlaže u teorijama životne sredine, a posebnu ulogu ima teorija rutinske aktivnosti. Prema tome, povezanost alkohola i ubistava zavisi od nekoliko okolnosti: 1) situacije, okruženja ili društvenog konteksta u kome se alkohol konzumira; 2) karakteristika lica koje pije (pol, uzrast, istorija konzumiranja alkohola, biološke predispozicije); 3) nacionalne ili kulturne razlike; 4) količina i vrsta alkohola (Bye 2012, 232). Važnu ulogu ima i socijalna kontrola, pa je tako u jednoj etnografskoj studiji pokazano kako se grupa mladića iz radničkih porodica pod dejstvom alkohola ponašala na jedan način u okruženjima gde su bili stariji stanovnici, ali potpuno drugačije u delu grada gde su klubovi u kojima su bili njihovi vršnjaci i gde su zbog slabije kontrole ispoljili veću agresivnost (Fagan 1990, 276). U tom kontekstu, činjenica da se na alkohol u jednom društvu gleda sa odobravanjem, da je on dostupan i da se ne poštuju zakonska ograničenja takođe doprinosi većoj zloupotrebi (Gragišić Labaš 2007, 38). Gledano iz perspektive teorija životne sredine, vršenje ubistava pod dejstvom alkohola zavisi i od vremena

i prostora u kome dolazi do krivičnog dela. Naime, ubistva se pretežno vrše u privatnim i poluprivatnim okruženjima, a, na primer, u poređenju sa telesnim povredama nešto manje u javnom prostoru. Takođe, vreme vršenja su uglavnom vikend i večernji ili noćni časovi.

3. KLASIFIKACIJA UBISTAVA

U kriminološkoj literaturi postoje brojne klasifikacije ubistava. Najčešće se polazi od podele na instrumenatalna i ekspresivna ubistva. Prva su motivisana ostvarenjem određenog cilja kao što je novac ili, na primer, prikrivanje izvršenog krivičnog dela, dok druga predstavlja emotivnu reakciju na frustraciju (Thijssen 2011, 59). Istraživanja pokazuju da učinioci instrumentalnih ubistava ostvaruju više skorove na testovima inteligencije, ali su kod njih češći i poremećaji ličnosti. Impulsivno vršenje ubistava karakteristično je za lica koja ostvaruju slabije rezultate na testovima inteligencije, sa češćom istorijom neurorazvojnih poremećaja kao i učestalom zloupotrebom psihoaktivnih supstanci (Hanlon *et al.* 2013, 943). Ipak, pojedini autori tvrde da se primenom te klasifikacije može razvrstati oko 60% ubistava, dok ostali pominju elemente i ekspresivnih i instrumentalnih ubistava ili predstavljaju neku zasebnu kategoriju (Thijssen 2011, 67), zbog čega mnogi autori ukazuju na podtipove kao što su planirana/neplanirana, ekspresivna/instrumentalna ubistva, izvršena među poznanicima i strancima i ofanzivna/odbrambena (Adjorlolo, Chan 2017, 128).

Detaljniju klasifikaciju daju Jangs i Kanter, koji smatraju da se ubice mogu klasifikovati na sledeći način: 1) *osvetnik* ima cilj/misiju, ne umanjuje značaj dela nakon izvršenja, emotivno je smiren. Tvrdi da je žrtva doprinela sopstvenoj viktimizaciji, ima samokontrolu, a osveta se vrši zbog uvrede ili zaštite sebe ili bliskog lica; 2) *profesionalac* je najtipičniji predstavnik ubistva izvršenog zbog koristoljubivih motiva. Emotivno stabilan, hladan, ne umanjuje značaj dela, za njega su posledice i žrtva nebitni. Doživljava zadovoljstvo zbog osećaja moći jer je uspeo da realizuje delo i ostvari kontrolu nad novim izazovom; 3) *tragični heroj* je lice za koje je ubistvo bio jedini mogući način reagovanja u datoj situaciji. Umanjuje značaj dela, prebacuje odgovornost na druge, emotivno je uzbuđen; 4) *žrtva* je učinilac koji sebe doživljava kao ugroženo lice, emotivno uzbuđen, umanjuje odgovornost, prebacuje odgovornost na druge, a na krivično delo gleda kao na posledicu sopstvene nemoći (Youngs, Canter 2011, 9–12).

Brukman vrši podelu prema polu i ukazuje na sličnosti i razlike između ubistava čiji su učinioci muškarci i žene. Treba, pri tome, imati u vidu da muškarci čine najveći broj i ubica i ubijenih. Muškarci najčešće ubijaju

poznanike (30%), nepoznata lica (20%), a zatim prijatelje i članove porodice (10% i 7%). Pripadaju nižim društvenim slojevima, često su nezaposleni ili rade fizičke poslove i nemaju kvalifikacija, a među njima je dosta i korisnika socijalne pomoći. Ubistva koja čine muškarci mogu se podeliti u dve velike kategorije koje, prema mišljenju autorke, objašnjavaju oko dve trećine ubistava u sprovedenom istraživanju u Engleskoj i Velsu. Prvu grupu čine ubistva kao rezultat sukoba (konfliktna ubistva), a drugu osvetnička ili ubistva radi rešavanja nekog ranijeg konflikta (Brookman 2005, 124).

Konfliktna ubistva dešavaju se u različitim okruženjima. To mogu biti privatni stanovi i kuće, a često su i mesta ispred klubova i pabova. Alkohol ima bitnu ulogu i služi, kao i primena nasilja, za demonstriranje muškosti. U mnogim slučajevima postoji doprinos žrtve koja inicira sukob. Važnu ulogu u nadmetanju i odbrani časti i muškosti ima i publika, odnosno prisutna treća lica (Brookman 2005, 127). Tu vrstu ubistava pojedini autori objašnjavaju kao situacionu transakciju koja se odvija između ubice i žrtve uz često prisustvo publike. Tako Lukenbil navodi da ubistvo prolazi kroz četiri faze. Prva podrazumeva započinjanje transakcije, na primer, provokacijom žrtve, nepovinovanjem žrtve učiniočevim zahtevima ili neverbalnom komunikacijom. U drugoj fazi učinilac intepretira situaciju, da bi u trećoj odlučivao da li da nastavi i „sačuva obraz“ ili da odustane i pokaže slabost. U četvrtoj fazi i žrtva ima priliku za takvu odluku, ali najčešće se opredeljuje za nasilje kao vrstu transakcije (Luckenbill 1977, 180–184). Do sličnih zaključaka u studiji koja je obuhvatila 159 ubistava došli su Felson i Štedman (Felson, Steadman 1983, 70). U tom smislu i Kac (2009, 341) ukazuje na to da je za razumevanje srži zločina neophodno uzeti u obzir moralne emocije: poniženje, pravednost, aroganciju, podsmeš, cinizam, skrnavljenje i osvetu. Za onog koji ubija iz strasti izazov je da izađe iz situacije koja inače izgleda ponižavajuće. Autor slično navodi i za tipična instrumentalna ubistva, kao što su ona izvršena prilikom razbojništva, jer previše oklevanja stvara nesigurnost u reakcijama licem u lice, koja je u takvim situacijama neprimerena (Katz 2009, 342).

Osvetnička ili ubistva radi razrešenja sukoba podrazumevaju planiranje krivičnog dela, zbog čega su i opasnija. Učinioci ne pokazuju kajanje. Između konflikta ili percipirane nepravde i ubistva postoji vremenski razmak, a učinilac i žrtva se češće poznaju u poređenju sa konfliktnim ubistvima. Zanimljivo je da autorka navodi da učinioci osvetničkih ubistava kao i ubice motivisane koristoljubljem pripadaju marginalizovanim društvenim slojevima. Učinioci konfliktnih ubistava, s druge strane, mogu pripadati i uglednim radničkim porodicama (Brookman 2005, 140).

U slučajevima kada muškarci ubijaju žene najčešće je reč o bračnoj ili vanbračnoj partnerki. Brukman i u tim ubistvima pravi razliku između konfliktnih i planiranih ubistava. U oba slučaja motivi su najčešće dominacija

i ostvarivanje kontrole, što autorku navodi na zaključak da nema velikih razlika između slučajeva kada muškarci ubijaju druge muškarce ili žene (Brookman 2005, 154). Suprotno tome, feministički stavovi ističu da nasilje prema partnerki nije impulsivno već strateški planirano (Moffit *et al.* 2000, 223–224). Feministički pristup ubistvo žena vidi kao posledicu procesa socijalizacije u kome se muškarci uče da imaju hegemoniju nad ženama koje su im potčinjene. Dakle, zanemaruje se individualna i/ili socijalna patologija. Suprotno, perspektiva o opštem nasilju ukazuje na sličnosti u etiologiji nasilja prema partneru i prema drugim žrtvama (Kivivuori, Lehti 2012, 61–62). Dobaš i Dobaš tvrde da su ubice žena partnerki stariji, u manjoj meri nezaposleni i isto tako manje zloupotrebljavaju alkohol u poređenju sa ubicama drugih muškaraca (Dobash, Dobash 2015, 63). U Švedskoj su došli do zaključka da su psihijatrijski poremećaji češći u slučaju ubica partnera. U Finskoj su istraživanja pokazala da je nezaposlenost ubica nepoznatih muškaraca bila viša za 10% u odnosu na ubistva partnerki, da su te ubice češće ranije osuđivane, da je zavisno od upotrebe psihoaktivnih supstanci bilo 72% ubica nepoznatih muškaraca naspram 53% međupartnerskih ubistava. Što se tiče uticaja alkohola, autori nisu utvrdili velike razlike između pomenutih tipova ubistava (Kivivuori, Lehti 2012, 71–73).

Za razliku od muškaraca, žrtve žena ubica najčešće su njima bliska lica, a retko nepoznata lica ili poznanici. U slučaju ubistva partnera u velikom broju su to žene preko 30 godina, a prema nekim procenama oko trećine žena ubica partnera su neposredno pre događaja zloupotrebljavale alkohol. Postoje najčešće dva scenarija: 1) žena reaguje odmah na fizički ili verbalni sukob sa žrtvom; 2) reakcija je odložena, ubistvo je neočekivano, a žrtva pasivna (prema Lukić 2019, 332). Doprinos žrtve sopstvenoj viktimizaciji veoma je visok u tim ubistvima imajući u vidu da se procenjuje da je oko 80% žena ubica prethodno iskusilo neki oblik porodičnog nasilja (Brookman 2005, 167). Razumevanje ubistava koje čine žene ne može se tražiti samo u shvatanjima o ženi kao bespomoćnoj, pasivnoj, iracionalnoj ili onoj koja je naučila da se tako ponaša (Brookman 2005, 174). Umesto toga, ubistva koja čine žene van partnerskih odnosa ne treba odvajati od ubistava koja čine muškarci. Žene u tim situacijama takođe mogu štiti svoj status ili ugled, što su, na primer, potvrdila istraživanja o maloletničkim gangovima (Blanchette, Brown 2006, 9).

Majke koje ubijaju svoju decu mogu se klasifikovati prema različitim kriterijumima (McKee, Dwyer 2015, 154; Oberman 2007, 43–44). Majke ubice novorođene dece pre imaju poremećaj ličnosti nego duševnu bolest.

Među faktorima koji se dovode u vezu sa ubistvima starije dece navode se duševne bolesti, nasilje u porodici, siromaštvo i nezaposlenost, kao i zloupotreba psihoaktivnih supstanci (prema Lukić 2019, 333).

Konačno, postoji i podela ubistava prema kriterijumu odnosa između ubice i ubijenog. Prvu kategoriju čine primarna ubistva koja su ujedno i najčešća i obuhvataju lica koja se poznaju (partneri, srodnici, prijatelji, poznanici). Druga je kategorija neprimarnih ubistava izvršenih prema nepoznatim licima. Primarna su najčešće i ekspresivna, dok su neprimarna planirana i vrlo retko podstaknuta ponašanjem žrtve (Smith, Parker 1980, 139). U domaćoj literaturi se karakteristike ubica i ubijenih vrlo često analiziraju na osnovu odnosa između njih. Tako Pešić navodi da posebnu karakteristiku ubistava u kojima je jedan od aktera bio pod dejstvom alkohola čine odnosi ubice i žrtve. Obično je reč o porodičnim, srodničkim i prijateljskim odnosima (Pešić 1972, 64). Mladenović ističe tri vrste dominantnih odnosa u ubistvima u kojima postoji faktor alkoholisanosti. Prvu, najbrojniju, grupu čine ubistva između suseda, poznanika i prijatelja. U toj grupi faktor alkoholisanosti dominira (72%) i kod ubice i kod ubijenog. Potom dolaze ubistva između krvnih srodnika, a najčešće su to ubistva učinjena zbog dugogodišnjeg zlostavljanja od oca ili muža koji zloupotrebljava alkohol. Konačno, autorka navodi i ubistva između lica koja se nisu ranije poznavala, a rezultat su međusobnog vređanja ili izazivanja u svađi u alkoholisanom stanju (Mladenović 1973, 271). Polazeći od podele na instrumentalna i ekspresivna ubistva, Simeunović Patić navodi da je pod dejstvom alkohola u trenutku činjenja dela bilo više od polovine izvršilaca ubistava iz koristoljublja i jedna petina učinilaca ubistva u kontekstu teškog razbojništva (Simeunović Patić 2003, 157). S druge strane, među ekspresivnim ubistvima pravi se razlika na osnovu odnosa ubice i žrtve i navode sledeći podaci: muškarci koji su ubili svoje partnerke bili su pod dejstvom alkohola u skoro polovini slučajeva, dok je to zabeleženo kod dve trećine muškaraca koje su ubile njihove partnerke; u ubistvima krvnih srodnika češće je pod dejstvom alkohola u trenutku ubistva bila žrtva (41%) nego ubica (25%); u ubistvima poznanika, prijatelja, daljih rođaka, suseda pod dejstvom alkohola bili su u podjednako meri obe strane (48,5%), a značajno je i učešće hroničnog alkoholizma; u ekspresivnim ubistvima nepoznatih lica alkoholičari su bili dvostruko manje zastupljeni nego druge kategorije (Simeunović Patić 2003, 165–181).

4. EMPIRIJSKA ANALIZA

4.1. Uzorak

Istraživanje se radi na osnovu uzorka sastavljenog od 84 pravnosnažna sudska predmeta ubistava, teških ubistava i ubistava na mah prikupljenih u Višem sudu u Beogradu u periodu 2011–2015.⁵ Iako se u literaturi (Clinard, Quinney, Wildeman 1994, 28) sa puno osnova navodi da je u ovom krivičnom delu tamna brojka među najmanjima,⁶ treba napomenuti da se to istraživanje ne odnosi na nerасsvetljena ubistva kojih je poslednjih godina, prema evidencijama Republičkog zavoda za statistiku znatno manje nego devedesetih godina prošlog veka.⁷

Podaci su prikupljeni uvidom u svaki pojedinačni sudski predmet. Osim karakteristika učinioca, prikupljeni su i podaci za žrtvu, a za svaki slučaj je naveden i kratak opis događaja. Primetno je da u predmetima najčešće nedostaju podaci o žrtvi krivičnog dela. Kriminološki relevantne varijable poput ranije osuđivanosti žrtve, socioekonomskog i bračnog statusa pa čak i uzrasta najčešće smo pronalazili u obdukcionim nalazima i iskazima svedoka. Za učinioca su prikupljeni podaci za 25 varijabli, za žrtvu za sedam varijabli, a za krivično delo 10 varijabli.

Definisanje pojmova

Zloupotreba alkohola ispituje se analizom dveju varijabli. Prva je alkoholisanost, odnosno prisustvo alkohola u krvi/urinu u trenutku izvršenja krivičnog dela, to jest viktimizacije. Druga je alkoholizam u skladu sa definicijom navedenom u teorijskom delu rada, a što je rezultat procene veštaka u krivičnom postupku. U tim slučajevima po pravilu je izricana mera bezbednosti obaveznog lečenja alkoholičara.

⁵ Uпитnik za istraživanje kreiran je u okviru „Balkan Homicide Study“ pod pokroviteljstvom *Max-Planck* Instituta za međunarodno krivično pravo (<https://www.balkan-criminology.eu/research-focuses/current-projects/balkan-homicide-study/>), a sprovođenje istraživanja finansiralo je Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije.

⁶ Zbog čega ti autori smatraju da je ono najpogodnije za međunarodne komparacije kriminaliteta.

⁷ Tako je, prema Republičkom zavodu za statistiku nerасsvetljenih ubistava, u Srbiji 2015. godine bilo 25. <https://publikacije.stat.gov.rs/G2016/Pdf/G20165617.pdf>.

Kada je u pitanju podela ubistava, u istraživanju smo u osnovi pošli od podele na ekspresivna i instrumentalna ubistva. No, ako bismo ostali samo na pomenutoj klasifikaciji, pitanje je da li bismo dobili precizniju predstavu o značaju koji alkohol ima u vršenju ubistava. Naime, pretpostavljamo da bismo najveći broj svih ubistava mogli svrstati u kategoriju ekspresivnih. Zbog toga smo odlučili da, osim te klasifikacije, ubistva razvrstamo i u konfliktna, ubistva izvršena radi razrešenja ranijeg sukoba (osvetnička), između partnera (bračnih, vabračnih, bivših), ubistva motivisana koristoljubljem (ovde smo uvrstili i situacije kada je ubistvo izvršeno prilikom vršenja razbojništva ili razbojničke krađe) i ostala (na primer, kada ubistvo izvrše policijski službenici u prekoračenju ovlašćenja). Pojam konfliktnog ubistva podrazumeva spontano odvijanje sukoba, a ubistvo je rezultat emotivne reakcije na frustraciju. Suprotno, kada se ubistvo vrši radi razrešenja konflikta, radnja je planirana i rezultat prethodno donete odluke.⁸ Motiv je vrlo često osveta. Konačno, analizu smo vršili i prema vrsti odnosa između dve strane i podelili ih na ubistva među nepoznatima i ubistva između lica koja se poznaju, sa potkategorijama.

Primeri konfliktnih ubistava

Dva studenta su igrala karte u stanu. U jednom trenutku se dogodila svađa, a potom je osuđeni žrtvi naneo telesne povrede nožem.

Sukob se dogodio u kafani. Žrtva je imala vatreno oružje i pretila je osuđenom i njegovom bratu. Osuđeni se fizički sukobio sa žrtvom, a potom mu se pridružio i brat. U jednom momentu ispaljen je metak i žrtva je bila ubijena. Učinioci su pobjegli.

Primeri ubistava kojima se razrešava sukob (osvetnička ubistva)

Ubica je naneo prostorelne rane žrtvi iz vatrene oružja. Između njih je ranije postojao sukob, a osuđeni je pretio žrtvi smrću zbog toga što je svedočila protiv njega u krivičnom postupku.

⁸ Iako ima jasne kriterijume razgraničenja u odnosu na konfliktna ubistva, pitanje je kako odrediti situacije u kojima učinilac ne iskazuje nameru da izvrši ubistvo kako bi razrešio sukob. Ako bi, na primer, učinilac došao u žrtvin stan kako bi raspravili prethodno postojeći sukob, a potom tokom svađe/konflikta izvrši ubistvo, postojali bi elementi obe kategorije.

Osuđeni i žrtva su najpre ušli u verbalni konflikt, a potom i u fizički obračun u kome je žrtva nanela lake telesne povrede osuđenom. Učinilac je potom otišao do svog stana po pištolj da se osveti. Pucao je na žrtvu, ali promašio. Žrtva je počela da beži, ali je osuđeni uspeo da je sustigne, baci na pod, a potom ju je ubio tako što joj je pucao u glavu.

4.2. Cilj istraživanja

Cilj istraživanja je da se najpre izvrši deskriptivna analiza koja podrazumeva utvrđivanje rasprostranjenosti zloupotrebe alkohola (uključujući akutno pijanstvo i alkoholizam) među osuđenim licima za ubistvo i teško ubistvo. Osim učinilaca, ispitivanjem su obuhvaćene i žrtve. U deskriptivnom delu analiziramo i druge karakteristike uzorka i ukrštamo varijable. Imajući u vidu različite tipologije ubistava u literaturi, drugi cilj ovog istraživanja je pokušaj da se ustanovi da li je i koja od navedenih podela relevantna kada je zloupotreba alkohola u pitanju. Analize su rađene u programu SPSS, verzija 18.

4.3. Hipoteze

1. Muškarci češće nego žene vrše ubistvo pod dejstvom alkohola.
2. Muškarci osuđeni za ubistvo češće su zavisnici od alkohola nego žene.
3. Muškarci žrtve partnerskog nasilja su u većem broju slučajeva pod dejstvom alkohola u trenutku viktimizacije nego žene žrtve partnerskog nasilja.
4. Konfliktna ubistva su zastupljena u većem broju slučajeva nego osvetnička ubistva.
 - 4.1. Učinioci konfliktnih ubistava su u većem procentu pod dejstvom alkohola u trenutku izvršenja dela nego učinioci osvetničkih ubistava.
 - 4.2. Žrtve konfliktnih ubistava su u većem procentu pod dejstvom alkohola u trenutku viktimizacije nego žrtve osvetničkih ubistava.
5. Ubistva između lica koja se poznaju u većem broju slučajeva izvršena su pod dejstvom alkohola u momentu preduzimanja radnje krivičnog dela nego ubistva između lica koja se ne poznaju.
 - 5.1. Ubistva između daljih srodnika i prijatelja u većem broju slučajeva izvršena su pod dejstvom alkohola nego ubistva između partnera i članova porodice.

4.4. Rezultati

4.4.1. Deskriptivna analiza podataka

Uzorak je sastavljen od ukupno 84 sudska predmeta, pri čemu je ukupan broj osuđenih lica 95, a ukupan broj žrtava 105. Najveći broj slučajeva (66,3%) jeste krivično delo učinjeno u pokušaju, ostalo su dovršena krivična dela. Dalje, oko dve trećine uzorka (68,4%) čini krivično delo ubistva iz čl. 113 Krivičnog zakonika, dok je teško ubistvo iz čl. 114 Krivičnog zakonika zastupljeno u 28,4%. U samo tri slučaja radilo se o ubistvu na mah iz čl. 115 istog zakona. Ubistva po pravilu vrši jedno lice (74,7%), u saučesništvu sa još jednim licem 22,1%, dok su u tri slučaja ubistvo zajedno učinila tri lica. Takođe, ubistvo se najčešće vrši prema pojedincu (89,5%). Ubistvo dva lica registrovano je u 5,3% slučajeva, tri lica u 1,1%, a četiri lica u 4,2%. Zanimljivo je da su teška ubistva češće dovršena nego obična i ta veza je statistički relevantna ($\chi^2 = 21,353$, $c = 0,428$, $p = 0,000$). Kada se podaci o stadijumu ukrste sa podacima o vrsti ubistva, dolazi se do zaključka da se znatno češće dovršavaju ubistva koja su izvršena zbog koristoljublja, odnosno prilikom razbojništva i razbojničke krađe, nego sva druga ubistva (konfliktno, osvetničko, među partnerima). Ta veza je i statistički značajna ($\chi^2 = 11,944$, $c = 0,349$, $p = 0,018$). Dakle, razbojници su u 77% dovršili krivično delo, što bi se moglo povezati sa činjenicom da ubistvo planiraju, da žrtve ne pružaju otpor, da učinioci žele da spreče otkrivanje razbojništva. U uzorku je bilo podjednako konfliktnih ubistava, koja su opisana u teorijskom delu rada, (32 odnosno 37,2%) i osvetničkih (37,2%). Ubistva partnera smo izdvojili kao posebnu grupu i u uzorku ih je 10, odnosno 11,6%. Slede ubistva izvršena zbog koristoljublja odnosno zajedno sa razbojništvom ili razbojničkom krađom (9, odnosno 10,5%), a samo tri slučaja, što čini 3,5% uzorka, nismo mogli svrstati u neku od pomenutih kategorija.

Kada je u pitanju mesto izvršenja ubistava, iz istraživanja proizlazi da se ubistva nešto više (blizu 58%) vrše na otvorenom prostoru. Najčešće je to ulica (60%). Kada je zatvoreni prostor u pitanju, ubistva su u najvećem broju slučajeva vršena u kući ili stanu (72,5% svih ubistava izvršenih u zatvorenom prostoru, odnosno oko trećine u ukupnom uzorku). Ukrštanjem podataka o vrsti ubistava i prostoru gde je izvršeno zaključujemo da se partnerska ubistva u najvećem broju slučajeva vrše u zatvorenom prostoru (90%), a osvetnička na otvorenom (75%). Konfliktna i ubistva zbog koristoljublja učinjena su približno u istom procentu unutra i van. Veza prostora i vrste ubistava je statistički relevantna ($\chi^2 = 16,151$, $c = 0,398$, $p = 0,003$).

Najveći broj ubistava izvršen je upotrebom hladnog oružja, pod kojim smo podrazumevali različite vrste sečiva, ali i tupih predmeta (54,3%), zatim vatrenim oružjem (37,2%) i upotrebom samo fizičke snage (8,5%). Način

izvršenja je najčešće podrazumevao ubadanje (45%), pucanje (36,3%), prebijanje (16,5%) i davljenje (2,2%). Konfliktna ubistva su najčešće vršena ubadanjem (67,7%), osvetnička upotrebom vatrenog oružja (50%), između partnera (44,4%) prebijanjem, dok su ubistva izvršena zbog koristoljublja vršena podjednako pucanjem, prebijanjem i ubadanjem. Veza ovih varijabli je statistički značajna ($\chi^2 = 27,019$, $c = 0,493$, $p = 0,008$).

Podaci dalje pokazuju da je najveći udeo ubistava izvršen u glavnom gradu (64,2%), zatim u sredinama koje smo odredili kao urbane (18,9%) i naposljetku u ruralnim oblastima (16,8%). Što se vremenske komponente tiče, teorija ukazuje na to da se ubistva najčešće vrše vikendom ili ponedeljkom. U uzorku je najviše ubistava učinjeno u ponedeljak (22%), a potom u nedelju (14,9%). Najveći broj ubistava učinjen je u periodu od 19 do 21 h (25%), a potom između 1 i 2 časa posle ponoći (14,8%).

Učinioci su uglavnom muškarci (92,6%). U uzorku je bilo pet osuđenih žena, pri čemu su dve žene ubile partnera, u jednom slučaju je ubistvo rezultat konflikta, a u jednom slučaju motiv je osveta. Prosečan uzrast učinilaca je 34 godine, što pokazuje da su, za razliku zemalja Zapadne Evrope i SAD, u kojima je se ubistvo najčešće vrši u dvadesetim godinama (Stamatel 2012, 160), u našoj državi, a slično i drugim istočnoevropskim zemljama, učinioci ubistava u srednjem dobu. Najveći broj osuđenih ima završeno srednjoškolsko obrazovanje (57,6%), a potom osnovnu školu (33,7%). Bez završene osnovne škole je 7,6%, dok je samo jedno lice završilo višu školu.⁹ U uzorku je nešto više nezaposlenih (50,6%) nego zaposlenih (44,9%), a ostalo su penzioneri (4,5%).¹⁰ U skladu sa podacima o zaposlenosti, jasno je da skoro polovina osuđenih (47,2%) nema prihoda, a gotovo trećina (27,8%) ima ispodprosečne prihode. Prosečna primanja i primanja iznad proseka ima po 12,5% lica. Podaci o bračnom statusu pokazuju da skoro polovina osuđenika nije u braku (47,8%). Jedna četvrtina ima bračnog partnera, a 15% vanbračnog, razvedenih je 7,6%, dok je najmanje udovaca/udovica (4,3%). Najveći broj osuđenika (56,1%) nema dece. Što se nacionalnosti tiče, većina (87,2%) izjasnila se kao Srbin/Srpkinja, potom Rom/Romkinja (7,4%), dok su ostale nacionalne i etničke grupe bile zastupljene u 5,3%.

⁹ Slični podaci dobijaju se i za celokupnu populaciju osuđenih u Srbiji. Tako je 2015. godine 51% svih osuđenih lica završilo srednju školu, 24,4% osnovnu školu, 10% je bez škole ili ima nekoliko razreda, dok 5,9% ima završenu višu ili visoku školu.

¹⁰ Ako pogledamo podatke o zaposlenosti za celokupnu populaciju osuđenih u Srbiji (uzećemo 2015. godinu), nezaposlenih je 45,9%, što ne odstupa značajno od podatka za osuđene za ubistva.

Ranije osuđivanih je 42, odnosno 44,2%, što je malo više u odnosu na ukupni prosek za sva osuđena lica i koji se kreće između 35% i 40%. Najveći broj osuđenika nije ranije osuđivan za neko krivično delo sa elementima nasilja (72, odnosno 75,8%). Ako i postoji osuda za ranije nasilno delo, po pravilu je u pitanju samo jedno krivično delo (18,9%), dok je samo jedno lice bilo tri puta osuđeno za neko nasilno delo i samo jedno lice za četiri nasilna krivična dela. To pokazuje da nasilne kriminalne karijere ima veoma mali procenat ubica i da u tom smislu ne možemo govoriti o nekoj specijalizaciji. Najveći broj osuđenika nije ranije osuđivan na zatvorsku kaznu (66, odnosno 69,5%), a među bivšim zatvorenicima najviše je onih (22%) kojima su izrečene zatvorske kazne u trajanju do tri godine. Duže od pet godina u zatvoru je ranije provelo 7,4% lica iz uzorka.

Žrtve ubistava su po pravilu muškarci (82,8%). Samo u jednom slučaju žrtva ubistva koje je učinila žena bila je takođe ženskog pola, u ostalim slučajevima žrtve žena ubica bile su muškog pola. Najveći broj žena viktimizovano je u kontekstu međupartnerskog nasilja (53,3%)¹¹, a zatim zbog osvete (20%). U konfliktnim situacijama viktimizovano je 13,3% svih žena, a isto toliko i zbog koristoljublja. Sa muškarcima je situacija drugačija. Najveći broj je stradao u konfliktnim situacijama (44,1%), potom zbog osvete (41,2%), zbog koristoljublja (7,4%). Najmanje muškaraca ubile su njihove partnerke (2,9%), dok 4,4% muških žrtava nije moglo biti svrstano u neku od tih grupa. Veza vrste ubistava i pola žrtve statistički je značajna ($\chi^2 = 31,581$, $c = 0,525$, $p = 0,000$).¹²

Što se tiče odnosa ubice i ubijenog u najvećem broju slučajeva reč je o licima koja se poznaju (73%). Pretežno su u pitanju poznanici (od ukupnog broja to je 34,9%, a u odnosu na kategoriju lica koja se poznaju 48%), a potom prijatelji (15,5%, odnosno 21,3% kategorije lica koja se znaju). Kada su u pitanju porodični odnosi, na prvom mestu po brojnosti žrtava je partner (10,7%), zatim članovi uže porodice (7,7% svih slučajeva), dok je najmanje stradalo članova šire porodice (3,8% svih slučajeva). U 91% slučajeva ubistava između lica koja se ne poznaju motiv je koristoljublje. Osveta se najčešće vrši prema poznanicima (50%), a sukob je pretežno motiv i među poznanicima (44,6%). Ljubomora kao motiv pretežno je zastupljena u ubistvima partnera (60%), kao i raskid/razvod (75%).

¹¹ Žene čine 80% svih žrtava međupartnerskog nasilja.

¹² Relacija je testirana između učinioca i prve žrtve, odnosno nisu obuhvaćeni slučajevi sa više učinilaca i više žrtava.

4.4.2. Provera hipoteza

Analiza najpre pokazuje da je kod 42 osuđenika (45,2%) ustanovljeno prisustvo alkohola, dok je prisustvo opojnih droga registrovano u 16%, odnosno kod 15 lica. Što se tiče alkoholizma, procenjeno je da je 7,9% lica imalo razvijenu zavisnost, dok je taj procenat zavisnosti od opojnih droga bio manji (4,5%). Svi alkoholičari u uzorku učinili su ubistvo u stanju alkoholisanosti. Na osnovu samo deskriptivnih podataka možemo videti da alkohol ima bitnu ulogu u razumevanju ubistava. Od ukupnog broja muškaraca, 44,2% je bilo pod dejstvom alkohola u trenutku ubistva, dok je taj udeo kod žena učinilaca 57%. Iako taj rezultat ne ide u prilog prvoj postavljenoj hipotezi, treba ipak imati u vidu da je u uzorku bilo samo sedam žena osuđenih za ubistvo. Na većim uzorcima trebalo bi ispitati da li su žene u većem procentu pod dejstvom alkohola u trenutku ubistva. Podaci o postojanju alkoholizma pokazuju da se taj oblik zavisnosti pojavljuje samo kod muškaraca ubica.

Već je pomenuto da je porodično nasilje najčešći kontekst u kome su žene ubijene, a u istom kontekstu žene najčešće i vrše ubistva. U uzorku ubistva partnera čine 11,6%. Osuđene su dve žene i osam muškaraca. Interesantno je da su obe osuđene žene bile pod dejstvom alkohola, dok je to slučaj sa polovinom muškaraca osuđenih za ubistvo partnerki. Dakle, na prvi pogled se čini da je manje muškaraca bilo pod dejstvom alkohola u partnerskim ubistvima, ali, kao što smo naglasili, treba biti oprezan u izvođenju zaključaka zbog malih apsolutnih brojeva i mogućnosti da su slučajno obe žene koje su ubile partnere bile pod dejstvom alkohola.

Kada su žrtve svih ubistava u pitanju, podaci pokazuju da je samo jedna žena (5,5%) bila pod dejstvom alkohola u trenutku viktimizacije, dok je to slučaj sa 21,4% ubijenih muškaraca. Interesantno je da nijedna žrtva partnerskog ubistva nije bila pod dejstvom alkohola u trenutku viktimizacije.

Ukoliko u analizi pođemo od klasifikacije ubistava na ekspresivna, čiji je jedini cilj da se žrtva liši života, odnosno da joj se nanese zlo, i instrumentalnih, koja su rukovođena još nekim ciljem (novac, zadovoljenje seksualnog nagona, sprečavanje hapšenja ili otkrivanja krivičnog dela), dolazimo do zaključka da se 77,9% ubistava svrstava u ekspresivna, a 22,1% u instrumentalna ubistva. Kada smo podatke o toj klasifikaciji ukrstili sa varijablom o prisustvu alkohola kod učinioca u trenutku ubistva, nismo dobili statistički značajnu vezu. Naime, skoro podjednak broj ekspresivnih ubistava učinjen je pod dejstvom alkohola kao i u treznom stanju (36 lica, odnosno 53,7% naspram 46,3%). Šest lica (33,3%) učinilaca instrumentalnih ubistava bilo je pod dejstvom alkohola. Zbog toga smo ubistva klasifikovali i na druge načine.

Najpre smo pošli od podele koju predlaže Brukman, a posebno smo još izdvojili ubistva partnera i ubistva motivisana koristoljubljem. U uzorku je najviše konfliktnih ubistava (37,2%), kao i ubistava izvršenih radi razrešenja sukoba (37,2%), među partnerima (11,6%) i ubistava motivisanih koristoljubljem (10,5%). Preostalih slučajeva je 3,5%. U slučajevima konfliktnih ubistava 21 učinilac (65,6%) bio je pod dejstvom alkohola, u slučajevima rešavanja sukoba (osvetnička ubistva) 10, odnosno 32,3%, u ubistvima partnera šest osuđenika (60%), a u ubistvima izvršenim motivisanih koristoljubljem pet lica (55,6%). Posmatrano u odnosu na populaciju svih slučajeva u kojima je učinilac bio pod dejstvom alkohola, najviše su opet zastupljena konfliktna ubistva (50%). Ta veza je umereno statistički značajna ($\chi^2 = 10,529$, $c = 0,332$, $p = 0,032$). Dakle, najmanje mogućnosti za ubistvo izvršeno pod dejstvom alkohola ima u slučajevima rešavanja postojećih sukoba, zatim u ubistvima iz koristoljublja, ubistvima partnera i na kraju konfliktnim ubistvima. Kada je u pitanju zavisnost od alkohola, najveći udeo alkoholičara učinio je konfliktno ubistvo (57,1%), a potom ubistvo partnera (28,6%). No, ta veza nije statistički značajna. Imajući u vidu stavove u literaturi da su čak i ubistva partnera planirana, a ne rezultat impulsivnosti, odlučili smo da na osnovu činjeničnih stanja ubistava partnera iz presuda izvršimo njihovo razvrstavanje na konfliktna i ubistva kojima se razrešava neki raniji sukob. Analiza je pokazala da pet slučajeva možemo klasifikovati kao konfliktna, a pet kao planirana.

Primeri konfliktnih ubistava (uključujući i pokušaje)

Posle kraće verbalne rasprave sa suprugom, žena je uzela bušilicu i udarila muža nekoliko puta u predelu glave kako bi ga sprečila da je napusti.

Žena žrtva ubistva je prethodno bila žrtva nasilja svog vanbračnog partnera. Napad se dogodio kada je žrtvin brat došao da je odvede kod roditelja kako bi sprečio dalje nasilje vanbračnog partnera. Osuđeni je hteo da napadne brata žrtve, a u pokušaju da ga spreči u tome žena je zadobila ubod ostrim predmetom u grudi.

Bračni partneri su izašli uveče, potom su se posvađali i potukli pa vratili kući. On je bacio pepeljaru na nju, a ona ga je izbola nožem. Tokom suđenja suprug je hteo da se pomire.

Primeri ubistava kojima se razrešava sukob

Osuđeni je otišao u supermarket gde je radila njegova bivša supruga. Iako je u tom trenutku bio u braku sa drugom ženom, nožem je uboo bivšu suprugu jer nije mogao da prihvati da ona ne želi da opet bude s njim.

Osuđeni je došao u stan svoje bivše supruge gde je živela sa svojim roditeljima. Nosio je crnu torbu, a kada je žrtva – bivša supruga došla do njega i pitala da li je doneo novac koji je dugovao, on ju je napao nožem. U sukob su se uključili i žrtvini roditelji koji su takođe pretrpeli lake i teške telesne povrede. Osuđeni je prilikom bekstva iz stana ukrao novčanik i narukvicu.

Osuđeni je ubio svoju suprugu zbog ljubomore. Čekao je da zaspi, a onda ju je zadavio i uboo nožem u vrat nekoliko puta. U trenutku započinjanja radnje ubistva ona se probudila, pokušala da se odbrani i zbog toga je, osim smrtnih, zadobila i povrede ruku.

Podaci su pokazali da je 67,6% ubica u konfliktnim ubistvima bilo pod dejstvom alkohola, što je, s druge strane, bio slučaj sa 31,4% onih što su krivično delo vršili radi razrešenja sukoba. Ubistva izvršena zbog koristoljublja su u 55,6% slučajeva učinjena pod dejstvom alkohola. Veza je statistički značajna i to u većoj meri u odnosu na prethodnu klasifikaciju ($\chi^2 = 10,497$, $c = 0,332$, $p = 0,015$). Dakle, verovatnije je da će konfliktna i ubistva iz koristoljublja biti učinjena pod dejstvom alkohola nego ubistva koja su motivisana rešavanjem sukoba. Kako podaci pokazuju da je u polovini slučajeva ubistava učinjenih iz koristoljublja učinilac bio pod dejstvom alkohola, zanimalo nas je da vidimo da li će se rezultati promeniti ukoliko tu kategoriju priključimo ubistvima iz osvete/rešavanja sukoba. Naime, za oba tipa ubistava karakteristično je da su po pravilu planirana. Ispostavilo se da je i ta veza statistički relevantna ($\chi^2 = 8,830$, $c = 0,307$, $p = 0,012$) i da je alkohol prisutniji opet u kategoriji konfliktnih ubistava (67,6% konfliktnih pod dejstvom alkohola).

Podaci pokazuju da je najveći broj žrtava koje su bile pod dejstvom alkohola u trenutku viktimizacije (70% svih žrtava pod dejstvom alkohola) stradao u kontekstu konfliktnih ubistava. Preostalih 30% viktimizovano je zbog razrešenja ranijeg sukoba. Dakle, u slučaju partnerskog nasilja i razbojništava nismo imali slučajeve u kojima je žrtva u alkoholisanom stanju. Ova veza je i statistički značajna¹³ ($\chi^2 = 11,522$, $c = 0,353$, $p = 0,021$).

¹³ Analizirali smo samo podatke prve žrtve, odnosno nisu uključeni slučajevi u kojima je bilo više od jedne žrtve. Samo u dva slučaja u kojima je bilo više od jednog viktimizovanog lica žrtve su bile pod dejstvom alkohola.

Tabela 1. Deskriptivni podaci i statistički relevantni zaključci

	Pod dejstvom alkohola	Zavisnost od alkohola
Osuđeni	45,2%	7,9%
Ženski	57%	0
Muški	44,2%	7,9%
Žrtva	18%	
Ženski	5,5%	
Muški	21,4%	
Tip ubistva 1 (osuđeni)		
Ekspresivna	53,7%	9,1%
Instrumentalna	33,3%	6,7%
Tip ubistava 2 (osuđeni)	$\chi^2 = 10,497,$ $c = 0,332, p = 0,015$	
Konfliktna	67,6%	16,7%
Osvetnička	31,4%	2,9%
Zbog koristoljublja	55,6%	0
Tip ubistava 3 (osuđeni)		
Među licima koja se poznaju	44,3%	10,1%
Među licima koja se ne poznaju	45,5%	0

U delu o deskriptivnim podacima navedeno je da su konfliktna ubistva najčešće vršena hladnim oružjem, dok je u ubistvima zbog ranijeg sukoba najviše bilo zastupljeno vatreno oružje. Ukrštanje podataka o alkoholisanosti i vrsti oružja potvrđuje da su ubistva učinjena pod dejstvom alkohola najčešće vršena upotrebom hladnog oružja (71% svih ubistava izvršenih pod dejstvom alkohola) i ta veza je statistički značajna ($\chi^2 = 11,552, c = 0,332, p = 0,003$).

Upoređujući podatke o alkoholisanom stanju osuđenih i žrtava¹⁴ zaključujemo da su žrtve u skoro 20% slučajeva bile pod dejstvom alkohola. Kada su žrtve pod dejstvom alkohola, najčešće su (u 82,4% situacija) i učinioci pod dejstvom alkohola i ta veza je statistički značajna ($\chi^2 = 11,256$, $c = 0,338$, $p = 0,001$).

Konačno, ispitivali smo i da li je vrsta odnosa između učinioca i žrtve povezana sa slučajevima ubistava izvršenih pod dejstvom alkohola. Najpre smo sve relacije podelili u dve grupe prema kriterijumu da li se učinilac i žrtva od ranije poznaju ili ne. U slučajevima ubistava nepoznatih lica, alkoholisano je bilo 45,5% osuđenika, dok je u ubistvima između lica koja se poznaju taj udeo 44,3%. Ta veza nije statistički značajna. Ako se izdvoje kategorije stranaca, partnera, članova uže porodice i ostalih (šira porodica, prijatelji poznanici), takođe nema statistički značajnih relacija. Naime, iako je više od polovine svih ubistava učinjenih pod dejstvom alkohola (56,1%) upravo u poslednjoj grupi (šira porodica, poznanici, prijatelji), isto tako najveći broj ubica čije su žrtve iz te kategorije lica nije bio u alkoholisanom stanju (54,9% svih lica koja nisu bila pod dejstvom alkohola).

5. ZAKLJUČAK

Nesporno je da alkohol ima značajnu ulogu u razumevanju etiologije nasilničkog kriminaliteta, a prema tome i u razumevanju ubistava. Takođe je činjenica da nijedan faktor ne možemo izdvojiti kao ključan za objašnjenje ubistava i u tom smislu zloupotreba alkohola daje određeni doprinos u sadejstvu sa drugim faktorima. Pregled literature pokazuje da se taj doprinos najčešće analizira utvrđivanjem rasprostranjenosti ubistava učinjenih pod dejstvom te psihoaktivne supstance, dok se manje pažnje posvećuje pitanju u kom kontekstu ili za učinioce kojih ubistava alkohol ima značajniju ulogu.

U radu smo, osim teorijske, sproveli i empirijsku analizu 84 pravnosnažna sudska predmeta Višeg suda u Beogradu u kojima su lica osuđena za ubistvo, teško ubistvo ili ubistvo na mah. Podaci da je skoro polovina (45,2%) svih osuđenih bila pod dejstvom alkohola u trenutku izvršenja ubistva, da je u uzorku 7,9% alkoholičara i da je oko 20% svih žrtava takođe bilo pod dejstvom alkohola u trenutku viktimizacije jasno upućuju na značaj koji ta psihoaktivna supstanca ima u razumevanju ubistava. Prvo treba istaći da između ubica pod dejstvom alkohola i ubica koje su bile trezne nismo uspeli

¹⁴ Analizirali smo samo podatke prve žrtve, odnosno nisu uključeni slučajevi u kojima je bilo više od jedne žrtve.

da ustanovimo razlike u odnosu na njihov uzrast, pol, sociodemografske karakteristike ili podatke o njihovoj ranijoj osuđivanosti. To upućuje na zaključak da bez obzira na to da li zlopotrebljavaju alkohol ili ne, ubice odlikuju određene zajedničke karakteristike. Iako te karakteristike nisu svojstvene samo ubicama, već se javljaju i kod učinilaca drugih krivičnih dela, može se istaći da je prosečni ubica muškog pola, u srednjim tridesetim godinama, sa završenom srednjom školom, češće nezaposlen i bez redovnih primanja, nema bračnog ili vanbračnog partnera, a najčešće nema ni decu. U više od polovine slučajeva reč je o ranije neosuđivanim licima.

Kako bismo ustanovili da li je zlopotreba alkohola karakteristična za određeni tip ubistava, u radu smo testirali postojanje relevantnih statističkih veza između više tipologija i zlopotrebe alkohola. Klasična podela na ekspresivna i instrumentalna ubistva nije se u tom pogledu pokazala relevantnom. Naime, imajući u vidu da se skoro 80% svih ubistava svrstava u kategoriju ekspresivnih, teško je doći do zaključaka o nekim specifičnostima ubistava izvršenih pod dejstvom alkohola. Razvrstavanje takvih dela prema odnosu između ubice i žrtve takođe se nije pokazalo statistički relevantnim.

Ispostavilo se da klasifikacija ubistava koju je ponudila autorka Brukman pruža više objašnjenja. Pokazalo se, naime, da su ubice koje reaguju trenutno u konfliktnoj situaciji koja nastaje zbog stvarne ili pretpostavljene uvrede ili po proceni učinioca neadekvatnog ponašanja žrtve ujedno i najčešće pod dejstvom alkohola. Pri tome, nije relevantno da li se žrtva i učinilac poznaju. U konfliktna ubistva mogu se svrstati i slučajevi ubistva partnera ako je lišavanje života usledilo u tako opisanim okolnostima. Važno je naglasiti da alkohol ima značajnu ulogu u razumevanju konfliktnih ubistava ne samo kada je učinilac u pitanju, već i žrtva, jer podaci pokazuju da je najveći udeo žrtava koje su bile pod dejstvom alkohola viktimizovan upravo u kontekstu konfliktnih ubistava. Iako su u uzorku bila samo tri ubistva na mah, sva su svrstana u grupu konfliktnih ubistava, što se i uklapa u opis te grupe koja upravo i podrazumeva ishitreno delovanje.

S druge strane, alkohol ima manju ulogu, odnosno manje je zastupljen kod ubica koje ne reaguju u momentu već posle određenog kraćeg ili dužeg vremena. Oni planiraju ubistvo, vrlo često to rade da bi se osvetili za pretrpljenu uvredu, prema njihovom mišljenju neadekvatno ponašanje žrtve ili da bi na taj način rešili postojeći konflikt. I ta ubistva mogu biti vršena prema različitim kategorijama žrtava, uključujući i sadašnjeg ili bivšeg partnera. Zbog činjenice da delo planiraju, češće su osuđeni za dovršena ubistva i za teže oblike. Osuđeni zbog ubistava iz koristoljublja u polovini slučajeva bili su pod dejstvom alkohola (ukupno je bilo devet lica). U jednoj od statističkih analiza tu grupu smo svrstali u ubistva kojima se rešava raniji sukob polazeći od zajedničke karakteristike planiranja krivičnog dela. Ispostavilo se da u tom slučaju alkohol ima veću ulogu u konfliktnim ubistvima.

Analiza povezanosti zloupotrebe alkohola i ubistava značajna je na planu prevencije kriminaliteta, a rezultati kriminoloških studija trebalo bi da daju određeni doprinos u tom pogledu. Iako je nesporno da je zloupotreba alkohola među populacijom ubica rasprostranjenija nego u opštoj populaciji u jednom društvu, uvođenje zabrana prodaje alkohola ne bi bilo rešenje. Moglo bi se, naprotiv, očekivati da bi takva mera povećala aktivnosti organizovanih kriminalnih grupa koje bi dobile novu isplativu delatnost na crnom tržištu. Osim toga, iako studije pokazuju da sa porastom potrošnje alkohola dolazi i do porasta ubistava, treba imati u vidu i zaključke da nije relevantna samo količina konzumiranog alkohola već i kulturni obrasci pijenja. S druge strane, svaki program ili mera koja bi bila usmerena na edukaciju sa ciljem redukovanja opijanja ili na situacionu prevenciju sigurno bi imala pozitivne efekte i na sprečavanje nasilnih krivičnih dela.

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THE RELATIONSHIP BETWEEN ALCOHOL ABUSE AND HOMICIDES IN THE SAMPLE OF CONVICTED OFFENDERS IN BELGRADE

Summary

This paper examines the relationship between alcohol abuse and homicides. The first part explores the relevance of alcohol in violent crime in general as well as in homicides. The authors further analyse criminology theories that explain the influence of this factor in understanding homicides.

The second part of the article is an empirical analysis of a sample of 84 final court cases of the High Court in Belgrade, involving 105 victims, with the total 95 persons convicted of homicide, aggravated homicide or manslaughter. In addition to determining the prevalence of alcohol abuse in the sample, the authors also analyse the significance of the presence of alcohol in different homicide classifications. Authors conclude that the most relevant is the classification into conflict, revenge, intimate partner and homicides committed during robbery. The classification of homicides into expressive and instrumental, and homicides between strangers or acquaintances is not statistically significant.

Key words: *Homicide. – Alcohol abuse. – Empirical analysis. – Theories.*

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**ISTOPOLNE ZAJEDNICE ŽIVOTA U SVETLU PRIMENE
HAŠKOG PROTOKOLA O MERODAVNOM PRAVU ZA
OBAVEZE IZDRŽAVANJA IZ 2007. GODINE**

Pod istopolnim zajednicama života u uporednom pravu se podrazumevaju istopolni brakovi, registrovana partnerstva i de facto istopolne zajednice. U Haškom protokolu o merodavnom pravu za obaveze izdržavanja, značajnim izvorom srpskog kolizionog prava u toj oblasti, ništa nije naznačeno o njegovoj (ne)primeni na takve zajednice, niti je definisan pojam „porodični odnos“ u smislu čl. 1 tog protokola. Autor u ovom radu istražuje u kojoj meri se taj pojam može ekstenzivno tumačiti i da li može obuhvatiti i istopolne zajednice života. Suštinska je dilema da li primena Protokola na takve odnose proizilazi iz autonomnog tumačenja pojma „porodični odnos“ ili iz odluke svake države potpisnice pojedinačno. Zauzimajući stav o tim pitanjima, autor ispituje mogućnost primene Protokola za određivanje merodavnog prava u sporovima

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povodom izdržavanja iz istopolnih zajednica zaključenih u inostranstvu, koji se vode pred domaćim organima. Posebna pažnja je posvećena analizi hipotetičkog slučaja i domašaju klauzule javnog poretka iz čl. 13 Protokola.

Ključne reči: *Protokol iz 2007. godine. – Izdržavanje. – Merodavno pravo. – Porodični odnosi. – Istopolne zajednice života.*

1. UVOD

Ideje slobode pojedinca i ravnopravnosti pokrenule su demokratizaciju porodičnih odnosa u poslednjih nekoliko decenija. Individualizacija, pluralizam i privatizacija u porodičnim odnosima suštinski su redefinisali tradicionalnu porodicu, zasnovanu na čvrstom kolektivizmu (grupi) i porodičnoj solidarnosti. Nova paradigma braka i porodice zasniva se na ispoljavanju slobode volje i izbora individua (više u Ponjavić 2009, 25–28). U sklopu pluralizma porodičnih odnosa, brak između muškarca i žene danas nije jedina porodičnopravna ustanova namenjena formalizaciji emotivnog odnosa dvoje ljudi. U procesu modifikacije porodičnog prava i porodičnih odnosa veliki broj država je u poslednjih nekoliko decenija ozakonio različite forme istopolnih zajednica života. Najčvršći oblik formalizacije tih zajednica je istopolni brak, koji u državama u kojima je uveden, po pravilu, ima rodno neutralni karakter (videti Duraković 2014, 142–143; Pavlović 2021a, 10–11, a za nordijske zemlje Lund-Andersen 2017, 6).¹ Osim toga, u uporednom porodičnom pravu postoje još dva oblika ozakonjenja istopolnih zajednica života – registrovano partnerstvo i tzv. *de facto* istopolna zajednica. Registrovano partnerstvo postoji u nekim državama sveta² kao ustanova paralelna institutu braka.³ Dejstva su im slična, ali ne moraju biti identična. Nasuprot

¹ Tako, u holandskom zakonodavstvu brak je moguć između dve osobe istog ili različitog pola. Videti Knjigu 1 holandskog Građanskog zakonika, čl. 30. Istopolni brak postoji u Holandiji, Belgiji, Španiji, Norveškoj, Švedskoj, na Islandu, u Portugaliji itd.

² Registrovano partnerstvo je prvi put uvedeno u Danskoj 1989. godine, a nakon toga u Norveškoj, Švedskoj, na Islandu, u Holandiji, Belgiji, Francuskoj, Nemačkoj, Finskoj, Luksemburgu itd.

³ U nekim državama registrovano partnerstvo postoji paralelno sa brakom koji se zakonom te države definiše kao životna zajednica žene i muškarca (primera radi, u hrvatskom pravnom sistemu, čl. 12 Obiteljskog zakona Hrvatske, *Narodne novine* 103/15, 98/19). S druge strane, nekada registrovano partnerstvo postoji istovremeno sa istopolnim brakom, kao što je slučaj u holandskom pravu, za oba pravna sistema videti fn. 1 i 5 rada.

tome, *de facto* istopolne zajednice ne podrazumevaju formalnu proceduru za nastanak već odluku dva partnera istog pola da žive zajedno.⁴ U nekim pravnim sistemima pojedine pravne forme tih zajednica mogu da postoje paralelno⁵ ili tokom vremena jedna forma može da zameni drugu.⁶

Osim država koje su ozakonile istopolne zajednice života, postoje i one koje ne oklevaju da zadrže tradicionalne porodičnopravne koncepte i ne predviđaju nikakva prava za partnere iz istopolnih zajednica života (pravo na izdržavanje, penziju i sl.). Jedna od takvih država je i Srbija, čiji pravni sistem normira brak isključivo kao zajednicu muškarca i žene⁷ i zakonski ne reguliše (ni istopolno ni heteroseksualno) registrovano partnerstvo niti *de facto* istopolnu zajednicu. Drugim rečima, Srbija ne normira nijednu formu istopolnih zajednica života (više u Pavlović 2021a, 58). Saglasno tome, pravo na izdržavanje između istopolnih partnera u srpskom pravnom životu nije regulisano pošto je taj vid finansijskog obezbeđenja člana porodice u domaćem pravnom sistemu predviđen isključivo između (heteroseksualnih) supružnika i između (heteroseksualnih) vanbračnih partnera.⁸

Međutim, može se zamisliti situacija da partner iz strane, legalno zasnovane istopolne zajednice života podnese tužbu pred našim sudom radi dosuđivanja izdržavanja od drugog partnera, dužnika izdržavanja. Imajući u vidu da je reč o pravnom odnosu koji je pravovaljano nastao u inostranstvu i da se njegova dejstva „protežu“ i na našu državu, najpre treba odrediti merodavno pravo za ma kakvo odlučivanje o tom tužbenom zahtevu. Zakon

⁴ Više o specifičnostima registrovanog partnerstva i o faktičkoj istopolnoj zajednici u Pavlović 2021a, 11–14. Faktička istopolna zajednica normirana je u Portugaliji, Sloveniji, Hrvatskoj, Italiji itd.

⁵ Tako, u hrvatskom pravnom sistemu normirani su tzv. neformalno životno partnerstvo (*de facto* istopolnu zajednicu) i „životno partnerstvo“. Videti Zakon o životnom partnerstvu osoba istog spola, *Narodne novine* 92/14, 98/19 (čl. 2 i 3). U holandskom pravu regulisani su i istopolni brakovi i registrovana partnerstva. Videti čl. 30 i dalje Knjige 1 holandskog Građanskog zakonika

⁶ Tako, u Nemačkoj je istopolni brak uređen (od 2017. godine), a prethodna registrovana partnerstva se mogu konvertovati u brak (§20 Lebenspartnerschaftsgesetz, *BGBI. I S. 266*). Istopolni brak je uveden putem Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, *BGBI. 2017 I 2787*, stupio na snagu 1. oktobra 2017.

⁷ Ustav Republike Srbije, *Službeni glasnik RS* 98/2006, čl. 62, st. 2; Porodični zakon, *Službeni glasnik RS* 18/2005 i 72/2011 – dr. zakon, čl. 3.

⁸ Porodični zakon – PZ, *Službeni glasnik RS* 18/2005 i 72/2011 – dr. zakon, čl. 151 i 152.

o rešavanju sukoba zakona sa propisima drugih zemalja⁹ ne sadrži specijalnu kolizionu normu za bilo koje pitanje proisteklo iz istopolnih zajednica života zaključenih u inostranstvu.

Osim toga, sastavni deo srpskog kolizionog prava u materiji izdržavanja čini Haški protokol o merodavnom pravu za obaveze izdržavanja¹⁰ (u daljem tekstu: Protokol) i njime su derogirane odgovarajuće odredbe ZRSZ. Protokol ne sadrži eksplicitnu odredbu kojom bi se nedvosmisleno odredila njegova primena na obaveze izdržavanja između partnera iz istopolne zajednice života. Zato je naše istraživanje usmereno na dva ključna pitanja. Prvo je neophodno razmotriti da li se zajednice života lica istog pola mogu smatrati „porodičnim odnosom“ u smislu čl. 1. st. 1 Protokola, odnosno da li izdržavanje proisteklo iz tih zajednica potpada pod polje njegove primene. U slučaju da je odgovor pozitivan, drugo pitanje se odnosi na način primene Protokola od srpskih postupajućih organa u slučaju spora povodom zatraženog izdržavanja između partnera iz istopolne zajednice života zaključene u inostranstvu.

U ovom radu je najpre napravljen kratak osvrt na karakteristike Protokola i njegova koliziona rešenja (2). U izlaganju se zatim ispituje da li se istopolne zajednice života mogu smatrati „porodičnim odnosom“ u smislu čl. 1, st. 1 Protokola i da li svaka država potpisnica može samostalno doneti odluku o kvalifikaciji takvih zajednica kao *porodičnih odnosa* (3) i zauzima stav o primeni Protokola u sporovima povodom međusobnog izdržavanja proisteklog iz istopolnih zajednica života zaključenih u inostranstvu koji se vode pred srpskim nadležnim organima. Posebna pažnja je posvećena domašaju i mogućnostima za primenu klauzule javnog poretka iz čl. 13 Protokola, zbog čega je analiziran hipotetički slučaj supruge iz nemačkog istopolnog braka, koja zahteva dosuđivanje izdržavanja pred domaćim sudom (4), nakon čega sledi zaključak, kao sublimacija izlaganja (5).

⁹ Zakon o rešavanju sukoba zakona sa propisima drugih zemalja – ZRSZ, *Službeni list SFRJ* 43/82 i 72/82 – ispr. *Službeni list SRJ* 46/96 i *Službeni glasnik RS* 46/2006 – dr. zakon, čl. 3.

¹⁰ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=133>, poslednji pristup 12. januara 2022.

2. POGLED NA PROTOKOL I KOLIZIONA REŠENJA PROTOKOLA

Protokol je usvojen na Haškoj konferenciji za međunarodno privatno pravo (u daljem tekstu: Haška konferencija) u novembru 2007. godine, čime su unifikovane kolizione norme za obaveze međusobnog izdržavanja. U polje primene Protokola spada određivanje merodavnog prava za obaveze izdržavanja iz *porodičnog odnosa* (podvukao autor), *krvnog srodstva, braka ili tazbinskog srodstva, uključujući obaveze izdržavanja deteta, bez obzira na bračni status njegovih roditelja* (čl. 1, st. 1 – *ratione materiae*). On se primenjuje bez uslova reciprociteta, odnosno i ako je merodavno pravo države koja nije ugovornica (čl. 2 Protokola) (više u Pavlović 2021, 484–485), što je i čest slučaj sa međunarodnim instrumentima haškog sistema. Imajući u vidu kolizionopravnu unifikaciju, u njegovo polje primene ne ulaze pravila o određivanju međunarodne nadležnosti, priznanju i izvršenju odluka, ni pravila o upravnoj saradnji između država (videti Bonomi 2013, 21). Vremensko važenje Protokola regulisano je u odredbi čl. 22, tako što se on *neće* primeniti na izdržavanje zatraženo u državi ugovornici *za period* pre njegovog stupanja na snagu.¹¹

Sva koliziona rešenja Protokola normirana su u odredbama članova 3–8, pri čemu opšte koliziono pravilo iz čl. 3 Protokola upućuje na primenu prava države uobičajenog boravišta poverioca izdržavanja (o čl. 3 više u Pavlović 2021, 485–486; Živković 2013, 84–85). Prema tome, stranka ne mora imati državljanstvo jedne od država ugovornica da bi došlo do primene Protokola (više u Hausmann 2018, 445). Nasuprot opštem kolizionom pravilu, odredbom čl. 4 Protokola predviđeno je odstupanje, ali budući da ono služi određivanju merodavnog prava za obaveze međusobnog izdržavanja između roditelja i dece (i potraživanje lica mlađih od 21 godine prema licima koji nisu roditelji)¹², ova odredba nije od presudnog značaja za temu rada, tako da je nećemo dodatno elaborirati (o čl. 4 više u Pavlović 2021, 486–487).

Što se tiče obaveze izdržavanja između supružnika, razvedenih supružnika ili lica čiji je brak poništen, merodavno pravo se može odrediti putem osnovnog kolizionog pravila iz čl. 3 Protokola. Međutim, pravo uobičajenog boravišta poverioca izdržavanja neće se primeniti ukoliko se ispune dva

¹¹ Videti odredbe čl. 23–25 Protokola, koje se odnose na potpisivanje, ratifikaciju, pristupanje i stupanje na snagu.

¹² U slučaju da je reč o supružnicima i bivšim supružnicima, ukoliko jedan od njih ima manje od 21 godine, na obaveze njihovog međusobnog izdržavanja ne primenjuju se pravila iz čl. 4 već pravila o izdržavanju između supružnika u toku trajanja braka ili bivših supružnika iz čl. 5 Protokola (više u Živković 2013, 85)

kumulativna uslova: 1) ako se jedna od stranaka protivi primeni tog prava i 2) ako je pravo neke druge države (naročito pravo države njihovog poslednjeg zajedničkog uobičajenog boravišta) u bližoj vezi sa brakom (čl. 5 Protokola). Ukoliko su uslovi ispunjeni, primenjuje se pravo te druge države (više u Pavlović 2021, 487–488; Živković 2013, 87).

Odredbom čl. 6 Protokola propisano je da dužnik izdržavanja može osporiti poveriočev zahtev za izdržavanje ako istakne da obaveza izdržavanja ne postoji ni prema pravu države uobičajenog boravišta dužnika ni prema pravu zajedničkog državljanstva stranaka, u slučaju da ga imaju. To znači da ako stranke nemaju zajedničko državljanstvo, dovoljno je da obaveza nije predviđena pravom uobičajenog boravišta dužnika izdržavanja (Staudinger 2020a, Rn. 11). U slučaju da imaju zajedničko državljanstvo, uslovi su stroži, odnosno postojanje obaveze izdržavanja procenjuje se i po pravu uobičajenog boravišta dužnika i po pravu države čije državljanstvo obe stranke imaju (Bordaš, Đundić 2013, 149). Reč je o tzv. *odbrambenoj* klauzuli, a kako nju nije moguće primeniti na svaki vid međusobnog izdržavanja, za temu rada je važno istaći da se dužnik na nju ne može pozvati kod, primera radi, obaveza izdržavanja između supružnika i bivših supružnika.¹³

Konačno, Protokol daje mogućnost strankama da same izaberu pravo po kome će se rešavati pitanje njihovog međusobnog izdržavanja. Osnov je autonomija volje, ali je ona u ovom slučaju ograničena na četiri prava¹⁴ (čl. 8, st. 1 Protokola)¹⁵. S druge strane, odredbom čl. 7 Protokola predviđen je tzv. procesnopravni sporazum, „samo za potrebe posebnog postupka koji se vodi u konkretnoj državi“. Tada poverilac i dužnik izdržavanja mogu izabrati pravo države u kojoj su postupak i pokrenuli, odnosno izabrati *lex fori*¹⁶ (o odredbama čl. 7 i 8 više u Pavlović 2021, 489–490; Bordaš, Đundić 2013, 144–149). Kako se teško može zamisliti da istopolni partneri izaberu pravo Srbije kao pravo države suda, pošto u našem pravu izdržavanje u tom smislu nije uređeno, potonja odredba neće biti posebno analizirana.

¹³ Ali i za obaveze izdržavanja roditelja prema deci, vidi čl. 6 Protokola. O toj odredbi videti Pavlović 2021, 488–489; Bordaš, Đundić 2013, 149. Za primenu te odredbe vidi primer iz 4.2. dela rada.

¹⁴ a) Pravo države čije državljanstvo ima jedna od stranaka u trenutku izbora; b) pravo države uobičajenog boravišta jedne od stranaka u trenutku izbora; v) pravo koje su stranke izabrale kao merodavno za svoje imovinske odnose ili pravo koje je zaista primenjeno na te odnose; g) pravo koje su stranke izabrale kao merodavno za svoj razvod ili rastavu ili pravo koje je zaista primenjeno na njihov razvod ili rastavu.

¹⁵ Za ograničenja primene ovog člana vidi Živković 2013, 89.

¹⁶ Vidi čl. 7, st. 1 Protokola.

3. PORODIČNI ODNOS U SMISLU ČL. 1, ST. 1 PROTOKOLA – ISTOPOLNE ZAJEDNICE ŽIVOTA

3.1. Pristupi tumačenju pojma porodični odnos

3.1.1. Postavljanje problema

Protokolom nije data definicija pojma porodični odnos u smislu čl. 1, st. 1, ali se ona nije mogla ni očekivati, imajući u vidu različite porodičnopravne ustanove koje postoje u državama potpisnicama, a kojima su svojstvena određena društvena, kulturološka i politička obeležja. Možda je želja tvoraca Protokola bila da se takve razlike ne potenciraju, budući da državama ugovornicama nisu dopuštene rezerve kojima bi se ograničilo polje njegove primene u pogledu određenih obaveza izdržavanja ili da se neke od njih isključe.¹⁷ Izvesno je da su iz polja primene Protokola isključeni zahtevi za izdržavanje proistekli isključivo iz ugovora ili, pak, javnopravni zahtevi (Staudinger 2020, Rn. 3).

Pojam porodični odnos u smislu čl. 1, st. 1 Protokola ima dvostruko značenje. On podrazumeva najpre zajedničku crtu eksplicitno navedenih primera u tom međunarodnom izvoru – „*krvno srodstvo, odnosi između roditelja i deteta, tazbinsko srodstvo, brak*“ (Bonomi 2013, 27). S druge strane, pojam porodični odnos može podrazumevati i *druge* odnose (više u Andrae 2014, 540–541). Prema tome, zahtevi za izdržavanje potpadaju pod polje primene Protokola ukoliko se oni na bilo koji način mogu pripisati odnosima iz čl. 1, st. 1 (Heiderhoff 2021, Rn. 39).^{18, 19}

U svakom slučaju, u Protokolu je pojam porodice široko postavljen (videti Bonomi 2013, 27; Junker 2017,⁴²⁶), čemu svedoči okolnost da on obuhvata i zahtev za izdržavanje samohrane majke prema ocu njenog deteta (u tom

¹⁷ Prema čl. 27 Protokola rezerve na taj međunarodni izvor nisu dozvoljene.

¹⁸ Da li u konkretnom slučaju postoji dotični odnos u smislu čl. 1 Protokola, prethodno je, odnosno prvo pitanje (nem. *Erstfrage*) (za polemiku o načinu vezivanja prethodnog pitanja u smislu Protokola i izbora argumenata za nezavisno vezivanje videti Hausmann 2018, 440–441). U sličnom smislu, ako u međunarodnom izvoru nije naznačen način rešavanja prethodnog pitanja, treba ga vezivati nezavisno (o tome više u Đorđević, Meškić 2016, 113).

¹⁹ Interesantno je da je u čl. 1, st. 2 Protokola propisano da odluke donete njegovom primenom ne utiču na postojanje bilo kog odnosa iz st. 1 tog člana. Stranka ne može koristiti odluku donetu primenom merodavnog prava određenog putem kolizionih rešenja Protokola da bi tvrdila da dotični odnos postoji (videti Bonomi 2013, 29). Međutim, budući da je obaveza izdržavanja posledica određenog statusnog odnosa između poverioca i dužnika, upitno je da li se izdržavanje uopšte može posmatrati

smislu Junker 2017, 426). U nemačkoj pravnoj literaturi se ističe da se pod pojmom brak, u smislu čl. 1, st. 1 Protokola, shvata i šepajući brak (nem. *hinkende Ehe*), koji postoji samo prema stranom, a ne i prema unutrašnjem pravu (više u Hausmann 2018, 442). Vanbračne zajednice nisu eksplicitno navedene u čl. 1, st. 1, ali su u pripremnim radovima i kasnijim komentarima date preporuke da pitanje izdržavanja iz takvih zajednica bude obuhvaćeno odredbama Protokola (Živković 2013, 81 fn. 5). Ukoliko se one, prema merodavnom pravu (statutu za izdržavanje),²⁰ smatraju porodičnim odnosom i stvaraju zakonsku obavezu izdržavanja, potpadaće po čl. 1, st. 1 Protokola (videti i uporediti Hausmann 2018, 443; Heiderhoff 2021, Rn. 44).²¹

Poseban izazov prilikom određivanja opsega pojma porodični odnos jeste dilema da li on obuhvata istopolne zajednice života, budući da postoje uporednopravne razlike u formama kojima su regulisane, ali one nisu ozakonjene u svim državama. Istopolni brakovi i registrovana partnerstva nisu pobrojani u čl. 1, st. 1 Protokola, ali ni eksplicitno isključeni iz polja njegove primene. O tom pitanju je mnogo raspravljano tokom njegove izrade, ali je prevladalo stanovište da se Protokolom ne zauzme jasan stav. Taj „propust“ je napravljen namerno, da bi se izbeglo sučeljavanje stavova država ugovornica povodom fundamentalnih razlika po tom pitanju (videti Bonomi 2013, 27). Zato ostaje dilema da li se istopolni brakovi i registrovana partnerstva mogu kvalifikovati kao „porodični odnosi“. Sa tim je povezano i pitanje da li bi odluka o primeni Protokola na takve odnose mogla predstavljati posledicu autonomnog tumačenja pojmova iz čl. 1, st. 1 Protokola ili bi se mogla ostaviti svakoj državi potpisnici zasebno (Heiderhoff 2021, Rn. 39–42). U nastavku je posebna pažnja posvećena analizi i jednog i drugog pristupa.

izolovano od pitanja statusa. Zbog neraskidivosti ta dva pitanja, može se govoriti o kvaziautonomiji izdržavanja u odnosu na odluku o statusu (više u Marjanović 2014, 149).

²⁰ U nemačkoj pravnoj teoriji je istaknuto da se merodavno pravo za neformalne faktičke zajednice ne može odrediti na osnovu čl. 5 Protokola (u tom smislu za nemačko pravo Hausmann 2018, 456). Suprotno je mišljenje Mirka Živkovića, koji smatra da naš sudija treba da primeni čl. 5 i na izdržavanje vanbračnog partnera (videti o tome Živković 2013, 87).

²¹ Prema shvatanju Mirka Živkovića, odluka o primeni Protokola na vanbračne partnere prepuštena je unutrašnjim zakonima država ugovornica, pa tako, iz ugla *srpskog* prava, Protokol treba primeniti na vanbračne zajednice budući da je u našem PZ predviđena obaveza izdržavanja iz takvog odnosa (videti Živković 2013, 81, fn. 5).

3.1.2. Prvi pristup – autonomno tumačenje pojmova iz čl. 1 st. 1 Protokola

U pravnoj teoriji je istaknuto da prilikom tumačenja pravnih pojmova i instituta u međunarodnom ugovoru ima mesta autonomnoj kvalifikaciji (videti i uporediti Jakšić 2017, 431–432; Stanivuković, Živković 2010, 257–258; Đorđević, Meškić 2016, 91; Varadi *et al.* 2010, 127–128), to jest uporednopravnoj kvalifikaciji (videti Hay, Krätzschar 2010, 116; Von Hoffmann, Thorn 2007, 229). Kako Protokolom nije definisan pojam „porodični odnos“ niti je ukazano na određeno nacionalno pravo po kome treba kvalifikovati taj pravni pojam²², za sprovođenje autonomne kvalifikacije tog pojma jedino preostaje kreiranje autonomnih (jednoobraznih) pojmova oslanjanjem na uporednopravnu analizu prava država ugovornica tog međunarodnog izvora.²³

Uporednopravna analiza podrazumeva ispitivanje zakonodavstava tih država, odnosno da li i koje od njih poznaju istopolne zajednice života. Takva analiza pokazuje da od 32 države *ugovornice Protokola* (računajući i Evropsku uniju [EU] kao ugovornicu)²⁴, 21 uređuje neku formu istopolnih zajednica života. Od država ugovornica Protokola, registrovano partnerstvo je priznato, primera radi, u Hrvatskoj²⁵, Estoniji²⁶, Grčkoj, na Kipru²⁷, Italiji²⁸, Sloveniji²⁹,³⁰, dok su istopolni brakovi dopušteni u Brazilu, Francuskoj,

²² U tom smislu o autonomnoj kvalifikaciji Đorđević, Meškić 2016, 91; Stanivuković, Živković 2010, 257–258.

²³ Videti u tom smislu o autonomnoj kvalifikaciji Đorđević, Meškić 2016, 90–91.

²⁴ Austrija, Belgija, Brazil, Bugarska, Hrvatska, Kipar, Češka, Estonija, Evropska Unija, Finska, Francuska, Nemačka, Grčka, Mađarska, Irska, Italija, Kazahstan, Letonija, Litvanija, Luksemburg, Malta, Holandija, Poljska, Portugalija, Severna Makedonija, Rumunija, Srbija, Slovačka, Slovenija, Španija, Švedska i Ukrajina. Videti spisak ugovornica na <https://www.hcch.net/en/instruments/conventions/status-table/?cid=133>, poslednji pristup 8. decembra 2021.

²⁵ O izdržavanju u registrovanom partnerstvu videti čl. 49 Zakona o životnom partnerstvu osoba istog spola.

²⁶ O izdržavanju videti §9 Kooseluseadus, *RT I*, 16. 10. 2014, 1

²⁷ O izdržavanju u Grčkoj i na Kipru videti Lima 2017, 325–327, 342–343.

²⁸ O izdržavanju videti Ferrari 2017, 150.

²⁹ Zakon o partnerski zvezi – ZPZ, *Uradni list RS* 33/15. Partnerska zveza je zajednica između dve žene ili dva muškarca i ima iste pravne posledice kao i brak u svim pravnim oblastima (čl. 2 ZPZ). Izuzetke od toga može propisati samo ZPZ.

³⁰ Osim tih država ugovornica, registrovano partnerstvo je uvedeno i u Češkoj, Švedskoj, Belgiji, Francuskoj, Nemačkoj, Finskoj, Luksemburgu, Mađarskoj, Irskoj, Austriji, Hrvatskoj, Malti. U nekim od tih država kasnije je uveden i istopolni brak i takve države su različito postupale sa prethodnim registrovanim partnerstvima. Primera radi, Švedska je dopustila konverziju registrovanog partnerstva u brak, dok Francuska nije i sl. (više u Pavlović 2021a, 13).

Holandiji³¹, Belgiji³², Španiji, Luksemburgu, Švedskoj, Finskoj itd.³³ Kao što je rečeno, u uporednom porodičnom pravu te forme mogu da koegzistiraju ili da zamene jedna drugu. S druge strane, deset država ugovornica Protokola ne reguliše nijedan oblik istopolne zajednice života, kao što je slučaj sa Srbijom, Severnom Makedonijom, Poljskom, Slovačkom i sl³⁴.

To upućuje na zaključak da danas više od polovine država ugovornica poznaje istopolne brakove i/ili registrovana partnerstva. Što se takvih država ili država koje su spremne da priznaju takve ustanove tiče, na Diplomatskom zasedanju je zaključeno da ih takve države mogu podvesti pod kolizionu normu za međusobno izdržavanje supružnika i bivših supružnika (čl. 5 Protokola) (videti Hausmann 2018, 456; Bonomi 2013, 45–47). Primera radi, iz ugla nemačkog prava se pod *klauzulu odstupanja* iz čl. 5 Protokola supsumiraju i registrovana partnerstva i istopolni brak, posebno od kada je potonji uveden u taj pravni sistem (Hausmann 2018, 456).³⁵ U hrvatskom ZMPP³⁶ eksplicitno se upućuje na primenu Protokola za izdržavanje u okviru registrovanog (životnog) partnerstva (čl. 40 u vezi sa čl. 45).

Istorijskim tumačenjem Protokola sugerije se da je cilj njegovog donošenja bila unifikacija kolizionih rešenja za određivanje merodavnog prava za obaveze izdržavanja i unapređivanje rešenja iz Konvencije od 2. oktobra 1973. godine o merodavnom pravu za obaveze izdržavanja (u daljem tekstu: Konvencija iz 1973). Čini se da je tokom njegove izrade postojala latentna težnja da se pod kolizionu normu čl. 5 uključe i obaveze izdržavanja proistekle iz registrovanog partnerstva ili istopolnog braka, budući da su neke delegacije predlagale da se u tekstu izričito navede da se odredba *čl. 5 može, uz diskreciono pravo država, primenjivati na ustanove bliske braku* (videti Bonomi 2013, 27). Takve dopune u konačnom tekstu nema, ali je već naglašeno da iz propratnih materijala uz Protokol proizilazi zaključak da se taj član primenjuje i na registrovana partnerstva i istopolne brakove.

³¹ O izdržavanju nakon prestanka braka videti BW 1:157

³² O dosuđivanju izdržavanja nakon razvoda videti Sosson 2010, 56–57.

³³ Osim tih država ugovornica Protokola, istopolni brak poznaju još: Austrija, Nemačka, Irska, Malta i Portugalija.

³⁴ Osim tih država, istopolne zajednice života nisu pravno priznate u Litvaniji, Letoniji, Ukrajini, Rumuniji, Bugarskoj i Kazahstanu.

³⁵ Videti fn 6. U nemačkom međunarodnom privatnom pravu postoji specijalna kolizionna norma za istopolni brak i to je čl. 17b, st. 4 i 5 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB). Tako, o čl. 17b EGBGB videti Martiny 2020, 3134–3139.

³⁶ Zakon o međunarodnom privatnom pravu Hrvatske – ZMPP Hrvatske, *Narodne novine* 101/17.

Navedenim prebrojavanjem država ugovornica Protokola koje poznaju istopolne brakove i/ili registrovana partnerstva može se zaključiti da će ga većina država potpisnica primeniti na obaveze izdržavanja proistekle iz takvih zajednica. To bi predstavljalo pokušaj izvođenja autonomne kvalifikacije pojma porodični odnos u toj konvenciji, koji bi mogao biti prihvaćen u svim državama potpisnicama. Ona bi svakako bila celishodna jer bi u suprotnom mogla nastati realna opasnost od neujednačene primene Protokola i osujećivanja osnovnog cilja unifikacije (u tom smislu za autonomnu kvalifikaciju Stanivuković, Živković 2010, 257). Ipak, treba imati u vidu da je autonomna kvalifikacija pojma porodični odnos od svih država potpisnica zaista izazov. Upitna je mogućnost apstrahovanja zajedničkih karakteristika tog pojma u okviru svih potpisnica Protokola, uzimajući u obzir njihove različite porodičnopravne sisteme i pravne tradicije.

3.1.3. Drugi pristup – svaka država potpisnica može samostalno da donese odluku

Moguć je i drugi pristup, prema kojem su potpisnice Protokola slobodne da različite institute kvalifikuju kao porodične odnose, u skladu sa odgovarajućim metodom u međunarodnom privatnom pravu (MPP) države suda (Staudinger 2020, Rn. 16). Prema preovlađujućem mišljenju u literaturi, za rešenje prve kvalifikacije u MPP³⁷ primenjuje se *lex fori* kvalifikacija.³⁸ Tada se pravna pitanja i pravni odnosi proistekli iz činjeničnog stanja sa elementom inostranosti shvataju u skladu sa merilima prava države suda, nakon čega se podvode pod odgovarajuću pravnu kategoriju domaćih kolizionih normi (videti Đorđević, Meškić 2016, 84). Na institute nepoznate domaćem pravnom sistemu primenjuje se funkcionalna kvalifikacija (videti i uporediti Von Hoffmann, Thorn 2007, 229–230; Kropholler 2006, 126 i dalje; Varadi *et al.* 2010, 128; Đorđević, Meškić 2016, 89–90, 92; Jakšić 2017, 433–435; Stanivuković, Živković 2010, 250–251; u sličnom smislu i Hay, Krätzschar 2010, 122).

Prema tome, šta se podrazumeva pod *drugim odnosima* u smislu čl. 1, st. 1 Protokola, određuje se u skladu sa pravom države potpisnice tog međunarodnog izvora, pred kojom se vodi postupak. Pri tome se kao osnova ne uzima supstancijalno porodično pravo te države već se sprovodi kvalifikacija u skladu sa vladajućim metodom, koji postoji u međunarodnom

³⁷ O kvalifikaciji kao dvofaznom postupku u domaćoj literaturi Đorđević, Meškić 2016, 78; Jakšić 2017, 417, 435–436.

³⁸ O toj kvalifikaciji uporediti Đorđević, Meškić 2016, 84–86; Stanivuković, Živković 2010, 254; Varadi *et al.* 2010, 124–126, 128; Von Hoffmann, Thorn 2007, 226–228.

privatnom pravu države suda (Andrae 2014, 541–542). Čini se da sprovođenje kvalifikacije u tom smislu neće biti zahtevno za države koje poznaju istopolne brakove i registrovana partnerstva jer na izdržavanje iz takvih odnosa mogu primeniti čl. 5 Protokola. To je fakultativno rešenje i ne obavezuje države potpisnice koje takve zajednice ne poznaju (Bonomi 2013, 45–47).

Teže je zauzeti stav po pitanju kvalifikacije pojma porodični odnos u slučaju desetak država ugovornica Protokola koje ne poznaju istopolne zajednice. Ne postoji osnov putem kojeg bi ove države bile dužne da uzmu u obzir odluke organa drugih država ugovornica o dosuđivanju izdržavanja između istopolnih partnera, iako to one mogu učiniti.³⁹ Za te države su moguća dva rešenja i oba su potpuno legitimna. Ako konstatuju da brakovi i partnerstva između lica istog pola nisu porodični odnosi u smislu čl. 1, st. 1 Protokola, onda se on ne primenjuje već se primenjuju nacionalne kolizione norme za izdržavanje (Bonomi 2008, 339). U slučaju da takve zajednice smatraju porodičnim odnosom, ali ih ne tretiraju kao brak, za određivanje merodavnog prava bi primenile ostale odredbe Protokola, naročito čl. 3 i 6 (Bonomi 2008, 339; Bonomi 2013, 27). Međutim, negativan aspekt tog pristupa je to što se može smatrati kontradiktornim sa obavezom jedinstvenog tumačenja Protokola (čl. 20).

3.1.4. *Autonomno tumačenje država članica EU*

Za države članice EU je u odredbi čl. 15 Regulation (EU) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (u daljem tekstu: Regulation No. 4/2009)⁴⁰ navedeno da se merodavno pravo za obaveze izdržavanja određuje Protokolom. Iz toga proizilazi obaveza jedinstvenog tumačenja ta dva međunarodna izvora i *autonomnog* tumačenja pojmova iz čl. 1, st. 1 Protokola (videti Hausmann 2018, 327, 440). Zato se postavlja pitanje da li svaka članica EU treba samostalno da odluči o kvalifikaciji pojmova Protokola ili da pristupi autonomnom tumačenju. Budući da se i EU i njene članice smatraju ugovornicama Protokola⁴¹ i da velika većina članica

³⁹ Kako se u Izveštaju navodi, države ugovornice, koliko je god to moguće, treba da uzmu u obzir odluke donete primenom Protokola u ostalim državama ugovornicama, ali ih nadležni organi ne moraju slediti (Bonomi 2013, 73–75).

⁴⁰ Regulation (EU) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ L* 7 of 10/01/2009.

⁴¹ Videti čl. 24 Protokola

EU posmatra istopolne brakove i registrovana partnerstva kao *porodične odnose* (videti Hausmann 2018, 442–443), poželjno je uniformno primeniti Protokol na istopolne brakove ili registrovana partnerstva jer se na taj način ostvaruje sinhronizacija sa Regulation 4/2009 (videti Staudinger 2020, Rn. 17). Konačno razjašnjenje može biti dobijeno od Suda pravde EU (u daljem tekstu: SEU) putem odlučivanja o prethodnom pitanju (videti Staudinger 2020, Rn. 17; Andrae 2014, 540).⁴²

U iščekivanju takve odluke, postoje dodatni argumenti za autonomno tumačenje pojmova Protokola u članicama EU. Najpre, zajednički život istopolnih partnera predstavlja deo društvene stvarnosti na globalnom nivou, koja se ne može ignorisati. U prilog tome govori i mišljenje AG Wathelet (u daljem tekstu: AG) u postupku pred SEU povodom slučaja *Coman*⁴³, koji navodi da se pojam „bračni drug“ u smislu Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EU⁴⁴ (u daljem tekstu: Directive 2004/38/EC), ne može tumačiti nezavisno od promena u društvu. Pojam bračni drug u smislu te direktive treba tumačiti nezavisno od pola dotičnih lica i mesta sklapanja braka. U vezi sa tim, AG navodi da se pravo EU mora tumačiti u skladu sa „savremenom stvarnošću“ EU (videti Opinion of AG Wathelet, tač. 53, 56; Petrović 2021, 85–86). Takva stvarnost podrazumeva da istopolni brak danas postoji na svim kontinentima, pa ta okolnost odgovara univerzalnom priznavanju različitih oblika porodice (Opinion of AG Wathelet, tač. 58; Petrović 2021, 86).⁴⁵

⁴² Argumenti govore u prilog tome da se primena Protokola na obaveze izdržavanja iz takvih odnosa ne treba ostaviti svakoj državi članici EU zasebno već da koncept *braka* u smislu čl. 5 Protokola treba tumačiti u evropsko-autonomnom, širem smislu (više u Hausmann 2018, 456).

⁴³ CJEU, case C-673/16, *Coman and Others*, ECLI:EU:C:2018:385. U tom predmetu su dva muškarca, Koman i Hamilton, zaključili istopolni brak u Briselu. Hamiltonu nije bio omogućen boravak u Rumuniji duže od tri meseca jer se, prema rumunskom pravu, brak definiše kao zajednica muškaraca i žene. Istopolni supružnici su podneli tužbu sudu u Bukureštu radi utvrđivanja da je došlo do diskriminacije po osnovu seksualne orijentacije prilikom ostvarivanja prava na slobodno kretanje u okviru EU. Taj sud je pokrenuo postupak pred Ustavnim sudom Rumunije radi odlučivanja o istaknutom prigovoru, koji je zatim prekinuo postupak i uputio zahtev Sudu EU da se izjasni o tumačenju pojma „bračni drug“ u smislu Direktive 2004/38/EZ (videti o tome Petrović 2021, 80–81).

⁴⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.04.2004, p. 77–123.

⁴⁵ O toj presudi videti i Pavlović 2021a, 124–125.

Osim toga, registrovano partnerstvo je u državama članicama EU na jedinstveni način obuhvaćeno pojmom „porodični odnos“ u smislu Regulation 4/2009 (čl. 1, st. 1) i Protokola (čl. 1, st. 1). To je posledica tumačenja pojma registrovano partnerstvo u Regulation (EU) No. 1104/2016 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (u daljem tekstu: Regulation (EU) 1104/2016)⁴⁶, s jedne strane, i činjenice da se obaveze međusobnog izdržavanja između registrovanih partnera uređuju u skladu sa merodavnim pravom, koje je određeno prema Regulation 4/2009 (videti recital 22 Regulation (EU) 1104/2016), s druge strane. Registrovano partnerstvo se, u smislu Regulation (EU) 1104/2016, shvata kao forma zajedničkog života dvoje ljudi predviđena zakonom, čija je registracija u skladu sa tim zakonom obavezna i koja ispunjava pravne formalnosti neophodne za njen nastanak prema tom zakonu, ali se stvarni sadržaj tog pojma prepušta nacionalnim pravima država članica (videti recital 17 i čl. 3, st. 1, tač. a Regulation (EU) 1104/2016) (u smislu Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships⁴⁷(Andrae 2014, 541–542).

3.2. Zauzimanje sopstvenog stava

Prema preovlađujućem mišljenju u literaturi, svaka država može sama da odluči o kvalifikaciji pojma „porodični odnos“ i primeni Protokola na istopolne zajednice (videti i uporediti Heiderhoff 2021, Rn. 42, sa daljim upućivanjima na literaturu; Staudinger 2020, Rn. 16; Bonomi 2013, 27; Andrae 2014, 541; u smislu shvatanja usvojenog u pravu države suda Bordaš, Đundić 2013, 138), što govori o prihvatljivosti drugog izloženog pristupa, sa kojim se i mi slažemo.

Prema našem mišljenju, to ipak ne znači da države koje ne poznaju istopolne brakove i registrovana partnerstva ne mogu takve odnose smatrati porodičnim. Ukoliko dotična država pristupi funkcionalnoj kvalifikaciji, moguće je pod taj pojam supsumirati odnose nepoznate domaćem pravom

⁴⁶ Regulation (EU) No. 1104/2016 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8/7/2016. Ne primenjuje se u svim državama članicama EU već u njih 18.

⁴⁷ Brussels, 16. 3. 2011, COM (2011) 127 final; 2011/0060 (CNS).

sistemu, ali koji u drugom pravnom sistemu stvaraju obavezu izdržavanja i karakterišu ih posebne lične veze trajnijeg karaktera. Drugim rečima, iz polja primene Protokola ne moraju *a priori* biti isključene ustanove koje se prema unutrašnjem materijalnom pravu ne smatraju (ili se još uvek ne smatraju) porodičnim odnosom ili iz kojih ne proizilazi obaveza izdržavanja (u tom smislu Andrae 2014, 542).

Funkcionalna kvalifikacija stranog istopolnog braka ili registrovanog partnerstva podrazumeva ispitivanje da li takve veze predstavljaju porodični odnos, u funkcionalnom smislu. Budući da je kod tih ustanova reč o odnosima između dva lica istog pola, protkanim uzajamnim emocijama i poštovanjem, sa različitim statusnim i imovinskim dejstvima, takva njihova funkcija upućuje na zaključak o shvatanju kao porodičnom odnosu. Osim toga, Evropski sud za ljudska prava (ESLJP) poslednjih godina je dao novo svetlo tumačenju odredaba čl. 8 i čl. 14 u vezi sa čl. 8 Evropske konvencije o ljudskim pravima (EKLJP). U poznatoj presudi *Šalk i Kopf protiv Austrije*⁴⁸, utvrđeno je da istopolni partneri uživaju pravo na „porodičan život“ u smislu čl. 8 EKLJP na isti način kao i heteroseksualni. Osim toga, u predmetu *Orlandi i ostali protiv Italije*⁴⁹, ESLJP je utvrdio da su italijanske vlasti, odbivši da izvrše upis istopolnih brakova podnosilaca predstavki zaključenih u inostranstvu, povredile pravo na porodični život aplikanata iz čl. 8 EKLJP, budući da nisu omogućile priznanje i zaštitu dotičnih istopolnih brakova podnosilaca predstavki (par. 199–210 presude; o presudama više u Pavlović 2021a, 53–57). Taj sud je u nekoliko predmeta utvrdio i da su istopolni partneri pretrpeli diskriminaciju po osnovu seksualne orijentacije (povreda čl. 14 u vezi sa čl. 8 EKLJP) zbog postupanja nadležnih vlasti tužene države.⁵⁰ Uzimajući u obzir takav razvoj sudske prakse ESLJP i da su članice Saveta Evrope i ugovornice Protokola uglavnom iste države, apsolutno negiranje porodičnog obeležja istopolnih zajednica u okviru potpisnica Protokola ne deluje previše izvesno.

Kolizionopravni sistem Protokola daje mogućnost širokog tumačenja pojma „porodični odnos“ (tako Andrae 2014, 542; Pavlović 2021a, 152; u smislu Konvencije iz 1973. videti Hausmann 2000, 260). Umesto uskog tumačenja njegovih pojmova, poželjno je šire i jedinstveno tumačenje, usklađeno sa

⁴⁸ ECHR, case 30141/04, *Schalk and Kopf v. Austria*, ECLI:CE:ECHR:2010:0624JUD003014104.

⁴⁹ ECHR, case 26431/12, 26742/12, 44057/12, 60088/12, *Orlandi and Others v. Italy*, ECLI:CE:ECHR:2017:1214JUD002643112.

⁵⁰ *Pajić protiv Hrvatske*, ECHR, case 68453/13, *Pajić v. Croatia*, ECLI:CE:ECHR:2016:0223JUD006845313; *Valianatos i ostali protiv Grčke*, ECHR, case 29381/09, 32684/09, *Vallianatos and Others v. Greece*, ECLI:CE:ECHR:2013:1107JUD002938109.

njegovim međunarodnim karakterom (u tom smislu za nemačko pravo Andrae 2014, 542). Takvo obeležje jasno proizilazi iz čl. 20 Protokola, budući da u njegovom tumačenju države ugovornice vode računa o međunarodnom karakteru tog izvora i potrebi promovisanja njegove jednoobrazne primene.

Uzimajući u obzir istaknute argumente, države ugovornice koje ne poznaju registrovano partnerstvo i istopolni brak takve veze funkcionalnom kvalifikacijom mogu smatrati porodičnim odnosom. One mogu merodavno pravo za izdržavanje odrediti putem drugih odredaba Protokola, osim čl. 5 (pre svega odredaba čl. 3 i 6) (Bonomi 2008, 339). Prema našem mišljenju, isto bi trebalo da važi i za *de facto* istopolne zajednice. U istom smislu kao i kod odluke povodom vanbračnih zajednica, ukoliko se *de facto* istopolne zajednice smatraju porodičnim odnosom prema statutu za izdržavanje i stvaraju zakonsku obavezu izdržavanja, potpadaće pod primenu Protokola. Do merodavnog prava bi se moglo doći jedino putem glavnog kolizionog rešenja iz čl. 3⁵¹ ili 6 Protokola⁵².

4. PRIMENA PROTOKOLA U SRBIJI UZ OGRANIČENJA JAVNOG PORETKA

4.1. Primena odredaba čl. 3 i 6 Protokola na istopolne zajednice života zaključene u inostranstvu

Na početku rada smo postavili dva ključna pitanja. Prvo je da li se istopolne zajednice života mogu smatrati „porodičnim odnosom“ u smislu čl. 1, st. 1 Protokola. Dosadašnja analiza pokazuje da takve veze nisu isključene iz tog pojma u smislu čl. 1, st. 1 Protokola (za registrovana partnerstva u smislu nemačkog prava videti Hausmann 2013, 673; Mankowski 2016, 53; za istopolni brak videti Heiderhoff 2021, Rn. 39; Mankowski 2016, 49; u kontekstu primene Konvencije iz 1973. na registrovana partnerstva videti Forkert 2003, 202–207).

Budući da je odgovor pozitivan, drugo ključno pitanje sa početka rada je – na koji način srpski sudovi treba da primene Protokol na izdržavanje proisteklo iz istopolnih zajednica života, legalno zaključenih u inostranstvu? Smatramo da bi domaći sudija, primenom funkcionalne kvalifikacije za

⁵¹ Merodavno pravo za faktučke zajednice ne može se odrediti na osnovu čl. 5 Protokola (za nemačko pravo videti Hausmann 2018, 456).

⁵² Čl. 5 Protokola ne pokriva vanbračne (faktučke) životne zajednice istog ili različitog pola. Kako su takve zajednice ograničene samo na kohabitaciju, može se primeniti samo čl. 6 Protokola (videti Staudinger 2020b, Rn. 8).

nepoznate pravne ustanove⁵³ i širokim tumačenjem pojma porodični odnos, takve odnose mogao smatrati porodičnim. Reč je o tumačenju u funkcionalnom smislu, ne o shvatanju tog pojma kao braka u smislu domaćeg supstancijalnog prava. Sledstveno tome, na obaveze izdržavanja iz takvih zajednica moglo bi se primeniti opšte koliziono rešenje iz čl. 3 Protokola, odnosno pravo države uobičajenog boravišta poverioca izdržavanja. S druge strane, srpski pravni sistem te institute ne izjednačava sa brakom, pa takva obaveza izdržavanja ne bi potpala pod primenu čl. 5 Protokola. Konsekventno, dužnik izdržavanja može osporiti takvu obavezu izdržavanja pozivajući se na odbrambenu klauzulu iz čl. 6 Protokola.⁵⁴

Postoje mnogobrojni argumenti koji idu u prilog primeni čl. 3 i 6 Protokola u Srbiji. Prvo, Protokolom su derogirane odgovarajuće odredbe ZRSZ i njegova primena se u domaćoj sudskoj praksi podrazumeva (Apelacioni sud u Nišu, Gž2 85/2017).⁵⁵ To zapravo znači da i za kolizione norme Protokola svakako važi načelo službene dužnosti, kao jedno od osnovnih načela MPP.⁵⁶ Drugo, u Nacrtu novog ZMPP Srbije (u daljem tekstu: Nacrt) za određivanje merodavnog prava za obaveze izdržavanja upućuje se na primenu Protokola (čl. 115). To je očekivano, imajući u vidu već postojeću derogaciju odredaba ZRSZ u materiji izdržavanja, da se Srbija nalazi u postupku pristupanja EU i da je Nacrt izrađen sa ciljem da se osavremene aktuelni propisi i da se delimično *unifikuju* i *harmonizuju* sa međunarodnim privatnim pravom, koje nastaje i razvija se u okviru EU (Živković 2014, 1–2). Kada i ako naša država postane njena članica, primenjivaće Regulation No. 4/2009, odnosno Protokol za određivanje merodavnog prava u materiji izdržavanja.

⁵³ U domaćem MPP se u postupku prve kvalifikacije koristi *lex fori* kvalifikacija, dok se za institute nepoznate domaćem pravnom sistemu primenjuje funkcionalna kvalifikacija (više u Đorđević, Meškić 2016, 92–93)

⁵⁴ Tako o tumačenju čl. 6 Protokola videti Bonomi 2013, 49. Videti varijantu 2 slučaja u 4.2. delu rada.

⁵⁵ „Priznanje strane sudske odluke (presude) o izdržavanju maloletnog deteta i bivše supruge, o čijoj izmeni treba odlučiti pred domaćim organom je prethodno pitanje za odlučivanje suda u konkretnom sporu, s obzirom da bi tek tada, a prema odredbama čl. 1, 2, 3, 4 i 5. Protokola o merodavnom pravu za obaveze izdržavanja... bilo merodavno pravo RS, kao pravo uobičajenog boravišta poverioca izdržavanja“. Iz obrazloženja sentence Apelacionog sud u Nišu, Gž2 85/2017, 2. mart 2017, *Paragraf Lex*.

⁵⁶ O načelu službene dužnosti više u Đorđević, Meškić 2016, 23–24.

Sledstveno tome, njene odluke o dosuđivanju izdržavanja moći će da budu priznate u drugim državama članicama bez posebnog postupka egzektivature (videti Bordaš, Đundić 2013, 151).⁵⁷

Treće, kako je u domaćoj literaturi sasvim ispravno istaknuto, okolnost da naše pravo ne poznaje određeni porodični odnos ne vodi automatski zaključku da treba odbiti mogućnost ostvarivanja izdržavanja (tako Živković 2013, 90). Četvrto, ne sme se izgubiti iz vida da stranke (istopolni partneri) mogu izabrati merodavno pravo u skladu sa odredbama čl. 8 Protokola. Pod pretpostavkom da je izbor punovažan u skladu sa formalnim preduslovima iz pomenutog člana⁵⁸, takvim činom bi stranke izrazile volju da bude merodavno pravo određene države. Ukoliko bi domaći sudija istopolnu zajednicu posmatrao kao porodični odnos (onako kako smo do sada izložili), ne deluje izvesno da će ignorisati izbor merodavnog prava već će ispitivati mogućnost njegove primene (i eventualno odbiti primenu zbog povrede javnog poretka iz čl. 13), čime bi primena Protokola na istopolne zajednice bila nesporna. Prema tome, ukoliko se u slučaju izbora merodavnog prava ima primeniti čl. 8 Protokola, ima mesta i za primenu čl. 3 i 6 Protokola na takve zajednice (u slučaju da izbora merodavnog prava nema ili nije punovažan).

Prema našem mišljenju, odluka domaćeg sudije da u primenu Protokola uključi i zahteve za izdržavanje iz pravnog odnosa istopolnih partnera iz zajednice nastale u inostranstvu ne potire osnovne koncepte srpskog pravnog sistema i takva bojazan ne treba da postoji. U slučaju da odredbe *lex causae* predviđaju međusobno izdržavanje istopolnih partnera, mogu biti ignorisane i neprimenjive jedino ako se konstatuje da je povređen srpski javni poredak (više o argumentima za primenu Protokola na istopolne zajednice života u Pavlović 2021a, 151–152).

4.2. Istopolne zajednice života i javni poredak

Javni poredak je u Protokolu uređen odredbom čl. 13, koja nalaže da se može odbiti primena stranog prava „samo u obimu u kome su njegova dejstva očigledno suprotna javnom poretku države suda“. Izveštajem je ovaj okvir konkretizovan, tako da za pozivanje na javni poredak nije dovoljno da određeni porodični odnos odstupa od koncepta javnog poretka *lex fori*

⁵⁷ Regulation No. 4/2009 sadrži dve grupe odredbi o priznanju i izvršenju odluka o izdržavanju – za države članice koje Protokol obavezuje (čl. 17–22) i za države članice koje Protokol ne obavezuje (čl. 23–26 Regulation No. 4/2009).

⁵⁸ Formalna punovažnost se ocenjuje u skladu sa čl. 8, st. 2 Protokola.

već da dosuđivanje izdržavanja po osnovu takvog odnosa bude, kako to Bonomi navodi, *neprilično* (eng. *improper*, nem. *anstößig*) (Bonomi 2013, 67). Između „očigledne suprotnosti“ i „nepriličnosti“ postoji evidentna nijansa, koja je u mnogim evropskim državama dovela do priznavanja dejstva stranog (porodičnog) koncepta, nepoznatog *lex fori*. Tako se, primera radi, u Francuskoj i Nemačkoj priznaju izvesna dejstva stranog poligamnog braka (videti Bonomi 2013, 67). Prema stavu iz Izveštaja, slično razmatranje se *mutatis mutandis* može primeniti i na istopolne brakove ili registrovana istopolna partnerstva (tako Bonomi 2013, 67). Drugim rečima, ako *lex causae* (određen Protokolom) predviđa obavezu izdržavanja u korist registrovanog partnera ili istopolnog supružnika, nadležni organ određene države koja ne priznaje bilo kakva dejstva sličnog odnosa, pa time ni dejstva u pogledu izdržavanja, može odbiti primenu stranog prava samo na način koji je propisan čl. 13 Protokola, odnosno u meri u kojoj bi njegova dejstva bila u *očiglednoj* suprotnosti sa javnim poretkom *lex fori* (Bonomi 2013, 47).

Obrisima čl. 13 Protokola treba pridodati jednu napomenu. Kada je reč o teorijski usaglašenim pretpostavkama za primenu klauzule javnog poretka iz doktrine MPP, prvi uslov je da povreda domaćeg javnog poretka mora biti posledica primene *in concreto* (tzv. meritorno dejstvo) stranih normi⁵⁹ i on je nagovešten u pomenutoj odredbi čl. 13. Drugi uslov podrazumeva da je domaći pravni život destabilizovan onda kada je nepoznat i nekonvencionalan pravni odnos u tesnoj vezi sa podnebljem domaće države (tzv. bliska veza) (videti o tome Đorđević, Meškić 2016, 132; Varadi *et al.* 2010, 157; Kegel, Schurig 2004, 527; Kiestra 2014, 71). *Vice versa*, kada takav odnos kvalitativno ne dotiče domaću državu (usled nedostatka bliske veze sa domaćom državom), a time ni njene tradicionalne i vrednosne postulate, primena *lex causae* se ne mora nužno zaobići (u tom smislu za čl. 13 Protokola i nemačko pravo videti Mankowski 2016a, 208). U slučaju minimalne veze slučaja sa domaćom državom (primera radi, partneri nisu naši državljani, nemaju prebivalište ni imovinu u Srbiji), određena dejstva stranog istopolnog braka ili registrovanog partnerstva bi se mogla priznati u domaćoj državi (tako Pavlović 2021a, 102–104, sa daljim upućivanjem na literaturu). Time bi, zapravo, nastalo tzv. *ublaženo* dejstvo javnog poretka,

⁵⁹ Za klauzulu javnog poretka u unutrašnjem pravu videti i uporediti Đorđević, Meškić 2016, 131; Varadi *et al.* 2010, 158. O potrebnom dejstvu u konkretnom slučaju videti Von Hoffmann, Thorn 2007, 273. U sličnom smislu i Kegel, Schurig 2004, 526. O krajnjem rezultatu primene strane norme videti Dika, Knežević, Stojanović 1991, 17; Jakob 2002, 220.

kada klauzula uopšte ne interveniše.⁶⁰ Štaviše, u domaćoj teoriji je zabeležen i stav o eventualnoj nepotrebnosti pozivanja na klauzulu javnog poretka u oblasti izdržavanja (više u Jovanović 2016, 187).

Uzmimo, na primer, da su dve istopolne partnerke zaključile istopolni brak u Nemačkoj, gde obe žive i nemačke su državljanke. Lisa je već dugo bez posla i želi da joj Franka finansijski pomogne, ali Franka to ne želi. Budući da je Lisi jedino preostalo da izdržavanje od Franke potražuje putem suda, koristi okolnost da Franka ima akcije velike vrednosti u jednoj srpskoj firmi i podnosi tužbu za dosuđivanje izdržavanja pred srpskim sudom. Kao osnov nadležnosti, Lisa se poziva na odredbu čl. 68 ZRSZ⁶¹, kojom je predviđeno da se međunarodna nadležnost suda u Srbiji može zasnovati ukoliko tuženi ima imovinu iz koje se može naplatiti izdržavanje.⁶²

Iako bi takva situacija bila realno teško zamisliva, teorijski je izazovna. Ako bi domaći sudija zasnovao međunarodnu nadležnost u skladu sa navedenom odredbom, na obavezu izdržavanja bi mogao primeniti opšte pravilo o merodavnom pravu iz čl. 3 Protokola. Tom odredbom je predviđeno da je tačka vezivanja uobičajeno boravište poverioca izdržavanja. Pošto je Lisino uobičajeno boravište u Nemačkoj, za izdržavanje je merodavno nemačko pravo. Čini se da Franka ne bi mogla da se pozove na tzv. odbrambenu klauzulu iz čl. 6 Protokola jer je obaveza izdržavanja predviđena i prema zajedničkom *lex nationalis*-u i prema pravu uobičajenog boravišta dužnika (nemačko pravo).

Sudija bi onda trebalo da ispita odredbe nemačkog BGB⁶³ (kao *lex causae*) i konstatuje da je tim zakonom predviđeno izdržavanje između supružnika.⁶⁴ Kako je istopolni brak institut koji se smatra protivnim našem javnom poretku (tako Stanivuković, Živković 2010, 343), domaći sudija će, po prirodi stvari, morati da ispita uslove za primenu klauzule javnog poretka iz čl. 13 Protokola i da li treba odbiti primenu nemačkog prava. Pri tome, on

⁶⁰ O ublaženom dejstvu javnog poretka više u Stanivuković, Živković 2010, 355–357. O javnom poretku u MPP i ublaženom dejstvu videti i Pavlović 2021a, 101–104.

⁶¹ Sličan slučaj u Pavlović 2021a, 153.

⁶² „Nadležnost suda Savezne Republike Jugoslavije u sporovima o zakonskom izdržavanju postoji i ako tuženi ima imovinu u Saveznoj Republici Jugoslaviji iz koje se može naplatiti izdržavanje.“

⁶³ Protokolom je *renvoi* isključen (čl. 12).

⁶⁴ Odredbe §1360, §1360a i §1360b BGB odnose se na jedan oblik obaveze bračnog izdržavanja – tzv. porodično izdržavanje (nem. *Familienunterhalt*) i podrazumeva izdržavanje od trenutka zaključenja braka do rastave (*Trennung*). Više u Schmidt 2017, 80–82.

mora voditi računa o tome da li je dejstvo nemačke norme o dosuđivanju izdržavanja između istopolnih supružnika *očigledno* suprotno javnom poretku Srbije, kako čl. 13 Protokola nalaže, ali i da li je rezultat primene nemačke norme *nepriličan* po domaći pravni sistem. Budući da nemačka odredba § 1360⁶⁵ BGB predstavlja izraz bračne solidarnosti (više u Schmidt 2017, 80), to jest čini se da se njome želi postići finansijsko obezbeđivanje supružnika sve dok žive zajedno, njen cilj se ne razlikuje mnogo od smisla srpskih materijalnih normi o izdržavanju. Zakonsko izdržavanje između supružnika ili vanbračnog partnera u našem pravnom sistemu pokazuje u prvom redu solidarnost između članova porodice, tzv. porodičnu solidarnost (više u Ponjavić, Vlašković 2019, 380–381). To upućuje na zaključak da se odredbama srpskog i nemačkog porodičnog prava želi postići sličan cilj – međusobna finansijska podrška između partnera. Osim toga, treba ispitati i okolnost da li postoji bliska veza tog slučaja sa domaćom državom jer je to neophodan uslov međunarodnoprivratnopravne teorije da bi se primenila klauzula javnog poretka. Smatramo da je bliska veza u tom primeru minimalna i da se svodi se na akcije dužnika izdržavanja u domaćoj kompaniji.

Kako bi onda trebalo vagati između cilja izdržavanja, ostavljanja tužilje bez osnovnih egzistencijalnih izvora prihoda, minimalne veze sa domaćom državom i okolnošću da je strani istopolni brak očito protiv našeg javnog poretka? U takvom rasporedu okolnosti deluje nam da je izvesniji prvopomenuti tas na ovoj vagi, odnosno neprimena klauzule javnog poretka i primena nemačkog prava (tzv. *ublaženo* dejstvo javnog poretka). Imajući to u vidu, ali i okolnost da čl. 13 Protokola treba primeniti samo u izuzetnim slučajevima (videti Živković 2013, 91; za nemačko pravo Andrae 2014, 595), smatramo da dejstvo §1360 BGB nije *neprilično* prema srpskom pravnom sistemu.

Varijanta 1 slučaja. Ako bismo promenili jednu činjenicu u slučaju i ako bi Franka imala uobičajeno boravište u Srbiji, ponovo ne bi mogla da se pozove na odbrambenu klauzulu iz čl. 6 Protokola. Kako su obe stranke nemačke državljanke, za primenu klauzule iz čl. 6 potrebno je da obaveza izdržavanja ne postoji ni prema pravu države čije državljanstvo imaju (nemačko) ni prema pravu uobičajenog boravišta dužnika izdržavanja (srpsko pravo).⁶⁶ Drugim rečima, nemačko pravo priznaje pravo na izdržavanje između supružnika, tako da uslovi za primenu čl. 6 nisu ispunjeni.

Varijanta 2 slučaja. U slučaju da je, primera radi, Lisa poljska državljanica (čije pravo ne poznaje istopolne zajednice), a da Franka ima uobičajeno boravište u Srbiji, Franka bi mogla da se pozove na čl. 6 i istakne da obaveza

⁶⁵ Prema toj odredbi, supružnici su međusobno obavezni da saobrazno izdržavaju porodicu kroz svoj posao ili imovinu.

⁶⁶ O toj odredbi videti u drugom delu rada.

izdržavanja između nje i Lise ne postoji prema pravu uobičajenog boravišta dužnika, odnosno srpskom pravu. Budući da nemaju isto državljanstvo, zajednički *lex nationalis* se ne može ni ispitivati, tako da je u tom slučaju dovoljno to što u pravu uobičajenog boravišta dužnika, to jest srpskom pravu, nije predviđena obaveza izdržavanja između istopolnih supružnika. Franka bi obavezu izdržavanja mogla osporiti, a posledica bi bila odbijanje Lisinog tužbenog zahteva.

5. ZAKLJUČAK

Pojam porodični odnos u smislu Protokola nije definisan za potrebe njegove primene, ali je on nesporno širok. Kada je reč o istopolnim zajednicama života, u Protokolu nije dat ni pozitivan ni negativan odgovor na pitanje da li ga treba primeniti na obaveze izdržavanja proistekle iz takvih zajednica. Kako je to u literaturi istaknuto, države potpisnice Protokola mogu različite institute kvalifikovati kao „porodične odnose“, u skladu sa odgovarajućim metodom u MPP države suda.

Iz prpratnih materijala uz Protokol proizilazi da države koje poznaju brakove ili partnerstva između lica istog pola na međusobno izdržavanje proisteklo iz takvih odnosa mogu primeniti koliziono rešenje kreirano za supružnike i bivše supružnike (čl. 5 Protokola). Ono nije obavezujuće za države koje takve institute ne poznaju. Međutim, ukoliko te države pristupe funkcionalnoj kvalifikaciji u MPP, smatramo da bi one takve (nepoznate) odnose mogle shvatiti kao „porodične“ u smislu čl. 1, st. 1 Protokola. Sledstveno tome, za određivanje merodavnog prava za obaveze izdržavanja proistekle iz takvih zajednica mogu primeniti odredbe Protokola, tačnije odredbu čl. 3 ili čl. 6. Prema našem mišljenju, isti princip trebalo bi da važi i za faktičke (*de facto*) istopolne zajednice.

Izloženi argumenti sugerišu da bi domaći sudovi trebalo relativno široko da tumače pojam „porodičan odnos“, na način koji obuhvata i obaveze izdržavanja, proistekle iz istopolnih zajednica života zaključenih u inostranstvu. Za određivanje merodavnog prava za takve obaveze izdržavanja, naši sudovi bi mogli primeniti čl. 3, odnosno čl. 6 Protokola. Da li će u konkretnom slučaju postojati potreba za primenom klauzule javnog poretka iz čl. 13 Protokola, zavisi od toga da li su ispunjeni uslovi za njenu primenu.

Hipotetički „scenario Franka i Lisa“ ukazuje na teorijsku mogućnost da se naši sudovi mogu susresti sa dejstvima pravovaljano zaključenog istopolnog braka u inostranstvu. Kako primena Protokola, kao međunarodnog izvora,

ima primat u odnosu na odgovarajuće odredbe ZRSZ, smatramo da ima mesta njegovoj primeni na zahtev za izdržavanje između istopolnih supružnika iz inostranog istopolnog braka. Raspored činjenica u tom scenariju, koje imaju posledice i na raspored pravnih mogućnosti, pokazuje pravni epilog dosuđivanja izdržavanja tužilji koja nema dovoljno sredstava za život. Prema našem mišljenju, pozivanju na klauzulu javnog poretka iz čl. 13 Protokola u ovom slučaju nema mesta.

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SAME-SEX RELATIONSHIPS IN LIGHT OF APPLICATION OF THE 2007 HAGUE PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

Summary

Same-sex marriages, registered partnerships and de facto unions are considered same-sex relationships in comparative law. In the Hague Protocol, an important source of the Serbian conflict of law system, nothing is indicated about its application to these relationships, nor is the notion of „family relationship“ defined in sense of Article 1. This paper examines the scope of interpretation of this notion and whether it includes same-sex relationships. The main dilemma is whether the application of the Protocol may arise from autonomous interpretation of notion „family relationship“ or from the decision of each contracting state. Taking a position regarding these issues, the author examines the possibility of application of the Protocol to determine applicable law in disputes regarding maintenance of same-sex relationships, concluded abroad, and processed before domestic authorities. Special attention is paid to the analysis of a hypothetical case and the extent of the public-policy clause from Article 13.

Key words: *2007 Hague Protocol. – Maintenance. – Applicable law. – Family relationship. – Same-sex relationship.*

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VLADAVINA PRAVA IZMEĐU PRAVEDNOSTI I PUKE ZAKONITOSTI – KRATAK PRIKAZ RAZVOJA DISKURSA U KONCEPTU VLADAVINE PRAVA

Vladavina prava je jedan od ključnih koncepata 21. stoljeća. Ideja vladavine prava postoji onoliko koliko postoje i promišljanja o državi i pravu, kao i o odnosu između ta dva pojma. Cilj ovog rada je da se na jednom mjestu pokuša prikazati razvoj ideje vladavine prava tokom historije. Autori se, u tom smislu, bave promišljanjima filozofa koji su u velikoj mjeri odredili smjer razvoja ideje vladavine prava. Naravno, u radu nisu navedeni svi filozofi koji su se bavili vladavinom prava, ali se svakako pokušava na hronološki način prikazati kako se vladavina prava kao ideja razvijala od vremena Platona, pa sve do savremenih teoretičara vladavine prava.

Ključne riječi: *Vladavina prava. – Vladavina pomoću zakona. – Pravednost. – Puka zakonitost.*

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1. UVOD

O vladavini prava se tokom historije razmišljalo na dva bazična načina – kao o sistemu vrijednosti koji zahtijeva da određenim društvom ili državom vladaju zakoni, bez obzira na sadržaj tih zakona, te s druge strane, kao o sistemu vrijednosti koji zahtijeva da određenim društvom vladaju pravedni zakoni.¹ Gledajući historiju razumijevanja ideje vladavine prava, taj koncept se gotovo uvijek kretao između dva pola – jedan je vladavinu prava razumijevao kao prostu vladavinu zakona, odnosno garantovanja pravne sigurnosti, dok je drugi pol vladavinu prava razumijevao ne samo kao vladavinu zakona, već i kao sistem vlasti u kojem trebaju da vladaju pravedni zakoni. U tom smislu, da bi se u cjelosti shvatio savremeni koncept vladavine prava, treba da razumijemo kako se sama ideja vladavine prava razvijala tokom historije. Historijski razvoj koncepta ideje vladavine prava nije problematizirao pitanje da li nekim društvom trebaju vladati zakoni, već kakvi zakoni trebaju vladati društvom.² Naravno, ovdje govorimo o diskursu unutar pitanja vladavine prava, a svakako da su izvan ovog diskursa oduvijek postojale anarhističke ideje, koje su smatrale da vladavina na osnovu zakona nije esencijalno potrebna društvu. No, vratimo se na pitanje razvoja ideje vladavine prava *per se*. Danas postoje brojne definicije vladavine prava, a mi ćemo navesti nekoliko ključnih – koje, kao takve, oslikavaju različite načine razumijevanja vladavine prava.

Jasminka Hasanbegović (2021, 192–194) razumijeva vladavinu prava kao vladavinu ljudskih prava. Na jednostavan način, autorica postavlja formulu za definisanje vladavine prava koja glasi: „vladavina prava = ljudska prava + nezavisno sudstvo“ (*Ibid.*). U tom kontekstu, ljudska prava predstavljaju esenciju vladavine prava, te bez efikasne sudske zaštite ljudskih prava ne može postojati ni vladavina prava u modernom smislu (*Ibid.*). Sličan stav ima

¹ Kao što će biti elaborirano u ovom tekstu, tokom historije su postojali vrlo različiti pogledi na vladavinu prava, a postoje i danas. I jedan i drugi pogled na vladavinu prava imaju argumentovane tvrdnje zašto je njihov koncept vladavine prava ispravniji od drugog koncepta vladavine prava, ali to ne podrazumijeva da je *per se* potrebno odbaciti onaj koncept vladavine prava s kojim se ne slažemo. Stavovi iznijeti u ovom tekstu su subjektivni, ali uvažavaju drugačije poglede na vladavinu prava.

² Značajno je napomenuti raspravu između Harta (Herbert Lionel Adolphus Hart) i Fulera (Lon Luvois Fuller) u Harvardskoj pravnoj reviji (Harvard Law Review), u kojoj je Hart iznosio teze u korist pravnog pozitivizma, tj. puke zakonitosti, i pisao da moralu i pravednosti nema mjesta u pravu, dok je Fuller, vice versa, iznosio argumente da pravo također u sebe mora sadržati moralne vrijednosti. O tome u: Hart (1958); Fuller (1958).

i Anne Ramberg, predsjednica Advokatske komore Švedske, koja vladavinu prava definiše na sljedeći način: „Vladavina prava zahtijeva mnogo stvari. Zahtijeva adekvatno zakonodavno usvajanje zakona. Ti zahtjevi se odnose na formu. Ali postoji i kvalitativni prag. Zakon mora pravilno uključivati društvene vrijednosti uključujući poštivanje ljudskih prava i međunarodnog humanitarnog prava. Ali ni to nije dovoljno. Vladavina prava također zahtijeva pravilno provođenje pravde. Ovo zauzvrat zahtijeva pouzdan i kvalitativan sudski sistem sa dobro obrazovanim i poštenim sudijama, tužiteljima i advokatima“ (prema Bingham 2011, 172–173).³ S druge strane, Džozef Raz (Joseph Raz) kada govori o vladavini prava – naglašava sljedeće: „Nedemokratski pravni sistemi, bazirani na negiranju ljudskih prava, raširenom siromaštvu, rasnoj segregaciji, spolnoj nejednakosti, religijskom progonu, u principu, odgovaraju zahtjevima vladavine prava bolje nego bilo koji pravni sistemi prosvijećenog Zapada... To bi bio nemjerljivo najgori pravni sistem, ali bi se odlikovao u jednom pogledu: u pogledu usklađenosti s principom vladavine prava... Zakon može stvoriti institut ropstva bez kršenja vladavine prava“ (Raz 1979, 211). Na osnovu navedenih definicija vladavine prava, moguće je uočiti dva suštinski različita pristupa razumijevanju vladavine prava. Prvi, ističe ljudska prava kao bitnu odrednicu vladavine prava, a drugi pod vladavinom prava podrazumijeva samo zakonitost, odnosno pravnu sigurnost. U širem smislu, ta dva pristupa se mogu koncipirati kao odnosi između potrage za pravednošću s jedne strane, i potrage za pukom zakonitošću s druge strane. Upravo u takvom odnosu se razvijao i sam diskurs u vezi vladavine prava, te se ideja vladavine prava *per se* uvijek kretala između potrage za pravednošću s jedne strane, te potrage za pukom zakonitošću s druge strane. U nastavku teksta prikazat ćemo kako se ideja vladavine prava razvijala između pravne sigurnosti (zakonitosti) i pravednosti od Platona pa do Toma Bingama (Tom Bingham). U nastavku teksta bit će dat hronološki prikaz teoretičara vladavine prava, iako bi se on mogao postaviti i na drugačiji način, podjelom teoretičara na one koji favoriziraju pravnu sigurnost, i onih koji favoriziraju pravednost, u okviru koncepta vladavine prava. Međutim, takav prikaz bi nosio opasnost svrstavanja teoretičara na jedan od ova dva pola, iako se većina teoretičara čija će misao biti prikazana u nastavku teksta, u okviru koncepta vladavine prava kretala između ta dva pola – pravne sigurnosti i pravednosti.

³ O drugim definicijama vladavine prava, pogledati u: Bingham (2011, 171–174).

2. PLATON I VLADAVINA PRAVA – PLATONOVO TRAGANJE ZA SAVRŠENOM DRŽAVOM

Nesumnjivo, Platon je smatrao zakone bitnim segmentom funkcionisanja države i društva, budući da od zakona ovisi razvoj društva, navodeći da tamo gdje zakon nije vrhovni autoritet – raspad države je blizu, a tamo gdje zakon uživa najviši autoritet – postoji blagostanje i ljudi uživaju u „blagoslovima koje su bogovi spusti“ li na državu (prema Gosalbo 2010, 232–235).⁴ Platon jasno postulira da u njegovoj državi svi trebaju biti jednaki i podvrgnuti redovnim zakonima – koji jednako važe za sve (prema Morrow 1941, 123). Sasvim razumljivo, Platon (1957, 120) u djelu *Zakoni* pojašnjava da „zakoni, jednako kao i sama država, trebaju služiti opštim interesima društva – objašnjavajući da (...) nisu valjani zakoni, koji nisu stvoreni radi zajedničke koristi državne cjeline. Za zakone, koji su stvoreni samo radi jednog dijela države, kažemo da su strančarski, a ne državnički, i da imaju krivo oni koji govore o njihovom pravu“. U djelu *Državnik*, Platon postulira da sudije i državni službenici primjenjuju zakone, odnosno imaju zadatak da odlučuju na osnovu zakona (prema Sørensen 2018, 417). S tim u vezi, Platon (1957, 120) smatra da se državne službe ne trebaju dodjeljivati na osnovu ekonomskog statusa ili na osnovu porijekla, već „(...) ko bude pokazivao najveću poslušnost izdanim zakonima i takvu pobjedu iznio u državi, njemu treba, kažemo, predati služenje zakonima“. Jasno je kako je Platon smatrao da primjenu zakona treba prepustiti onima koji su iskazali najveću poslušnost zakonima. U tom smislu, prema Platonovom mišljenju (Platon 1957, 120), vlast treba biti sluga zakona, a ne zakoni sluge vlasti. Za Platona, pravni poredak nema samo zadatak da „prisiljava“ građane na određeno ponašanje koje je u skladu sa zakonom, već i da obrazuje građanina kako bi on gradio, održavao ili unapređivao društvo (prema Burge–Hendrix 2013, 46).⁵ Da bi se postigla svrha pravnog poretka, smatra Platona (1957, 153) zakoni treba da budu objektivno postavljeni i korisni „Jer tvorac i najznatnijeg djela, ako

⁴ Na primjer, Atenjani su smatrali isonomiu (vladavinu prava) ključnim konceptom njihove demokratije. Isonomia je podrazumijevala jednakost pred zakonom, odnosno da se i bogataši i siromasi jednako tretiraju i da niko nije bio iznad zakona (Lanni 2021, 26–27).

⁵ Na primjer, Platon (1957, 154) tvrdi sljedeće: „Ako se, dakle, drugim zakonima i uredbama odстранjuju neplemeniti nazori i lakomost iz duša onih, koji imaju steći to znanje u dovoljnoj mjeri i na svoju korist, ta će odgojna sredstva biti valjana i prikladna. U protivnom slučaju, neopazice će se mjesto mudrosti steći ono, što se naziva lukavstvom. Tako se može sada vidjeti, kako su Egipćani i Feničani i mnogi drugi narodi stekli to zbog nepismenosti ostalih uredaba i načina bogaćenja, bilo da im se to dogodilo krivnjom nekoga lošeg zakonodavca ili da ih je snašao zao udes ili drugi kakav prirodni uzrok takve vrste.“

želi postići kakav ugled, mora stvarati nešto, što je dosljedno samo sebi“. Tako je isto i sa zakonima. Zakonodavac, prema Platonovom mišljenju, treba postavljati zakone na način da bude dostojan svoje vlasti i da ti zakoni budu objektivno izvršivi, korisni za sve građane (*Ibid.*).

Međutim, postoje elementi Platonove filozofije koji ne odgovaraju modernom konceptu vladavine prava.⁶ Tako, Platon je smatrao da građani trebaju biti bespogovorno lojalni državi (prema Lisi 2013, 98). Osim toga, problem sa Platonovom državom je nedostatak nezavisne sudske vlasti (prema Morrow 1941, 123). Također, Platon je smatrao da se društvo treba prilagođavati zakonima, a ne zakoni društvu, što je u određenoj mjeri suprotno modernom konceptu vladavine prava. Naravno, zakone prema modernom konceptu vladavine prava treba donositi kako bi se zadovoljila potreba građana, ali kada govorimo o domenu ljudskih prava, tada zakone ne treba prilagođavati volji većine, već principima ljudskih prava. Razumljivo je da Platonova filozofija sadrži određene elemente koji ne podržavaju moderni koncept vladavine prava, no za ovaj tekst je naročito bitan način na koji je Platon shvatao odnos između zakonitosti i pravednosti ili, preciznije – da li je Platon smatrao da država treba (osim puke zakonitosti) ostvariti i druge ciljeve, kao što je princip pravde? Prema Hendriksovom mišljenju (Burge–Hendrix 2013, 46), Platon pridaje važnost moralnosti u pravu, pa je upravo iz tog razloga smatrao edukaciju bitnom za funkcionisanje pravnog poretka. Funkcija zakona je da građane učini sretnima i međusobnim prijateljima, a veliki broj parnica i pojava nepravde među građanima čini ih manje prijateljima, a ujedno i manje sretnima (Platon 1957, 150). Platon u djelu *Država* u dijalog Glaukona, Polemarha, Trasimaha, Adeimanta i Kefala traga za pravednošću. Tako se, na samom početku tog djela, u tom dijalogu kazuje sljedeće: „Sasvim si upravu, o Kefale – rekoh ja. – Ali šta je sa pravičnošću? Da li se ona jednostavno sastoji u tome da se kaže istina, i u tome da svakome vratimo ono što smo od njega dobili. Ili bi to bilo ponekad pravično, a ponekad nepravično, već prema okolnostima?“ (Platon 2002, 7). Pitanje pravičnosti je, kao što možemo vidjeti, tema koja zaokuplja Platonovu filozofiju. Štaviše, Platon potragu za pravičnošću smatra i vrjednijom od same potrage za zlatom, ali jasno ističući problem pronalaska samog pojma „pravičnosti“ (Platon 2002, 14). Prema mišljenju Novice Milića (2020, 44), Platon postavlja ideju pravde iznad svakog pojedinca. Iako je sam Platon neprestano „traga“ za pojmom pravičnosti, on je ipak na koncu definiše na pozitivistički način. Tako, kao porijeklo pravičnosti, Platon nalazi nepravde

⁶ Kada govorimo o modernom konceptu vladavine prava, mislimo na onaj koncept koji je naveden u uvodu teksta i koji podrazumijeva poštivanje ljudskih prava. Takav koncept vladavine prava nije prihvaćen od svih teoretičara vladavine prava, što ovdje i napominjemo. To pitanje ćemo detaljnije razmotriti u zaključku teksta.

koji su ljudi činili jedni drugima, pa su na kraju donijeli zakone kojima su odredili šta je pravično (Platon 2002, 33). U djelu *Država*, u raspravi o pravičnosti on kazuje: „Svaka vlast, opet, pravi zakone u svoju korist: demokratija demokratske, tiranin izdaje monarhističke zakone, a tako čine i ostale vlasti. Za ono što je njima korisno vele da je pravo podanika, kome se ovi imaju pokoravati, i ako ga prekorači, onda ga kažnjavaju kao čoveka koji je prestupio zakone i počinio krivicu. Tako ja mislim, najdraži moj, kad kažem da sve države podjednako sude o pojmu pravičnosti: da je pravičnost od koristi za državnu vlast. Jer *ako* ta državna vlast vlada u državi tako će svako, ko dobro razmisli, uvideti da je baš svuda pravično ono što ja velim: ono što koristi jačemu“ (Platon 2002, 16–17). Očigledno je da Platon pravičnost poistovjećuje s pukom zakonitošću – pravično je ono što država presudi da je pravično. Stoga, Platonova filozofija daje ozbiljne temelje za dalju diskusiju koja se vodi diskursu o vladavini prava. Jasno je da Platon postulira osnovne formalne elemente vladavine prava, ali je, i pored toga, njegova filozofija potaknula diskusiju o definisanja vladavine prava – između puke zakonitosti i pravednosti. Platon definitivno ističe bitnost pravednosti, ali u neku ruku, on pravednost definiše tako da svako ima pravo na subjektivan način definisati šta je pravično, zbog čega se pravednost poistovjećuje s pukom zakonitošću. Osim toga, problem Platonove filozofije je, u kontekstu vladavine prava *per se*, što on traga za savršenom državom, a što na koncu može dovesti do ugrožavanja slobode – bazične vrijednosti vladavine prava (Lisi 2013, 99). Kako navodi Milić (2020, 46), snažno normirana Platonova država (*polis*) raskida s vrijednošću slobode, tako što je potčinjava metafizičkoj ideji pravde. Ali, kako smo prethodno ustanovili, ideja pravde kod Platona je pozitivistička – pravedno je ono što država odredi da je pravedno. Neminovno, Platonovo traganje za savršenom državom je „mač s dvije oštrice“. U jednu ruku je pozitivno, pošto daje karakteristike države koja funkcioniše na bazi vladavine prava u formalnom smislu, ali u drugu ruku, također, neminovno ograničava slobodu kao osnovnu vrijednost vladavine prava. Na koncu, gledajući Platonovu državu Radbruhovim očima, Platon definitivno postulira pravnu sigurnost i pravnu svrsishodnost kao elemente vladavine prava, dok kod segmenta pravde, Platon definiše pravdu na pozitivistički način – što neminovno dovodi do toga da pravda ne služi ograničenju volje vladara, nego, štaviše, tu volju legitimizira.

Ne bez razloga, Milić (2020, 46) napominje da su „Platonov politički ideal pre su Sparta i stari Egipat, sa svojim čvrstim socijalnim i državnim hijerarhijama, aristokratske pa čak i monarhijske države od Helade do Perzije“.

3. ARISTOTEL I VLADAVINA PRAVA – ARISTOTELOVA „POZITIVISTIČKA“ PRAVDA

Aristotel, slično kao Platon, nastavlja diskurs u vezi odnosa države, zakona i pravde. Aristotel (1984, 6) ističe: „Pravednost je, međutim, potreba države, jer pravda čini poredak državne zajednice, a ona se sastoji u tome da se odluči šta je pravo“. Za Aristotela, građani moraju uživati privilegiju dobrih zakona i moraju biti naviknuti da se pridržavaju tih zakona kako bi se očuvala stabilnost pravnog poretka (prema Frank 2005, 509). U tom kontekstu, Aristotel (1984, 42) u djelu *Politika* objašnjava: „Zakon nema nikakvu moć da učini da mu se ljudi pokoravaju; ta moć potiče od običaja, a običaj se stvara tek dugim nizom godina, tako da lako menjati već postojeće zakone u druge, znači slabiti snagu zakona.“ Aristotel je u tom smislu smatrao da samo stabilan pravni poredak, koji ne podliježe učestalim promjenama, može oblikovati ponašanje ljudi te je iz tog razloga smatrao da zakone ne treba često mijenjati. U tom kontekstu je bitna i činjenica da je Aristotel smatrao kako snaga zakona nije samo u tome što iza njega stoji autoritet države, već i u njegovom kontinuitetu (a što je čak i bitnije od prethodnog) jer upravo kontinuitet postojanja zakona na duži period oblikuje ponašanje ljudi. Ipak, da bi se ljudi pokoravali dobrim zakonima, tvrdi Aristotel, treba da postoji vladavina dobrih ljudi (prema Frank 2007, 48). Konkretno, za Aristotela vladavina prava ovisi od vrline ljudi, tj. ako vladaju dobri ljudi – tada će i postojati vladavina prava, odnosno vladavina dobrih zakona (prema Frank 2005, 512).

Vlast treba biti povjerena mudro sastavljenim zakonima. Jasno je da će zakoni u dobrim državama biti pravedni, a u izopačenim državnim uređenjima nepravedni, kazuje nam Aristotel (1984, 71–72), pritom jasno naglašavajući da je razlika između dobrih i izopačenih država u tome da li vladaju pravedni ili nepravedni zakoni. Postavlja se pitanje, šta je pravda za Aristotela. Kako sam kazuje u djelu *Politika*, pravedno je da svi podjednako vladaju i da se podjednako pokoravaju, što predstavlja promišljanje koje postulira jednakost pred zakonom, tako da je za Aristotela u neku ruku pravedno da se zakoni jednako primjenjuju na sve pojedince (Aristotel 1984, 83). To potvrđuje i Aristotelova teza da „(...) zahtevati da vlada zakon znači zahtevati da vlada bog i zakoni, a zahtevati da vlada čovek znači dopustiti i životinji da vlada (...) Stoga zakon predstavlja razum bez prohteva“ (*Ibid.*). Da li to znači da za Aristotela vladavina zakona jednostavno predstavlja pravdu? Kako tvrdi Hasanbegović (2021, 172), u Aristotelovom smislu bi se moglo tvrditi da je svaki državno–pravni poredak pravedan jer svaki državno–pravni poredak primjenjuje vlastite zakone. U neku ruku, za Aristotela je vladavina prava, u skladu s prethodno navedenim, imanentna

svim tipovima vlasti (prema Bates 2013, 59). Nadalje, pravo za Aristotela nije metapolitičko, tj. ne kreira pravo politiku već politika, odnosno režim na vlasti kreira pravo, a samim time i ono što je pravedno (prema Bates 2013, 71–73). U skladu s tim, Aristotel je također smatrao da se dobra vladavina može ostvariti samo ako vladaju dobri ljudi. Za Aristotela je, u skladu s tim, najbolji način vladanja demokratija, koja je ograničena vladavinom prava, ali ne prava koje je prirodno ili metapolitičko već prava koje je demokratsko – stvoreno voljom većine (prema Bates 2003, 212–213).⁷ Ipak, iako Aristotel i Platon, iz ove perspektive gledanja, vladavini prava pristupaju na formalistički način, razumijevati Aristotela i Platona kao pravne pozitiviste i formaliste bilo bi suštinski pogrešno jer su oni živjeli i promišljali u drugačijem vremenu i pravnom sistemu (Frank 2007, 45–46). Razumljivo je zašto su Platon i Aristotel pravnu sigurnost poistovjećivali s pravdom – pravda je dosljedna primjena zakona. Međutim, Platon i Aristotel ne bi smjeli biti opravdanje za savremeno formalističko razumijevanje vladavine prava.⁸

4. TOMAS HOBBS IZMEĐU VLADAVINE PRAVA I VLADAVINE POMOĆU ZAKONA

Prije nego što analiziramo filozofiju Tomasa Hobsa (Thomas Hobbes) u kontekstu vladavine prava, nakratko ćemo se osvrnuti na dvojicu značajnih prirodnopravnih filozofa čija je filozofija značajna za ispravno razumijevanje Hobsovog pozitivizma, a kojima zbog ekonomičnosti prostora u ovom tekstu nismo posvetili posebna poglavlja. Za Cicerona, pozitivni zakoni se hrane jednim božanskim zakonom, što za pretpostavku ima stav da su nepisano pravo prirode i božanstva izvori pisanog prava (prema Nojman [1986] 2002, 73). Nadalje, prema Ciceronovom mišljenju, iako se pozitivno pravo mora prilagođavati lokalnim uslovima, ono ne smije biti u suprotnosti s univerzalnim prirodnim pravom (prema Nojman [1986] 2002, 74). Nesumnjivo bitan u tom kontekstu je i poznati srednjovjekovni filozof i teoretičar – Toma Akvinski (Thomas Aquinas). Akvinski, slično kao Ciceron, postavlja prirodno pravo kao granicu pozitivnom pravu, objašnjavajući da zakon koji je u suprotnosti s prirodnim pravom nije zakon. Akvinski (Akvinski 1990, 180) u tom smislu kazuje: „Stoga svaki ljudski

⁷ Pravo koje je demokratsko podrazumijeva pravo ili zakon koji je izglasala demokratska većina, bez obzira na to da li je ono pravedno ili ne.

⁸ Pod formalističkim razumijevanjem vladavine prava podrazumijevamo pomenutu definiciju Džozefa Raza, koji vladavinu prava definiše kao „bilo koji sistem koji dosljedno primjenjuje zakone, bez obzira na sadržaj tih zakona“.

zakon samo utoliko ima vrijednost zakona (*habet de ratione legis*) ukoliko se izvodi iz naravnog zakona. Ako se u nečemu razilazi s naravnim zakonom, onda to već nije zakon, nego izopštenje zakona“. U ovom kratkom osvrtu na filozofiju začetnika prirodnopravne misli, možemo primijetiti osnovnu ideju prirodnog prava koja se proteže i do danas, a to je da pozitivno pravo mora biti u skladu s prirodnim pravom. Kratko upoznavanje s osnovnom idejom prirodnog prava pomoći će da bolje razumijemo Hobsovu filozofiju, koja će biti predstavljena u nastavku teksta.

Ako postoje različita tumačenja misli nekog filozofa, onda je to sigurno misao Tomasa Hobsa.⁹ Za Hobsa (Hobbes [1651] 2018, 147–162), sve što nije protivno zakonu prirode – može se učiniti zakonom u ime onih koji imaju suverenu vlast. U neku ruku, na osnovu te teze, čini se da Hobs negira ideju pravnog pozitivizma o nepovezanosti morala i prava (Dyzenhaus 2001, 466). Ipak, posve je jasna Hobsova ideja da samo pozitivno pravo ima pravno dejstvo na pojedince (*Ibid.*). Hobs tvrdi da ni istina ni pravda ne pretvaraju neko pravilo u zakon jer da pretvaraju – sva poslušnost bi bila uslovna, a sav autoritet na osnovu toga privremen (prema Malcolm 2016, 117). Hobs je prirodno stanje vidio kao borbu svih protiv svih, gdje su ljudi predstavljeni kao „vukovi“ (*Homo homini lupus est*) (vidi Nojman [1986] 2002, 127). Hobs (Hobbes [1651] 2004, 103) navodi da se pravda može definisati samo onda kada postoji neki sporazum ili zakon „jer, tamo gdje nije prethodio nikakav sporazum, nije preneseno nikakvo pravo, i svatko ima pravo na sve, te dosljedno tome, nijedna radnja ne može biti nepravedna. No, ako je sklopljen neki sporazum, onda je njegovo kršenje nepravedno, a definicija nepravde je upravo neizvršavanje sporazuma. Pravedno je pak sve ono što nije nepravedno“. A zakon, ili u širem smislu pravo, za Hobsa postoji samo ako je doneseno od suverena, i njegova validnost ne može biti upitna bez obzira na sadržaj (prema Dyzenhaus 2021, 261). U skladu s tim, država putem prava određuje šta je pravedno, a šta nije – što potvrđuje i teza Noela Malkolma (Malcolm 2016, 132) da za Hobsa vladavina prava predstavlja sistem u kojem suveren vlada na osnovu zakona, tj. gdje politička oblast djeluje kroz pravnu oblast. U tom smislu, ne čudi što neki autori smatraju upravo Hobsa osnivačem političkog koncepta upravljanja *rule by law*¹⁰ (vidi Dyzenhaus 2021, 276).

⁹ O tome pogledati u: Ribarević (2006).

¹⁰ U prevodu, vladavina pomoću zakona podrazumijeva sisteme u kojima ustav i zakoni ne služe kako bi ograničili vlast nego kako bi legitimizirali postupke vlasti. Moderni sistemi *rule by law* imaju nekoliko odlika: izgrađen institucionalni sistem, s formalno koliko–toliko nezavisnom sudskom vlasti koja zapravo služi za: održavanje društvene kontrole i borbe protiv političkih neistomišljenika, legitimiziranja i legaliziranja postupaka vladajućeg režima; kontrolu rada administrativnih

Očigledno, Hobs prepoznaje prirodne zakone kao postojeće, a za njega je najvažniji prirodni zakon težnja ka miru i održavanje mira (prema Pavlović 2006, 63). Kako navodi Malcolm (Malcolm 2016, 121), za Hobsa postoji samo jedno neotuđivo pravo imanentno ljudima, a to je pravo na vlastito očuvanje.¹¹ Iz tog razloga, Hobs se i zalaže za jaku centralnu državu koja će osnovno prirodno pravo ljudi, pravo na mir, moći zaštititi na efikasan način (prema Nojman [1986] 2002, 125–130; Malcolm 2016, 124). U formalnom smislu, Hobs potpuno podržava princip vladavine prava, za njega svi zakoni moraju biti pisani, javno objavljeni i dobiti krajnje odobrenje od suverena (prema Malcolm 2016, 129). Zanimljivo, Hobs smatra da postoji mogućnost da se pojedinac odupre primjeni nekog zakona ako sama procedura donošenja tog zakona nije bila ispravna (prema *Ibid.*). Ipak, ostaje upečatljiva Hobsova tvrdnja da pravo kreira suveren koji ima apsolutno pravo da donosi zakone po svojoj volji. Kako navodi Vukašin Pavlović (2006, 72), za Hobsa sve što čini suveren ne može biti nepravedno niti suveren može biti optužen od podanika za nepravdu. Drugačije rečeno, sve dok se suveren kreće u granicama zakona, tj. ovlaštenja koje mu je na osnovu zakona dato, suveren ne može postupati nepravedno. U tom smislu, kako navodi Luka Ribarević (2006, 91–92), u Hobsovoj filozofiji postoje dvije linije argumentacije, prva postulira državnu silu kao apsolutnu, a druga naglašava i bitnost morala u pravu koje treba odgojiti građanina. U kontekstu ovog teksta, treba istaći da postoji, u najmanju ruku, još jedna diferencijacija u Hobsovoj filozofiji, a tiče se promovisanja ideje vladavine prava i vladavine pomoću zakona. Na prvi pogled, čini se da se Hobs kroz svoju filozofiju kreće po tankoj niti koja razdvaja vladavinu prava i vladavinu pomoću zakona. Nesumnjivo je da u formalnom smislu Hobs podržava princip vladavine prava, dok u suštinskom sadržaju vladavine prava – pravdi, Hobs u većoj mjeri naginje vladavini pomoću zakona. Ipak, čitajući Hobsa, moguće je zaključiti kako i zagovornici vladavine prava, ali i vladavine pomoću zakona, mogu pronaći

službenika i održavanje kohezije među vladajućom elitom; ispunjavanje obaveza u ekonomskoj sferi, tj. prikazivanja države sigurnom za strane investicije (Moustafa, Ginsburg 2008, 1–13). Također, o konceptu rule by law pogledati u: Tushnet (2014); Jenco (2010); Balasubramaniam (2008).

¹¹ Rok Svetlič (2007, 115), tumačeći Hobsovo razumijevanje odnosa vladara i podanika, navodi: „Kada je takva odluka jednom donešena i ugovor prihvaćen, sva se vlast prenosi na suverena, kome su podanici podređeni u svakom pogledu, osim u slučaju kada se radi o zaštiti prava na život. Oni nemaju nikakvih izvornih prava, jer su sva njihova prava, koja im dodjeljuju socijalna pravila, samo koncesije. Podanici tako ne smiju imati nikakve vlastite prosudbe o pravilnosti, odnosno nepravilnosti socijalnih pravila.“ O argumentaciji zašto Hobsa ne bi trebalo smatrati osnivačem teorije pravnog pozitivizma pogledati u: (*Ibid.*).

argumentaciju za svoje tvrdnje u Hobsovoj filozofiji. U skladu s tim, bilo bi nepravedno svrstati Hobsa na jednu ili drugu stranu, s obzirom na činjenicu da se Hobs nesumnjivo kreće po tankoj liniji između ta dva principa.

5. DŽON LOK I VLADAVINA PRAVA – PROBLEM PARLAMENTARNOG SUVERENITETA

Džon Lok (John Locke) postavlja drugačiju paradigmu o prirodnom stanju nego Hobs. Lok, za razliku od Hobsa, prirodno stanje opisuje kao stanje harmonije u odnosima među ljudima, dok motiv za postojanje države Lok pronalazi u razlogu očuvanja prirodnih prava čovjeka (prema Nojman [1986] 2002, 143–150). Lok navodi: „Prirodno stanje ima prirodni zakon da upravlja njime, koji obvezuje svakoga; a um, koji predstavlja taj zakon, poučava sve ljude, koji ga pitaju za savjet, kako su svi jednaki i nezavisni i da nitko ne treba nanositi zlo drugom čovjeku, njegovom zdravlju, slobodi ili posjedu“ (citat prema Jakopec 2013, 421). Na osnovu rimskog prava, Lok zaključuje da niko ne može prenijeti više prava na drugog nego što i sam posjeduje, pa kako prirodno stanje ne daje pravo ljudima da vrše nasilje nad drugima – tako ni ljudi ne mogu prenijeti pravo vršenja nasilja na državu (prema Nojman [1986] 2002, 143–150). Lok, kako navodi Milić (2020, 160), vrši reviziju Hobsovog promišljanja o samoj moći suverena, navodeći da suveren mora da pazi i na saglasnost ljudi, da njegovu najvišu moć oličenu u državi ne legitimizira samo pristanak podanika već i saglasnost samih građana da te zakone prihvate. U tom smislu, Lok (Locke [1689] 1993, 125–126) ističe da prirodna sloboda čovjeka podrazumijeva da je čovjek slobodan od bilo kakve moći na zemlji, da čovjek nema obaveze prema nikakvoj zakonodavnoj vlasti ljudi, već prema pravilima prirode. S druge strane sloboda pojedinca u društvu podrazumijeva da pojedinac bude pod vlašću zakonodavne vlasti koja je zasnovana na pristanku ljudi (*Ibid.*). Definitivno, Lok priznaje da vlast treba biti suverena, ali da takvu vlast treba povjeriti zakonodavnom organu koji će svoju moć temeljiti na odobrenju, tj. pristanku ljudi.

Lok je bio zagovornik ograničene ustavne monarhije (prema Muftić 2002, 43–50). Također, smatrao je ustav fundamentalnim aktom pozitivnog prava (Mattie 2005, 78–79). U skladu s tim, Loka možemo smatrati jednim od idejnih tvoraca savremenog konstitucionalizma, iako treba naglasiti da nije sve u Lokovoj filozofiji bilo u skladu s modernim shvatanjem ideje konstitucionalizma. Prije svega, ni kada je suverena vlast predana u ruke zakonodavne vlasti, ni tada ne postoje garancije da će postojati vladavina prava, jer i zakonodavna vlast u jednakoj mjeri može biti autoritarna kao

i kada je vladar jedan čovjek – monarh.¹² Također, Lok u svom ustavnom sistemu vlasti izostavlja sudsku vlast kao bitnu komponentu vladavine prava. On smatra da zakonodavna i izvršna vlast jedna drugu ograničavaju bez učešća sudske vlasti. Tako, prema Lokovom mišljenju, zakonodavna vlast ima pravo odrediti i odlučiti na koji način će se u državi održavati red i mir, a da bi država funkcionisala poštujući prirodna prava građana – zakonodavna vlast se predaje raznim osobama koje su međusobno udružene u vladajuću strukturu (prema Jakopec 2013, 428).¹³ Zakonodavna vlast donosi zakone koje svi moraju poštovati, pa i sami donositelji zakona, i to radi opšteg dobra, dok uz zakonodavnu vlast postoji i izvršna vlast koja nadgleda izvršavanje zakona i njihovu uspješnost (prema *Ibid.*). To nam jasno govori da za Loka sudska vlast u ustavnom sistemu nema funkciju, kao korektiv koji će štititi građane od nepravredne zakonodavne i izvršne vlasti.

Osim toga, problem sa Lokovom filozofijom, kada je u pitanju vladavina prava, jeste u tome što (u određenoj mjeri) Lok prirodna prava čovjeka posmatra kroz prizmu prava vlasništva, što sasvim sigurno nije jedino prirodno pravo čovjeka gledajući to iz ugla savremenog shvatanja koncepta ljudskih prava. Definitivno, Lok je filozof koji je zaslužan za dalji razvoj vladavine prava, ali iako je bio predstavnika liberalne teorije i začetnika ideje vladavine prava, i u njegovoj filozofiji postoje nedostaci u usporedbi sa savremenom idejom vladavine prava. Njegova filozofija je naročito bitna za bolje razumijevanje odnosa prirodnog i pozitivnog zakona, ali i za bolje razumijevanje nastanka prvih ustavnih država. Lokova prva ustavna država počiva na ideji parlamentarnog suvereniteta, što ne odgovara savremenom konceptu vladavine prava, koji počiva na ideji da u sistemu vladavine prava niko nije suveren, pa ni parlament, nego je suvereno jedino pravo.

6. ALBERT VAN DAJSI – VLADAVINA PRAVA KAO DIO PRAVNE KULTURE

Albert Van Dajsi (Albert Venn Dicey) prvi je autor koji je u djelu *Uvod u izučavanje ustavnog prava* detaljno obrazložio ideju vladavine prava, iako je termin vladavina prava postojao *avant la lettre de Dicey* (Lino 2018, 740).

¹² Na primjer, ser Francis Jacobs u objašnjavanju odnosa parlamentarnog suvereniteta i vladavine prava navodi da je teško ali ne i nemoguće danas identificirati državu u kojoj suvereni zakonodavni organ nije podređen ograničenju njegove moći. Štaviše, i međunarodni i unutrašnji suverenitet je inkompatibilan s drugim konceptom koji također ima historijsku podlogu i koji je rašireno poznat kao najvažnija vrijednost, a to je vladavina prava (prema Bingham 2011, 161).

¹³ O Lokovoj podjeli vlasti, pogledati i u: Bačić (1987, 103–105); Jenkins (2011).

Za Dajsija, vladavina prava podrazumijeva supremaciju redovnog prava na uštrb arbitrarnog načina odlučivanja, jednakost pred zakonom gdje svi imaju jednaka prava i obaveze pred redovnim sudovima, te zaštitu individualnih prava (prema Gosalbo–Bono 2010, 253–254). Drugačije kazano, za Dajsija vladavina prava podrazumijeva vladavinu kroz pravne norme i procedure, a ne kroz neograničeno diskreciono pravo, zatim formalnu jednakost pred zakonom, te postepeno uspostavljanje individualnih prava (prema Lino 2018, 741). Dajsi je smatrao da se britanski model zasniva na principu zaštite individualnih prava, u kome je ustav posljedica upotrebe privatnog prava, i to djelovanjem redovnih sudova i Parlamenta (prema Gosalbo–Bono 2010, 253–254).¹⁴ To je uzrokovano anglosaksonskom pravnom tradicijom, u kojoj redovni sudovi svojim tumačenjima kreiraju pravo, pa je zbog toga Dajsi (ne bez razloga) smatrao da je rezultat zaštite individualnih prava uzrokovan sudskim načinom odlučivanja (prema Walters 2021, 158). Kako navodi Dajsi (Dicey 1979, 199), iako *Habeas Corpus Acts* ne deklariše nikakva prava ni principe, opet ima veću praktičnu vrijednost od stotine ustavnih članova koji garantuju individualne slobode. Stoga je jasno da Dajsi – kada govori o postepenoj uspostavi zaštite individualnih prava – smatra kako se ona prava, koja su propisana pravnim propisima, također trebaju dosljedno štititi. Ipak, bio je svjestan da može postojati diskrepancija između onoga što je propisano i onoga što se primjenjuje u praksi. Iz tog razloga, Dajsi je smatrao da se individualna prava trebaju postepeno štititi, kako ne bi došlo do te diskrepancije.

Tako Dajsi (Dicey 1979, 186–187), oslanjajući se na Aleksisa de Tokvila (Alexis de Tocqueville), navodi da u Sjedinjenim Američkim Državama i Engleskoj ima više slobode u običajima naroda nego u zakonima, a da u Švicarskoj više slobode ima u zakonima, nego u običajima naroda. Zbog toga se prava pojedinca bolje štite u Sjedinjenim Američkim Državama i Engleskoj, nego u Švicarskoj (vidi Dicey 1979, 183–190).¹⁵ U tom kontekstu, za Dajsija je vladavina prava neodvojivo povezana s načinom života u određenom društvu, odnosno ona je neodvojivo vezana za kulturu tog društva, što znači da vladavina prava prevashodno mora postojati u kulturi određenog društva, kako bi mogla zaživjeti kroz norme te države (Walters 2021, 169). Stoga,

¹⁴ To je dio anglosaksonske pravne tradicije. Ni danas u Ujedinjenom Kraljevstvu ne postoji ustav u formalnom smislu, ali zato veliki broj dokumenata kao što su *Habeas Corpus Act*, *Magna Charta Libertatum*, *Bill of Rights* čine *materia constitutionis* ustava Ujedinjenog Kraljevstva u materijalnom smislu (pogledati Vorländer 2012, 31–34).

¹⁵ Za Dajsija je vladavina prava povezana s dostignućima engleskog naroda, pa s tim u vezi vladavina prava predstavlja civilizacijsko dostignuće engleskog naroda (prema Lino 2018, 747).

pravnu kulturu Dajsi smatra osnovnim preduvjetom za ostvarenje vladavine prava, jer bez toga zakoni neće biti dovoljni da se vladavina prava ostvari te će postojati, kako to Hasanbegović (2021) naziva – *neutemeljeni normativni optimizam*. Iako je Dajsi prvi elaborirao termin vladavina prava u njegovoj filozofiji postoje previranja između pravednosti i puke zakonitosti, odnosno između principa vladavine prava i vladavine pomoću zakona. Na koji način je Dajsi razumijevao vladavinu prava? Definitivno, njegovo razumijevanje vladavine prava bliže je *thin* negoli *thick* definiciji vladavine prava (Lino 2018, 741).¹⁶ Walters (Walters 2021, 160) ističe da je Dajsijeva vladavina prava jednostavno predstavljala vladavinu pomoću zakona, tj. *thin* vladavinu prava, što potvrđuje Dajsijev zaključak da se nezakoniti akti izvršne vlasti mogu legalizovati zakonom naknadno, te se u tom smislu čini da su u Dajsijevoj teoriji vladavine prava zanemareni čak i formalni principi zakonitosti, posebno u pogledu zabrane retroaktivnosti i opštosti pravnih normi. Drugi problem u Dajsijevom razumijevanju vladavine prava je što i on, slično kao i Lok, suverenost parlamenta smatra dijelom vladavine prava. Za Dajsija (Dicey 1979, 70), parlamentarna suverenost znači da ne postoji moć engleskog ustava koja može doći u istu ravan sa parlamentarnom suverenošću. S tim u vezi je Dajsi (Dicey 1979, 414) smatrao da parlamentarna suverenost vodi ka vladavini prava. Bio je svjestan negativnih strana parlamentarne suverenosti, ali je također smatrao da zakonodavna vlast ne može ugroziti individualna prava, koja su kao takva „ugrađena“ u redovne zakone koji čine identitet zajednice, ili može – ali to bi svakako, prema njegovom mišljenju, moglo izazvati revolucionaran odgovor naroda (prema Walters 2021, 169). U suštini, Dajsi (Dicey 1979, 79) je smatrao da svaka neadekvatna odluka zakonodavne vlasti može potencijalno prouzrokovati otpor građana. Treći problem Dajsijevog razumijevanja vladavine prava je bio taj što je vladavinu prava koristio kao alat za legitimiziranje imperijalističkih postupaka Ujedinjenog Kraljevstva prema koloniziranim narodima (prema Lino 2018, 763–764).

Kao i prethodni teoretičari vladavine prava, tako i Dajsi vlastito razumijevanje vladavine prava „instalira“ određene elemente koji ne odgovaraju savremenom konceptu vladavine prava. Njegov doprinos najviše leži u tome što je prvi pokušao definisati šta vladavina prava kao takva podrazumijeva,

¹⁶ *Thick* definisanje vladavine prava podrazumijeva razumijevanje vladavine prava u supstantivnom smislu, što u vladavinu prava uključuje razne principe, kao što su ljudska prava, jednakost pred zakonom, supremacija prava, zabrana arbitarnosti, podjela vlasti i slično, dok *thin* definisanje vladavine prava podrazumijeva formalističko shvatanje vladavine prava kao puke vladavine zakona, bez obzira na suštinske kvalitete tih zakona, i to razumijevanje vladavine prava je istovjetno principu vladavine pomoću zakona.

a bio je prvi koji je pokušao individualna prava učiniti neizostavnim dijelom vladavine prava. U tom kontekstu, ako čitamo Dajsiya iz savremene perspektive, jasno je da je bio bliži vladavini pomoću zakona, nego vladavini prava, ali gledajući u kontekstu vremena kada je on promišljao o vladavini prava, jasno je da on pravi bitan iskorak u razumijevanju vladavine prava, te bi ga bilo nepravedno smatrati zagovornikom vladavine pomoću zakona. Također, Dajsi je zanemarivao institucionalne garancije vladavine prava, smatrajući da će vladavina prava, ako je ugrađena u pravnu kulturu naroda, nadjačati one institucije koje djeluju suprotno vladavini prava.

Nedvojbeno, pravna kultura je kamen temeljac ostvarenja i opstanka vladavine prava. Međutim, za ostvarenje i opstanak vladavine prava neophodno je da postoje institucionalne garancije koje će osigurati vladavinu prava. Tako Dajsi izostavlja sudsku vlast kao svojevrsan „pandan“ zakonodavnoj i izvršnoj, u smislu garantovanja vladavine prava. No, gledajući iz savremene perspektive, bitno je to što je Dajsi dao važnost pravnoj kulturi u kontekstu ostvarivanja ideala vladavine prava, pošto se danas taj segment očigledno zanemaruje te se smatra da ako postoje institucionalne pretpostavke za vladavinu prava – vladavina prava će kao takva i postojati, čemu nas je ipak u izvjesnoj mjeri razuvjerilo iskustvo postsocijalističkih država.¹⁷

7. HANS KELZEN I FORMALNI OKVIR VLADAVINE PRAVA

Hans Kelzen (Hans Kelsen) nastavlja isti narativ kao i prethodni teoretičari vladavine prava, koji podrazumijeva da država može (i mora) djelovati u skladu s pravnom normom, kao i da je u stvari i sama država subjekt prava (prema Bongiovanni 2007, 301–302). Prema Kelzenovom shvatanju, država je skup normi koje personificiraju pravni sistem, odnosno, država nije moć, već zakon (prema Gosalbo–Bono 2010, 244–245). Istina, kada govori o vladavini prava, Kelzen koristi termin pravna država (*Rechtsstaat*), ali to svakako ne predstavlja nikakvu suštinsku prepreku da Kelzena smatramo teoretičarem vladavine prava. Iz savremenog ugla posmatranja, pravna država je za Kelzena podrazumijevala da je pravni sistem suveren i da postoje pretpostavke za izgradnju javnog prava (prema Bongiovanni 2007, 302). Međutim, za Kelzena vladavina prava, tj. pravna država ne znači i, *per se*, zaštitu individualnih prava ili metapравnih principa. Kako navodi Hasanbegović (2020, 172), Kelzenov koncept pravne države podrazumijeva da je svaka država uređena

¹⁷ O vladavini prava u postsocijalističkim državama, detaljnije u: Sadurski (2014).

pravom pravna država, bez obzira na sadržinu i kvalitet pravnih normi, što bitno razlikuje takvu ideju pravne države od ideje vladavine prava. Takvim definisanjem pravne države, odnosno vladavine prava, Kelzen se zadržava na Platonovim i Aristotelovim stajalištima da vladavina prava postoji tamo gdje vladaju zakoni, bez obzira na to kakve kvalitete ti zakoni bili. Ipak, to nije sve kada je u pitanju Kelzenovo shvatanje vladavine prava. I Kelzenovom razumijevanju vladavine prava postoje određena stajališta koja idu ka pukoj zakonitosti, ali jednako tako i ona koja priznaju pravednost kao dio pravnog poretka. Tako Kelzen tvrdi: „Pravna norma nije važeća zato što ima određeni sadržaj, odnosno zato što je njen sadržaj logički izvodljiv iz pretpostavljene osnovne norme, već zato što je stvorena na izvjestan način – konačno na način određen pretpostavljenom osnovnom normom. Samo zbog toga, pravna norma pripada pravnom poretku čije su norme stvorene u skladu sa osnovnom normom. Prema tome, zakon može biti bilo koje vrste sadržaja“ (prema Haldemann 2006, 168). S druge strane, Kelzen u djelu *Čista teorija prava* tvrdi: „Premda se izričito naglašava razlikovanje između pravednosti i prava, oni ipak ostaju međusobno povezani više ili manje tankim nitima. Da bi bio „pravo“, naučava se, pozitivni poredak države mora imati nekog udjela u pravednosti, ili se tako mora realizirati neki etički minimum ili tako da mora pokušati – premda nedostatno – biti ispravno pravo, a to znači pravedan; da bi bilo „pravo“, pozitivno pravo mora u nekoj, ma koliko skromnoj mjeri, odgovarati ideji prava“ (Kelzen [1934] 2012, 25). Tu postoje dvije Kelzenove suprotstavljene tvrdnje – da zakon može biti bilo kojeg sadržaja te da pravo mora ispunjavati određene etičke minimume. Treba napomenuti da je Kelzen smatrao da pravda igra značajnu ulogu kada su u pitanju nacistički zločini i da se oni jednostavno ne mogu pozivati na zakone (prema Haldemann 2006, 170). Kako navodi Robert Valter (1999, 13), Kelzenov pravni pozitivizam ne daje opravdanje za određene radnje jer, kako on tvrdi, ostaje moralna odluka svakog čovjeka da pozitivno pravo poštuje ili da se protiv njega pobuni. Preciznije rečeno, Kelzen ne tvrdi da je svako pozitivno pravo ispravno, ali da pojedinac ima dvije mogućnosti – ili da poštuje pravnu normu, ili da se protiv nje pobuni.

U tom kontekstu, Kelzenov pravni pozitivizam treba razdvojiti od dotadašnjeg pravnog pozitivizma, koji je na nekritički način gledao na pravne norme. Ipak, Kelzen postavlja razliku između onoga što „jeste“ od onoga što bi „trebalo“ biti (vidi Spaak 2005, 403).¹⁸ Kako navodi Valter (1999, 16), Kelzenov pravni pozitivizam se razlikovao od državnopravnog pozitivizma u tome što je njegov pozitivizam bio spoznajno–kritički, te je na osnovu toga stari pravni pozitivizam postao kritički pravni pozitivizam. Kelzen je smatrao

¹⁸ O tome detaljnije pogledati u: Banović (2019).

da prirodno pravo ne može biti vrhovni zakonodavac, osim u slučaju kada bi priroda bila obdarena s inteligencijom – tada bi prirodno pravo moglo biti vrhovni zakonodavac (prema Bodenheimer 1950, 336). Kelzen ([1934] 2012, 57) smatra da, pravni poredak treba biti u skladu s temeljnom normom (*Grundnorm*) koja „(...) aktu prvog zakonodavca te dakle svim drugim aktima pravnog poretka koji na njemu počiva pridaje smisao trebanja“. U tom smislu, „Ta je temeljna norma samo izraz nužne pretpostavke svakog pozitivističkog shvaćanja pravne građe. Budući da se ne stvara u pravnom postupku, ona nema valjanost pozitivne pravne norme, ona nije postavljena, nego – kao uvjet sveg postavljenog prava, sveg pozitivnog pravnog postupka – pretpostavljena“ (Kelsen [1934] 2012, 58). Na taj način, Kelzen pravni poredak ne legitimizira prirodnim pravom, nego temeljnom normom, koja se pretpostavlja. Međutim, on ne otkriva sadržaj te temeljne norme, možda iz razloga što ta temeljna norma može biti bilo kojeg sadržaja.¹⁹

Kelzen je bio zagovornik ustavne države, u kojoj svi pravni akti moraju biti usklađeni s ustavom kao najvišim pravnim aktom, te je u tom smislu smatrao da demokratija jedino može funkcionisati na bazi ustavne države, u kojoj postoji ustavna kontrola većine (prema Bongiovanni 2007, 310). S druge strane, on nije bio protivnik prirodnog prava, jer je smatrao da etika i moral ne trebaju biti dijelom pravnog poretka, što smo u prethodnom dijelu teksta i pokazali. Kelzen je više bio skeptičan prema ulozi prirodnog prava, jer je smatrao da prirodno pravo nije ispunilo svrhu osiguranja moralnosti u pravnom poretka (prema Lukina 2020, 551).

Definitivno, Kelzenovo učenje predstavlja jedan od kamena temeljaca vladavine prava, naročito u formalnom smislu. Tako, prema mišljenju Lars Vinksa (Vinx 2007, 75), čista teorija prava je pravna teorija koja odgovara ideji vladavine prava u onoj mjeri u kojoj otvara put za što potpuniju realizaciju suštinske uloge vladavine prava.²⁰ Kelzen, u tom smislu, postavlja hijerarhiju pravnih normi, po kojoj sve pravne norme trebaju biti u skladu s ustavom (Kelsen [1934] 2012, 62). Međutim, on je smatrao da ustavi ne bi

¹⁹ Kako navodi Rok Svetlič (2006, 118): „Temeljna norma samo je način s kojim Kelsen krpa rupu u definiciji pojma prava. Znamo da Kelsena ne zanima fakticitet temeljne norme, nego mu samo služi kao, kantovski rečeno, regulativna ideja, oko koje se skuplja važenje hijerarhija punomoći. Temeljna je norma samo „pretpostavljena“, ona je „problematičan“ pojam, koji funkcionira i bez dokazivanja konkretne realnosti. Ukratko, temeljna norma kao povijesno najstariji ustav nije ništa „materijalno“ i, na kraju krajeva, svejedno je može li se uopće takav ustav locirati kao konkretan tekst, to je samo transcendentni element Kelsonove teorije, kojim rješavamo problem što proizlazi iz transferičnosti punomoći“.

²⁰ Ideja vladavine prava se kod Kelzena može implementirati samo u utopiji zakonitosti (prema Vinx 2007, 214).

trebali sadržavati odredbe o zaštiti ljudskih prava, ponajviše zbog otvorene prirode takvih odredaba, a također je smatrao opasnim dijelove ustava koji govore o jednakosti, pravdi, slobodi, moralnosti zbog mogućnosti njihove široke interpretacije od strane sudija, što bi moglo od sudija napraviti pozitivne zakonodavce ili vladu sudija (*government of judges*) (prema Sweet 2003, 2767–2768).

U tom kontekstu, Kelzenovo učenje u formalnom smislu je dalo moderne obrise vladavine prava, postavilo pravila za funkcionisanje vladavine prava, ali je također u većoj mjeri izostavilo suštinski element vladavine prava – pravednost. Odnosno, pravednost ostaje i dalje nedefinisan pojam, gdje je svaka država pravedna ako dosljedno primjenjuje vlastite pravne norme. Kelzenova pravna država je samo pravni okvir, hijerarhija pravnih normi, koja ne postavlja kriterije kakve kvalitete pravne norme trebaju biti. Ipak, Kelzen nije bio klasični pozitivista, on je također, kako smo i naveli, smatrao da pravni poredak treba ostvarivati minimum pravednosti, iako ta pravednost ostaje pozitivizirana. U skladu s tim učenjem, svaka država je pravedna ako dosljedno implementira vlastite pravne norme.

8. RADBRUHOVA FORMULA „*LEX INIUSTA NON EST LEX MAXIM*“ KAO KAMEN TEMELJAC VLADAVINE PRAVA

Gustav Radbruch (Gustav Radbruch) je filozof koji pravi preokret u razmišljanju o vladavini prava. Da bi se razumjela Radbruchova formula, treba prvenstveno objasniti sama njegova filozofska stajališta. S tim u vezi, Radbruch (Radbruch [1932] 2019, §1, 23) tvrdi: „Pravo može biti nepravedno (*summum ius – summa iniuria*), ali ono je pravo samo zato što je njegov smisao da bude pravedno“. U kontekstu odnosa prirodnog i pozitivnog prava, Radbruch (Radbruch [1932] 2019, §3, 36) tvrdi sljedeće: „Jednom spoznati, oni imaju prednost u odnosu na proturječno postavljeno pravo: prirodno pravo nadvladava pozitivno pravo“. Nadalje, u tom istom narativu, Radbruch (Radbruch [1932] 2019, §4, 52) navodi: „Ideja prava pak ne može biti ništa drugo doli pravednost“: Ipak, kada je u pitanju Radbruchovo učenje, pravednost nije jedini element ideje prava, nego su osim pravednosti elementi ideje prava za njega i pravna sigurnost, ali i pravna svrsishodnost. Radbruha (Radbruch [1932] 2019, §9, 97) navodi: „Pravna sigurnost zahtijeva pozitivnost, a pozitivno pravo hoće vrijediti bez obzira na svoju pravednost i svrhovitost“. Tako da pravda ne igra jedinu ulogu u Radbruchovoj filozofiji. U tom smislu, kako sam Radbruch (Radbruch [1932] 2019, §9, 99) ističe, pravednost, svrhovitost i pravna sigurnost trebaju zajednički da vladaju pravom u svim njegovim dijelovima, iako ti elementi

moгу u određenim okolnostima biti u koliziji.²¹ Jasno je da Radbruch pokušava balansirati između pravne sigurnosti, svrsishodnosti i pravедnosti. Prije nego se dotaknemo rasprave da li je Radbruch prije donošenja formule bio naklonjen pravnom pozitivizmu ili ne²², treba razjasniti šta Radbruchova formula podrazumijeva. Radbruchova formula je nastala nakon Drugog svjetskog rata, a presudan utjecaj na njen nastanak imali su nacistički zločini počinjeni u Drugom svjetskom ratu.

Radbruchova formula predstavlja oživotvorenje teza Cicerona i Akvinskog da pozitivno pravo nije pravo ako nije u skladu s prirodnim pravom. U tom kontekstu, Radbruch (Radbruch [1947] 2019, 246) tvrdi: „Nacionalsocijalizam je jednostavno povrijedio sva načela prava i na vidjelo iznio sve moguće vidove nepravda. On je pravnu državu koju je zatekao pretvorio u „državu nepravda“, u punom značenju te riječi. Najopasniji oblik nepravda jest nepravdo koje poprimi oblik zakona, „zakonsko nepravdo“. Sjetimo se samo jednoga od bezbrojnih primjera: *Nürnbergskih* rasnih zakona. Nitko nepristrasan ne bi sadržaj tog zakona nazvao časnim imenom „pravo.“ Upravo u takvom ozračju nastaje Radbruchova formula „zakonskog nepravda“ (*lex iniusta non est lex maxim*), koja zakone koji u nepodnošljivoj mjeri krše temeljna načela moralnosti i pravедnosti proglašava „nepravdom“ – dok one zakone koji nisu u tolikoj suprotnosti s pravdom i svrsishodnošću i dalje smatra „pravom“ (Radbruch [1946] 2019, 273). Prema tome, samo nepodnošljiva nepravda osporava pravnost *per se* (Haldemann 2006, 170). Radbruchova formula bez sumnje služi kao instrukcija sudijama u njihovom sudskom rezonovanju (Bix 2011, 57). Također, prema mišljenju Biksa (Bix 2013, 74), Radbruchova formula može ugroziti vladavinu prava jer daje prevelika ovlaštenja sudijama da odlučuju šta je „pravo“, a šta je „nepravdo“. No, kako definisati pojam „nepodnošljive nepravde“ danas – s obzirom na činjenicu da je posve jasno kako je nacistički režim vlastitim zakonima prouzrokovao nepravdu u tolikoj mjeri da se zakoni nacističke Njemačke jednostavno nisu mogli razumjeti kao pravo *per se*? Odgovor na to pitanje, čini se, daje Martin Borovski (Borowski 2021, 631–632), koji na osnovu tumačenja Radbruchove filozofije zaključuje da bi „nepodnošljiva nepravda“ odgovarala pojmu kršenja ljudskih prava. U vezi sa odnosom ljudskih prava i „nepodnošljive nepravde“, bitno je naglasiti Radbruchovo stajalište (Radbruch [1946] 2019, 274) da „pravni karakter nadalje nedostaje i svim onim zakonima koji su ljude tretirali kao niža stvorenja te im odriicali ljudska prava“. Svakako,

²¹ Također, o kritici isticanja bilo kojeg od tih elemenata prava pogledati u: Radbruch (2019, 99–100).

²² O Radbruchovim stavovima prije i poslije Drugog svjetskog rata, detaljnije: Paulson (1995).

nedvojbeno je povezanost Radbruchove „nepodnošljive nepravde“ i ljudskih prava, što se opet mora sagledati iz različitih perspektiva. U vrijeme kada je Radbruch pisao svoju formulu još uvijek nije bio razvijen koncept ljudskih prava u današnjem smislu, što nam govori da ne postoji prepreka da pojmove „nepodnošljive nepravde“ i kršenja ljudskih prava pokušamo (koliko je to objektivno moguće) izjednačiti.

S druge strane, postavlja se pitanje da li je Radbruch uvijek bio antipozitivista, ili su pak zločini nacističkog režima u Drugom svjetskom ratu promijenili njegova gledišta. Iako se na početku poglavlja o Radbruhu djelomično daje odgovor na to pitanje, u nastavku teksta ćemo detaljnije obrazložiti tu dilemu. Postoje gledišta da je Radbruch na početku svoje karijere bio zagovornik pravnog pozitivizma (vidi Leawoods 2000, 494). Kako navodi Bikš (2011, 57), Radbruchova formula predstavlja preokret u promišljanju Radbruha. Ipak, on je i prije pisanja formule bio kritičar pravnog pozitivizma, a samu pravdu je smatrao svrhom postojanja prava. Tako je za njega zadatak prava da služi pravdi (prema Borowski 2021, 627).²³ Dokaz o kritičkom pristupu prema pravnom pozitivizmu i prije sastavljanja formule je Radbruchova tvrdnja (Radbruch [1932] 2019, §25, 215–216): „Ponovo je pravna sigurnost ta koja je jedina u stanju opravdati pravomoćnost i neispravne presude. Međutim, u svezi s pravomoćnošću presude, javlja se jedan problem s kojim smo se već upoznali vezano uz pravno važenje zakona. Vidjeli smo da je samo pravna sigurnost u stanju podržati pravno važenje neispravnog prava, ali da se jednako tako mogu zamisliti i slučajevi u kojima je neispravnost tolika da protiv toga nikakvu težinu ne može imati ni vrijednost pravne sigurnosti zajamčene važenjem već jednog postavljenog prava“. U skladu s tim, kod Radbruha je riječ o kontinuitetu pravne misli, a ne o diskontinuitetu jer je tokom cijelog svog života on kritikovao pravni pozitivizam (Borowski 2021, 640–647).²⁴ Radbruch svojom formulom odstupa od određenih prijašnjih stavova da sudija treba provoditi zakone – čak i ukoliko zna da su nepravedni (Radbruch [1932] 2019, §10, 109). Takvo odstupanje, međutim, nije revolucionarno, posebno ako pogledamo druga pomenuta Radbruchova stajališta.

²³ Također, o Radbruchovoj kritici pravnog pozitivizma pogledati u: Borowski (2021, 633).

²⁴ Tako Radbruch (Radbruch 2019, 222) prilikom definisanja pravne države navodi: „Taj minimum vezanosti države samo svojim pravom, koje je sama postavila, proglašen je pozitivističkim ispražnjenjem misli o pravnoj državi, a ukazivalo se na to da je zamisao pravne države u svom izvornom obliku značila vezanost države preddržavnim ljudskim pravima i naddržavnim prirodnim pravom, te zahtijevalo da zamisao prava ponovo mora dobiti značenje primjene određene pravne ideje, a ne samo pravnog pojma uopće, na odnos pojedinca prema državi“.

Radbruhova formula je definitivno oživotvorila ulogu prirodnog prava i dala mu konkretnu ulogu u pravnom sistemu. U tom smislu, Radbruhova formula je značajna u savremenom kontekstu razumijevanja vladavine prava jer je na osnovu nje vidljivo da zadatak vladavine prava nije da striktno primjenjuje zakone već i da one zakone koji su „nepodnošljivo nepravedni“ (suprotni ljudskim pravima) stavi van snage. Tako djelovanje sudske vlasti, koja bi stavljala van snage zakone koje donosi zakonodavna vlast ne bi bilo nedemokratsko – iz prostog razloga što je savremena demokratija zasnovana na principu ustavne vladavine, prema kojem se zakonodavna vlast mora kretati u granicama koje je postavio ustav (pogledati Tan 2021, 11). Iako je bio oštar kritičar pravnog pozitivizma, Radbruch nije bio ni *jusnaturalista* te je u tom smislu pokušao kreirati pravnu filozofiju u kojoj će biti dovoljno prostora za pravni pozitivizma, ali i za moral (prema Leawoods 2000, 515). Time je dao moderne obrise principu vladavine prava koji mora sadržavati i pravnu sigurnost, jednako kao i svrsishodnost, ali možda i najbitnije od svega – pravednost. Vladavina prava ne može postojati bez bilo kojeg od ta tri elementa ideje prava. Ako ne postoji pravna sigurnost, vladavina prava postoji samo kao ideja, a ukoliko ne postoji svrsishodnost, tada vladavina prava ne služi interesima građana, dok ako ne postoji pravednost, tada postoji vladavina prava samo u formalnom smislu, odnosno postoji (modernim rječnikom kazano) vladavina pomoću zakona.

9. HAJEK I VLADAVINA PRAVA – KONKRETIZIRANJE PRINCIPA VLADAVINE PRAVA

Gdje je stao Dajsi u definisanju vladavine prava, tu je nastavio Hajek, samo što je on još preciznije definiše vladavinu prava i što je najbitnije vladavinu prava definiše kao ideju, te istovremeno određuje i faktičku primjenu vladavine prava. Hajek (Hayek [1960] 1998, 181) vladavinu prava promatra kao metapravo, skup principa viših i od zakona i od ustava, bez kojih vladavina prava ne može postojati. U tom smislu se ne ograničava samo na konstitucionalizam, kao vladavinu na osnovu ustava, jer kako Hajek navodi, ustav može ovlastiti vlast da ima pravo donositi bilo kakve zakone bez ikakvog ograničenja (*Ibid.*). Tada bi vlast formalno bila ograničena ustavom, ali bi suštinski imala neograničenu moć da donosi odluke upitnog kvaliteta, isključivo u zavisnosti od volje vladajućeg režima. Također, za Hajeka (Hayek [1960] 1998, 182) vladavina prava predstavlja ideal kojem se može veoma približiti, ali nikada ga se u potpunosti ne može dostići.²⁵

²⁵ O Hajekovom konceptu vladavine prava, također pogledati u: Cristi (1984);

Zašto je to učenje bitno kada ga uporedimo s promišljanjima već pomenutih pomenutih teoretičara? Prevažodno iz razloga što vladavinu prava postavlja kao metapravo te stoga vladavinu prava ne definiše striktno kao sistem koji funkcioniše na bazi ustava i zakona već kao sistem koji mora zadovoljavati određene više principe. S druge strane, vladavinu prava postavlja kao ideal kojem je moguće težiti, ali ga se nikada ne može potpuno dostići, tako da niti jedan pravni sistem ne možemo smatrati sistemom koji u cjelini implementira vladavinu prava. To znači da je prema Hajeku vladavina prava dinamična kategorija, koja je podložna promjenama, a sve sa ciljem zaštite pojedinca od nepravedne vlasti. Osim ta dva principa, Hajek postavlja kriterije vladavine prava na znatno širi način od Dajsija, i daje praktična uputstva kako se vladavina prava može ostvariti.

Prije svega, kako sam Hajek (Hayek [1960] 1998, 183) objašnjava, zakoni u sadržinskom smislu predstavljaju dugoročne mjere koje se odnose na još uvijek nepoznate slučajeve i ne sadrže nikakva upućivanja na pojedinačne osobe, mjesta ili predmete. Naravno, često, kako i sam Hajek (Hayek [1960] 1998, 182) objašnjava, zakoni znaju sadržavati pravila koja nisu opšta i neodređena, što nije u skladu s vladavinom prava. Drugi element vladavine prava za Hajeka je pravna sigurnost. Prema Hajekovom učenju (Hayek [1960] 1998, 184), zakoni moraju biti jasni i njihova primjena mora biti predvidljiva. Treći element je jednakost pred zakonom, od koje se, kako Hajek ističe, u određenim okolnostima može i odstupiti. Na taj način on postulira da zakon u svom formalnom obliku može biti savršeno opšti, ali da u svojoj primjeni mora postojati razumijevanje da svi ljudi nisu isti i da se na sve ljude ne može primjenjivati identično. No da bi se opravdalo to što zakoni nejednako tretiraju ljude, treba da postoji društvena saglasnost u vezi nejednakog tretiranja (Hayek [1960] 1998, 184–185). Četvrti i peti element su podjela vlasti i postavljanje granica upravne diskrecije (vidi Hayek [1960] 1998, 184–188). Šesti element podrazumijeva „(...) da je prinuda dopuštena samo kada je u skladu s opštim zakonima, a ne kad je sredstvo za postizanje pojedinačnih ciljeva tekuće politike“ (Hayek [1960] 1998, 188). Sedmi i osmi element su osnovna prava građana i građanske slobode, kao i obim mogućeg uplitanja države u individualnu sferu pojedinca. Tu se prava i slobode građanina postavljaju kao temelji vladavine prava, ali se također navodi kako se prava i slobode pojedinca mogu ograničiti zarad višeg cilja (vidi Hayek [1960] 1998, 189–191). Zadnji element su procesna jamstva, čiji je zadatak da osiguraju procesna prava pojedinca. Međutim, Hajek (Hayek [1960] 1998, 191–192) ističe: „Oni (jamstva) su namenjeni obezbeđenju prevlasti zakona, ali su nemoćni da zaštite pravdu tamo gdje je zakon namerno prepušta odluku slobodnoj proceni vlasti. Jedino tamo gde zakon odlučuje – a ovo znači, samo tamo gde nezavisni sudovi imaju poslednju reč – procesna jamstva su čuvari slobode“.

Hajek je pokušao da pokaže kako dostići ideal vladavine prava, jasno naglašavajući da se taj ideal nikada ne može potpuno dostići. Na taj način, Hajek u neku ruku zaokružuje do sada prezentovani diskurs o vladavini prava. U Hajekovoj filozofiji vladavine prava bitno je to što on na određen način postavlja institucionalne pretpostavke za ostvarenje vladavine prava, uz nezaobilaznu napomenu: „Ona (vladavina prava, prim. aut.) će biti delotvorna samo onoliko koliko se zakonodavac oseća njome vezan. U demokratiji to znači da ona neće preovladati sve dok ne čini deo moralne tradicije zajednice, zajednički ideal koji većina deli i bespogovorno prihvata“ (Hayek [1960] 1998, 181).²⁶ U tom smislu, Hajek jasno naglašava da vladavina prava, kako je i Dajsi tvrdio, ne može postojati ako ne postoji u pravnoj kulturi građana. U skladu s tim, Hajekova formula za vladavinu prava bi glasila: „*navedeni elementi vladavine prava + vladavina prava kao dio moralne tradicije građana*“. Vidljivo je da on u konceptu vladavine prava uključuje i elemente pravne sigurnosti i pravednosti u vidu zaštite prava pojedinca, te postavlja i druge institucionalne elemente bez kojih se vladavina prava ne može ostvariti. U tom smislu, postavlja se pitanje da li diskurs o vladavini prava završava s Radbruchova tri elementa: pravnom sigurnošću (zakoni moraju biti jasni, predvidljivi i neretroaktivni), svrsishodnošću (zakoni moraju služiti opštem interesu, tj. građanima) te pravednošću (država mora poštivati i osigurati poštivanje ljudskih prava). Odgovor na postavljeno pitanje dat je u nastavku teksta.

10. FULER I MORALNOST VLADAVINE PRAVA

Lon Fuller (Lon Luvois Fuller) nije se bavio pitanjem kakva vladavina prava *per se* treba biti. Fulerovu misao primarno zaokuplja odnos prava i morala (prema Rundle 2021, 186). Iako se Fuller ne bavi isključivo definisanjem vladavine prava, on ipak postavlja određene kriterije za definisanje vladavine prava. Za Fullera (Fuller 1960, 2), vladavina prava postoji tamo gdje se poštuje pravda i ljudsko dostojanstvo, gdje postoji zakonodavna vlast čiji se propisi poštuju i kada su nepravedni, gdje pravila vlasti sudska vlast vjerno provodi, te gdje postoji nezavisna sudska vlast koja je spremna zaštititi ugroženog pojedinca u slučaju pokušaja postupanja na arbitraran način. Pravda i ljudsko dostojanstvo predstavljaju jedan od osnovnih elemenata vladavine prava. Osim toga, pravnu sigurnost Fuller ne smatra ništa manje važnom, te u skladu s tim naglašava da se propisi moraju provoditi i onda

²⁶ O granicama zakonodavne vlasti u Hajekovom konceptu vladavine prava, detaljnije u: Williams (2008, 117).

kada su nepravedni. Takav stav podsjeća na Radbruchove predratne stavove u kontekstu balansiranja između pravednosti i pravne sigurnosti, gdje smisao prava jeste da bude pravedno, ali to nužno ne podrazumijeva da se nepravedni zakoni neće provoditi.

Moral, stoga, igra esencijalnu ulogu u Fulerovoj filozofiji. Za Fullera, pravni sistem koji ne ispunjava zahtjeve unutrašnjeg morala prava nije samo loš pravni sistem već nešto što se uopšte ne može nazvati pravnim sistemom (prema Rundle 2021, 196). Koje zahtjeve pravo mora ispuniti kako bi zadovoljilo kriterije unutrašnjeg morala prava? Prema Fulerovom mišljenju, sistem pravila treba težiti osobinama koje će pravo učiniti opštim; javno objavljenim; neretroaktivnim; dovoljno jasnim; mogućim za poštivanje; relativno konstantnim kroz vrijeme; i usklađenim između djelovanja države i postavljenih pravila (Fuller 1969, 46–91; Rundle 2021, 189). Pomenuti kriteriji predstavljaju, osim zahtjeva za unutrašnju moralnost prava, istovremeno i Fulerove kriterije za dostizanje ideala vladavine prava (prema Rundle 2021, 198). Zahtjevi za ostvarenje unutrašnjeg morala prava (vladavine prava) neutralni su i formalni. Ti *kriteriji* se ne odnose na ispunjenje supstancijalnih *kriterija*, kao što su pravda i poštivanje ljudskog dostojanstva. Ipak, to nisu jedini kriteriji za ostvarenje vladavine prava *per se* jer, kako smo prethodno naveli – pravda i ljudsko dostojanstvo sastavni su dio Fulerovog koncepta vladavine prava. Opštost pravnih normi u Fulerovoj koncepciji vladavine prava predstavljaju osnovu za ostvarenje pravde. Pravni sistem koji funkcioniše na osnovu opštih pravnih normi, ali i drugih navedenih kriterija, u formalnom smislu je sličan s principom pravde (Fuller 1969, 215). Fulerovi uslovi za unutrašnju moralnost prava (vladavinu prava) formalnog su karaktera, ali oni predstavljaju tek osnovu za ostvarenje vladavine prava, a nikako krajnji ishod. Bitno je izdvojiti i Fulerov stav koji nalazimo u njegovom objašnjenju procesa tranzicije iz despotske države u državu vladavine prava. On objašnjava da se jedan od najvažnijih aspekata navedene tranzicije ogleda u uspostavljanju formalnih institucija, koje će članovima zajednice (pojedincima) garantovati određeno učešće u donošenju odluka koje ih se direktno tiču (Fuller 1960, 5).

Fuler postavlja formalne kriterije kao osnov za ostvarenje vladavine prava, dok kriterije supstancijalne prirode navodi, ali ne definiše šta oni konkretno zahtijevaju. Čovjek u Fulerovoj koncepciji vladavine prava igra jednu od ključnih uloga, kao i moral samog pravnog poretka. Iako se Fuller, *per se*, nije bavio pitanjem vladavine prava, njegova misao predstavlja značajan doprinos diskursu koji se vodi u vezi s konceptom vladavine prava. Fulerovi kriteriji za unutrašnju moralnost pravnog poretka, koji uzgred

predstavljaju i kriterije za vladavinu prava, nesumnjivo su i danas relevantni, te predstavljaju značajan doprinos za savremeno definisanje vladavine prava, iako su oni, prevashodno, formalne prirode.

11. RAZ I VLADAVINA PRAVA KAO VRLINA ZAKONA

Na početku teksta je naveden Razov stav o različitosti između vladavine prava, pravde, ljudskih prava i demokratije.²⁷ Težište njegovog koncepta vladavine prava je na pravnoj sigurnosti. Tako za Raza vladavina prava postoji samo ako proizvodi pravne posljedice (Raz 1979, 153). Ljudima treba vladati na osnovu zakona i oni ga trebaju poštovati, a sami zakoni trebaju biti takvog sadržaja da se ljudi mogu njima ispravno rukovoditi (Raz 1979, 213).²⁸ Ta dva elementa predstavljaju esenciju vladavine prava za Raza. Očigledno je da Raz postavlja pravnu sigurnost kao primarni cilj vladavine prava²⁹, ali se tu ne zadržava. Nadalje, Raz (1979, 214–218) u pokušaju opsežnijeg definisanja vladavine prava navodi da u takvom sistemu zakoni treba biti moguće poštovati zakone, koji trebaju biti transparentni i jasni, relativno stabilni, tj. da se ne mijenjaju prečesto; donošenje posebnih zakona treba biti vođeno transparentnim, stabilnim, jasnim i opštim pravilima; nezavisnost pravosuđa mora biti garantovana; principi prirodne pravde se moraju poštovati; sudovi moraju imati mogućnost kontrole drugih grana vlasti, ali limitirane prirode – ograničeni u mjeri u kojoj osiguravaju vladavinu prava; pristup sudu mora biti zagarantovan; ne smije se dozvoliti da diskreciono pravo sprečavanja krivičnih djela izopšti primjenu zakona. Slično kao Fuller, Raz postavlja osam kriterija za vladavinu prava koji su više-manje formalni kriteriji koji bi trebali garantovati pravnu sigurnost. U jednom od kriterija, Raz navodi poštivanje prirodne pravde, ali nju sasvim kratko obrazlaže. U tom smislu, on definitivno stavlja težište na pravnu sigurnost kada govori o vladavini prava. Također, Raz nije protivnik ograničenja zakonodavne vlasti u određenom stepenu. Raz (1990, 336) smatra da zakonodavna vlast treba biti ograničena, ali da sudije ne trebaju biti „filozofski ambiciozne“ jer ih to čini lošim sudijama. Ograničenje zakonodavne vlasti treba biti u mjeri u kojoj će se garantovati formalni kriteriji vladavine prava.

Demokratska kultura, pravna tradicija koja podrazumijeva nezavisno pravosuđe, razvijenu pravnu profesiju, policiju i državnu službu su za Raza (1990, 339) osnove za ostvarenje vladavine prava jer, kako sam

²⁷ Također pogledati u: Raz (1979, 211).

²⁸ Vidi: Raz (1980, 27).

²⁹ Raz (1979, 214) priznaje da je ovakvo definisanje vladavine prava formalističko.

ističe – vladavina prava se ne može ostvariti donošenjem nekoliko zakona. Stoga je Razovo razmišljanje slično Dajsijevom kada govori pravnoj i demokratskoj kulturi kao osnovnom uslovu za ostvarenje vladavine prava. Za razliku od Dajsija, Raz (1993, 6) razumije da parlamentarna suverenost nije kompatibilna s vladavinom prava, ali u tom smislu daje prednost parlamentarnoj suverenosti.

Vladavina prava za Raza je inherentna pravu – pravo treba dostići njemu inherentnu vrlinu u vidu vladavine prava. Fulerove kriterije za unutrašnju moralnost prava Raz sasvim opravdano razumijeva kao formalne kriterije, no i pored toga – Razovo poimanje vladavine prava se razlikuje od Fulerovog, jer je Fuler smatrao da je vladavina prava povezana sa unutrašnjom moralnošću prava, dok Raz vladavinu prava smatra inherentnom pravu kao takvom, bez obzira na samu moralnost. Ipak, on naglašava da vladavina prava može služiti moralu, iako sama vladavina prava ne podrazumijeva nužno i moralnost pravnog poretka kao cjeline (Raz 1979, 226). U tom smislu navodi argumente u korist koncepta vladavine pomoću zakona, objašnjavajući da vladavina prava kao inherentna vrlina zakona predstavlja instrument u rukama ljudi, pa se kao takva može upotrebljavati na različite načine jer je kao takva moralno neutralna.

12. BINGAM I SUPSTANCIJALNA DEFINICIJA VLADAVINE PRAVA

Tom Bingam definiše vladavinu prava na sljedeći način: mora postojati pravna sigurnost (zakoni moraju biti jasni, predvidljivi, razumljivi te dostupni javnosti); pravne sporove treba rješavati na osnovu zakona, a ne na osnovu diskrecione volje pojedinca; mora postojati jednakost pred zakonom; državni službenici i druga lica s ovlaštenjem svoje ovlasti trebaju koristiti u dobroj vjeri, ne prelazeći postavljena ustavna i zakonska ograničenja; poštivanje ljudskih prava mora biti neupitno; država mora na efikasan i djelotvoran način rješavati pravne sporove između subjekata prava, uz neizostavno pravo na pravično suđenje (Bingham 2011, 37–110). Teško je u jednoj definiciji obuhvatiti sve elemente vladavine prava, te Bingam, po uzoru na Hajeka, nudi jednu sveobuhvatnu definiciju vladavine prava. Evidentno, Bingamova definicija vladavine prava sadrži i elemente pravne sigurnosti, svrsishodnosti i pravednosti oličene u poštivanju ljudskih prava jer, kako navodi Hasanbegović (2021, 174) „(...) moderno shvatanje pravde nije više aristotelovski apstraktno, tj. sadržinski neodređeno. Njega bitno određuju ljudska prava, ili prava čoveka, kako su se ona u početku nazivala. Iz sadašnjeg ugla posmatrano, iz XXI veka unazad, moderno poimanje pravde može se jasno rekonstruisati, pa se lako uviđa da se u moderno doba

pravednim smatra ono – bilo ustav, bilo zakon, bilo presuda, bilo ponašanje – što je u skladu s pravima čoveka, kasnije nazvanim ljudskim pravima“. Pravednost, tj. ljudska prava su kamen spoticanja za unificirano definisanje vladavine prava (vidi Bingham 2011, 66–85). Ali upravo su ljudska prava esencijalni element vladavine prava, koji u savremenom kontekstu razdvaja vladavinu prava od vladavine pomoću zakona, ili drugačije kazano – *thick* od *thin* načina definisanja vladavine prava. Savremeno definisanje vladavine prava sadrži sva tri Radbruchova elementa ideje prava – od pravne sigurnosti, preko svrsishodnosti, sve do same pravednosti, i to kao *conditio sine qua non* određivanja tog pojma, a koncept koji izostavlja princip pravednosti, tj. ljudskih prava, predstavlja koncept vladavine pomoću zakona. Takav koncept uspijeva fasadno prikazati pravnu sigurnost i svrsishodnost, dok je koncept ljudskih prava izostavljen ili samo deklarativno postavljen.

13. ZAKLJUČAK

Tema diskursa o konceptu vladavine prava nikada nije bilo pitanje da li treba da vladaju zakoni već kakvi zakoni trebaju vladati. Na početku, Platon i Aristotel su isticali da treba da vladaju pravedni zakoni, definišući pravdu na pozitivistički način, i to kao dosljedno provođenje zakona. Ciceron i Akvinski su smatrali da pozitivno pravo mora biti u skladu s prirodnim pravom, ali njihove težnje će se ostvariti tek Radbruchovim konceptom „zakonskog nepravda“. Hobs (slično kao Aristotel) definiše pravednost na pozitivistički način, dok je Lok smatrao kako je zadatak države da zaštiti prirodna prava čovjeka i da se vladavina prava može ostvariti samo dok postoji supremacija parlamenta. Dajsi (slično kao Lok) nastavlja narativ o parlamentarnoj suverenosti kao uslovu za postojanje vladavine prava, ali također prvi daje elemente vladavine prava. S druge strane, Kelzen nastavlja narativ pravnog pozitivizma, pri tome postavljajući institucionalne pretpostavke za ostvarenje vladavine prava. On nije smatrao da parlament treba biti suveren, štaviše, smatrao je da demokratsku većinu (parlament) treba ograničiti ustavom. Ipak, za Kelzena pravda ostaje jedan „pozitiviziran“ pojam, do kojeg se dolazi dosljednom primjenom zakona. Tek Radbruch, u određenom smislu, donosi svojevrsnu „revoluciju“ u razumijevanju odnosa pravne sigurnosti i pravednosti, stavljajući pravednost ispred pravne sigurnosti, ali pri tome, što je još bitnije, definišući pravednost kao poštivanje ljudskih prava. Na taj način je omogućio da se pravednost kao princip odvoji od pravne sigurnosti i postane joj nadređena, što je oživotvorilo ideju Cicerona i Akvinskog da prirodna prava budu nadređena pozitivnom pravu, pritom ne zanemarujući činjenicu da vladavina prava može opstati samo ako postoji pravna sigurnost, tj. ako zakoni postoje kao pozitivnopravni. Hajek, na

koncu, još sveobuhvatnije od Dajsija definiše vladavinu prava, ali se i njegova definicija, kao i savremena Bingamova definicija vladavine prava, generalno gledano, temelji na tri Radbruhova elementa ideje prava: pravednosti, pravnoj sigurnosti i pravnoj svrsishodnosti. Naravno, Fulerovo „moralno“ gledište o vladavini prava, i Razovo razumijevanje tih gledišta kao formalnih pretpostavki za ostvarenje vladavine prava predstavljaju značaj doprinos savremenom razumijevanju vladavine prava, naročito iz formalnog ugla definisanja vladavine prava.

Prema tome, osnovni element vladavine prava je pravednost, odnosno savremenim rječnikom kazano – ljudska prava – što ne isključuje pravnu sigurnost i pravnu svrsishodnost. Države se više ne mogu pozivati da ostvaruju princip vladavine prava bez poštivanja ljudskih prava jer to, savremenim rječnikom kazano, predstavlja puku vladavinu pomoću zakona. Ova teza nije prihvaćena od svih savremenih teoretičara vladavine prava, kao niti sama podjela na vladavinu prava i na vladavinu pomoću zakona.³⁰ Postavlja se pitanje, šta ako država poštuje ljudska prava, ali ne postoji pravna sigurnost? Takva situacija praktično nije moguća, s obzirom na činjenicu da, kako bi se ljudska prava kao takva poštivala – država mora imati snagu da vlastite zakone primjenjuje jer, u suprotnom ljudska prava ostaju na nivou deklarativnih principa. A u anarhiji se, potpuno jasno, ljudska prava ne mogu nikome garantovati. Također, države se danas ne mogu pozivati na činjenicu da poštuju vlastiti ustav i da na taj način u cjelini ostvaruju princip vladavine prava jer takvi ustavi mogu u potpuno negirati ljudska prava, pa stoga danas države osim vlastitih ustava moraju poštivati i međunarodne standarde kada su u pitanju ljudska prava i slobode, a koji predstavljaju kriterije da bi se odredilo da li je neka država pravedna ili ne. U kontekstu vladavine prava, diskurs koji se vodio od antičkih vremena do pozitivističke pravednosti doveo je do pravednosti koja je izjednačena s prirodnim pravima čovjeka – ljudskim pravima. Stoga, pravni pozitivizam danas, u tom kontekstu, podrazumijeva poštivanje ljudskih prava jer ljudska prava (kako je ranije navedeno) predstavljaju ne samo prirodna prava čovjeka već i pozitivna prava. Slijedom toga, danas ne postoji smetnja da pravni pozitivizam ne podrži moderni koncept vladavine prava, koji unutar sebe uključuje ljudska prava jer danas ljudska prava predstavljaju pozitivna

³⁰ O tome pogledati u: Waldron (2015); (1989). Tako Džeremi Voldron (Jeremy Waldron) smatra da podjela na vladavinu prava i vladavinu pomoću zakona nije potrebna (2021, 97). Brajan Tamanaha (Brian Tamanaha) naglašava da princip vladavine pomoću zakona više povezan s legalnošću nego vladavina prava (2004, 96). Također, o stavovima istog autora o opasnosti za vladavinu prava koja dolazi od preekstenzivnog pristupa prilikom tumačenja pravnih normi od strane sudske vlasti pogledati u: (Tamanaha 2006, 244).

prava čovjeka. Savremeno razumijevanje vladavine prava nam govori da je vladavina prava bez dosljednog poštivanja ljudskih prava i sloboda, samo puka vladavina pomoću zakona, te da se istinska vladavina prava može ostvariti samo uz puno poštivanje ljudskih prava – ne izostavljajući elemente pravne sigurnosti i svrsishodnosti. Bitno je napomenuti da ovako iskazana gledišta savremenog koncepta vladavine prava predstavljaju subjektivna gledišta, uz puno razumijevanje da postoje i drugačiji pogledi na sam koncept vladavine prava, kao što je i prikazano u samom tekstu.

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THE RULE OF LAW BETWEEN JUSTICE AND MERE LEGALITY – A BRIEF OVERVIEW OF THE DEVELOPMENT OF DISCOURSE IN THE CONCEPT OF THE RULE OF LAW

Summary

The rule of law is one of the key concepts in the 21st century. The idea of the rule of law exists to the extent that there are reflections on the state and law, and a relationship between these two concepts. The aim of this paper is to show in one place the development of the idea of the rule of law through history. In this sense, the authors look at the thoughts of philosophers who have largely determined the direction of development of the idea of the rule of law. Of course, not all philosophers who have contemplated the rule of law are listed in the paper, but it nevertheless attempts to show in chronological order how the rule of law as an idea developed from Plato to its modern theorists.

Key words: *Rule of law. – Rule by law. – Justice. – Mere legality.*

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Boris BEGOVIĆ, PhD*

Sarotte, Mary Elise. 2021. *Not One Inch: America, Russia, and the Making of Post-Cold War Stalemate*. New Haven and London: Yale University Press, 550.

“In Victory – Magnanimity”.
Winston Spencer Churchill

There should be no second thoughts – Sarotte’s book is thoroughly researched, extremely well documented, rich in details, and thrillingly well written study of the first post-Cold War decade. A job very well done! It pushes the reader from one page to the next, from one event to the following one, from one explanation to its possible alternative. The reader feels just like reading an exceptional novel. The author’s crystal clear thinking has led to the crisp and clear sentences, unambiguous and well explained insights, making it easy for the reader to agree with them or not. And, with all these qualities, perhaps the biggest value of the book is that it provides the reader abundant food for thought about post-Cold War international relations, about NATO expansion, so the reader is equipped to search for their own conclusions, especially about post-2000 developments, those not covered in the book – including Russia’s invasion of Ukraine in 2022, which is entering its seventh month at the time of this review going to press.

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The aim of this review is to provide sufficient evidence to support these assertions and some examples of the reader's insights based on the food for thought provided in this book. This can start in earnest with the title of the book: *Not One Inch*. After all, perhaps it was *one inch* that changed history. Or wasn't it? Who should be blamed for that very inch? Or is it just a propaganda framed question, not a proper historiographic one? Perhaps a clue to the answer to the last dilemma should be found in the speeches of the relevant incumbent officials.

In his annual end-of-year press conference in Moscow in December 2021, which in hindsight is evidently the first propaganda artillery salvo in preparation for the invasion of Ukraine, Russian President Vladimir Putin accused NATO of deceiving Russia by giving assurances in the 1990s that it would not expand "an inch to the East". "They cheated us – vehemently, blatantly. NATO is expanding," he said. He cited former US Secretary of State James Baker as Exhibit One in his case and quoted a remark Baker made to former President of the Soviet Union Mikhail Gorbachev in 1990, saying, "NATO will not move one inch further East." The incumbent Russian leader has made the claim frequently about violation of the Western countries solemn pledge not to expand their alliance. The claim has figured prominently as an important component in the Putin foreign policy narrative that presents Russia as the victim and aggrieved party. After Russia's annexation of Crimea in 2014, Putin accused Western leaders of having "lied to us many times, made decisions behind our backs, placed before us an accomplished fact. This happened with NATO's expansion to the East". In a speech at the Munich Security Conference in 2007, which some observers consider to be the end of Russia's goodwill for partnership with the West, he asked: "What happened to the assurances our Western partners made after the dissolution of the Warsaw Pact?"¹ That inch is obviously very important not only in the Russian official narrative regarding the invasion of Ukraine, but generally in the country's foreign and security policy.

At the very beginning of the book the author confirms that this very inch existed – it is in the title of the book with good reason. As in every good historiography book, Sarotte's voluminous study starts with the facts and context of that very inch, a leading motif of the book. On 9 February 1990, about three months after the fall of the Berlin Wall, US Secretary of State James Baker was talking with USSR President Mikhail Gorbachev about the unification of Germany, being aware that, due to the Soviet victory over the Nazi Germany in World War II, decades later Moscow still had hundreds of thousands of troops in East Germany and the legal right to keep them there

¹ All quotations from Putin's speeches are according to Dettmer (2022).

indefinitely. “To convince Gorbachev to relinquish this military and legal might, Baker uttered the words as a hypothetical bargain: what if you let your part of Germany go, and we agree that NATO will ‘not shift one inch eastward from its present position?’” (p. 1). Hence, “one inch” was spelled out indeed – it was about the unification of Germany – but it was definitely not a promise, let alone a pledge.²

Nonetheless, Sarotte’s book is not about one sentence, not about one ostensible pledge and its perception, but rather about the reconfiguration of the world after the fall of communism, the crumbling of the Soviet empire in Eastern Europe and the collapse of the Soviet Union, focused on strategic security issues. “This book uses the fight over NATO expansion as its through line. It tells the story not of the alliance itself but of the strategic choices that American and Russian leaders made during their decade-long conflict over the start of its enlargement to Central and Eastern Europe, and of the cumulative weight of those choices on today’s world” (p. 2). Although Sarotte’s book directly explores only the first decade of post-Cold War relations between the West and the East – the period analysed in the book ends with 2000, the year of political demise of Boris Yeltsin and the political advent of Vladimir Putin – the book provides grounds for the reader to consider the post-2000 developments, including further NATO expansion to the East – those that for the time being, have led to all hell breaking loose in Ukraine and no cooperation whatsoever between the West and Russia, but rather hostility.

This book is about strategic trade-offs. On the Western/American side, the main dilemma was about the stance towards the former Cold War adversary – Russia, as the successor, by all means, of the Soviet Union. What should have been the policy priority: security cooperation with Russia or providing firm security for new democracies established on the ruins of the Soviet empire? By choosing NATO expansion to the East, the new democracies proved to be the priority for the US. Nonetheless, “This tougher attitude achieved results, but it obscured options that might have sustained cooperation, decreased chances of US-Russian conflict reoccurring, and served Washington’s interests better in the longer term” (p. 3). What happened was not inevitable; it was a choice, first and foremost the choice of the US political elite. “Instead of incremental accession by a large number of states, they had the alliance extend the full weight of the Article 5 guarantee to a small number of states” (p. 5). And every political decision has its own opportunity costs. The author

² The record of conversation on that meeting as well as records and notes other relevant meetings dealing with the NATO expansion are available at: <https://nsarchive.gwu.edu/briefing-book/russia-programs/2017-12-12/nato-expansion-what-gorbachev-heard-western-leaders-early> (last visited 31 July, 2022).

points out two of them. The first one is path-dependency as “American options for managing post–Cold War contingency—namely, through the creation of a variety of relationships with such states, most notably with Georgia and Ukraine—became dramatically more limited just as Putin was rising within the ranks in Russia” (p. 5). The other one is, as pointed out George Kennan, the former US ambassador to Moscow, who in the 1940s had conceived the American strategy of containment, that “post–Cold War NATO expansion tipped the balance too far away from protecting newfound cooperation with Moscow” (p. 6).³

The main hypothesis of the book is that “NATO enlargement did not, by itself, cause the deterioration of US-Russian relations. Major events happen for multiple reasons; history is rarely, if ever, monocausal. American and Russian choices interacted with each other, cumulatively over time, and with each country’s domestic politics, to produce the decay” (p. 8). The decay went much further since the book went to print in 2021.

Part One of the book (“Harvest and the Storm”) covers the years 1989–92 and opens with the fall of the Berlin Wall and new democracies ascending, to the joy of most of the (western) world but, according to the author, “to the horror of Putin and Soviet leaders who believe their victory in World War II earned them the lasting right to dominate Central and Eastern Europe” (p. 13). The origin of the title of this part of the book is a metaphor that Helmut Kohl, the West German chancellor at the time, consistently used to advise his fellow Western leaders how to respond: get the harvest in before the coming storm. The West must rush in 1990 to secure the gains of its Cold War success before hardliners in Moscow mount a resistance to Gorbachev. Although Kohl was primarily, if not solely concerned with the unification of Germany, the early period after the collapse of the Berlin Wall was the period of the West’s rush to get as much as possible of the political spoils of the Cold War victory. At the end of period covered in this first part of the book, the Soviet Union was no more, and the George Bush Senior’s administration was out of office.

There is no doubt that the fall of the Berlin Wall was a tectonic change in modern history. As the author points out it “signaled the end of the Cold War order and the beginning of another, as yet unknown; everything, including NATO’s future, was on the table. Moscow could demand that Germany pull out of NATO in exchange for Soviet approval of its reunification, a presumably fatal development for an alliance that had been a prominent landmark of the transatlantic world for forty years” (p. 20).

³ This is a crucial sentence from Kennan (1997) quoted in the book.

The first issue in establishing a new order in chaotic time was the unification of Germany – the most important country in Central Europe for many, not only historical reasons. As well documented in the book, there were three major players. The first one was the US government, which had a clear goal: to maintain NATO in Europe and, in that way, to preserve the US' leading role in Europe's security; specifically to secure NATO's future in a united Germany by extending Article 5 to the country's new eastern territory. The other player was Germany itself, with unquestionable political strength and determination for the unification, whatever the cost may be. The third player was the Soviet Union with its political elite in quite defensive mode, aware that the foundations of its reign was crumbling, and without any clear idea or aim, save the self-serving goal of survival, but with great leverage due to the deployment of Soviet troops in East Germany since the end of Second World War. As the author pointed out "Gorbachev himself apparently did not yet know what he wanted, and both Bonn and Washington noticed this indecisiveness" (p. 45). Nonetheless, for the Soviet establishment it was obvious that the unification of Germany was inevitable. It was the head of the KGB, Vladimir Kryuchkov, with impeccable hardliner credentials, who pointed out at the time that "it is necessary to train our people gradually to accept the reunification of Germany" (p. 46).

Considering this constellation, Sarotte points out, the US government feared that the US and German goals were separable. "There existed realistic scenarios under which the [German] chancellor could cut a deal with Moscow to achieve German unification at the cost of NATO expansion beyond the Cold War line, or even of NATO membership altogether. Kohl and Gorbachev could reshape political order in Europe without having any Americans in the room" (p. 44). According to the author, it was the US National Security Advisor at the time, Brent Scowcroft, who later admitted that his nightmare was Gorbachev making Kohl an offer that the German could not refuse: "an offer for German reunification in exchange for neutrality" (p. 44).

With the German political elite ready to accept anything (in terms of international relations) in exchange for the unification, with the political elite of the Great Powers from Western Europe being without clear ideas, with the exception of the traditional British concerns about a strong unified Germany, and the French rather nebulous and entirely undeveloped ideas of a brand new pan-European security system (a sad echo of Charles de Gaulle ideas), with the Soviet political elite without a clear aim, though with a substantial leverage, the author demonstrates that the crucial actor was US President George H. W. Bush, whose response to the idea that Moscow might decide Germany's relationship with NATO was unequivocal and spoken

with Texan sophistication: “To hell with that!” (p. 43). According to the US President, a hard line was necessary because “we prevailed and they didn’t. We can’t let the Soviets clutch victory from the jaws of defeat” (p. 73).

Nonetheless, Sarotte demonstrates that it was not the determination of the US president that was decisive, but something else – the economic collapse of Soviet Union. After all, “It is the economy, stupid”. Hence, the Soviet leadership was in the humiliating position to ask the West for financial assistance. It was Germany that stepped in, providing concessionary loans and grants, gaining diplomatic leverage in return. The frenetic diplomatic manoeuvring, with Germany leaders doing the work for the US establishment, made that a format two plus four for negotiations (two German states and four victorious powers that divided Germany in 1945) was established and an agreement was reached. According to the author, it was the West Germany government that bought off Soviets for security concessions suitable for Americans. “Using Kohl’s ‘deep pockets’, they would take advantage of the Soviets’ economic weakness and make financial and economic incentives, not security concessions, the core of their strategy” (p. 74).

On 12 September 1990 the Treaty on the final settlement with respect to Germany was signed in Moscow by the ministers of foreign affairs of the six (two plus four) countries, including the Soviet Union.⁴ Not only that, according to the Treaty, Germany was to be united, but the country would be free joint and/or remain in any alliance it wished to, meaning that the united Germany would be in NATO (effectively Article 5, para 3 of the Treaty) – it was about to become a sovereign country without the restrictions introduced after 1945 – and Soviet troops were about to leave (East) Germany for good, by the end of 1994.⁵ The Second World War was finally over.

Accordingly, the reader concludes, NATO moved to the East – not one inch, but hundreds of kilometres, up to the border with Poland, with the explicit consent of the Soviet Union government, both executive and legislative, as the Treaty was ratified in the national parliament. So, about seven month after the hypothetical question about one inch, which one could have perceived as a pledge or understand as a promise, it was crystal clear that this was neither a pledge nor a promise, that NATO had expanded to the East and that the Soviet government had endorsed it in writing. The incumbent

⁴ Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201696/volume-1696-I-29226-English.pdf> (last visited 31 July, 2022).

⁵ There was around 380,000 Soviet troops with all military hardware located in the East Germany at the time of the signing of the Treaty.

Russian political elite and its fans in Russia and other countries may in hindsight regret this development, lament over the political decisions of the Soviet government at the time, but this book made it clear that it had nothing to do with ostensibly broken promises and unfulfilled pledges. This is not to say that the NATO expansion to the East was not one of the main (if not the main), although definitely not only cause of deterioration of the US-Russian relations, leading to the 2022 war in Ukraine, as demonstrated by Mearsheimer (2022), but just to assert that the “not one inch” broken pledge thesis is hardly anything other than a Kremlin’s propaganda gimmick – definitely not grounds for serious debate.

Sarotte demonstrates that the August 1991 failed *coup d'état* by Soviet hardliners was a watershed development.⁶ “Shock waves from the failed putsch rippled across the region. They fatally undermined Mitterrand’s attempt to create some kind of a pan-European confederation; Moscow now seemed less like a desirable partner and more like an unstable danger” (p. 119). Furthermore, it was not only the stability of the Soviet Union as a trustworthy partner that was in question, but, according to author, the putsch provided a boost for the secessionist movements of the Soviet republics, primarily the Baltic and Caucasian republics, and Ukraine. Perhaps the crucial development, Sarotte concludes, was a power struggle between Gorbachev and Boris Yeltsin, president of Russia, and the author refers to Brent Scowcroft, former US National Security Adviser, who believed that the Soviet Union was disintegrating, “almost completely because it was the way Yeltsin could get rid of Gorbachev – by making the latter man into the leader of a political entity that no longer existed” (p. 124). The Soviet Union was no longer sustainable. And the author rightly points out that at the time the Soviet collapse was expanding NATO’s opportunities.

The final blow to the Soviet Union, the author points out, was dealt by Yeltsin who decided he needed to get far away from Moscow and Gorbachev. Yeltsin, Ukraine leader Leonid Kravchuk, and Belarus leader Stanislav Shushkevich (the three Slavic leaders with nuclear weapons on their territories) took advantage of a previously scheduled visit by Yeltsin to Belarus to retreat to Viskuli, a hunting estate in the Belavezha forest near the

⁶ Some people joined the putsch due to their disappointment and idealism, like Marshal Sergei Akhromeyev, a Second World War hero and chief of the Soviet General Staff at the time. He committed suicide after the putsch failed, leaving a note saying, “I cannot live when my fatherland is perishing and everything that I believe to be the meaning of life is being destroyed” (p. 119). The head of the KGB, Vladimir Kryuchkov, a chief organiser of the coup, did not follow his example.

Polish border, in early December 1991, and to reach an accord that dissolved the Soviet Union.⁷ Yeltsin had decided to map out the future only with them, excluding other republics and the Soviet leader. The political elites of the other republics decided to accept that future. Gorbachev had no choice.

With the demise of Soviet Union to the “dustbin of history”, to use the expression of one of its founding fathers, the US administration’s main concern was control of the nuclear arsenal, now located in four independent states (Russia, Ukraine, Belarus, and Kazakhstan). The US goals were clear: to get the nuclear-armed republics to renounce independent command authority and to commit either to disabling weapons or transferring them to Russia for destruction. Hence, the concept was that only Russia, as a successor state of the Soviet Union, should remain a nuclear power, and replace the Soviet Union as the permanent member of the UN Security Council. Hence, the first priority for the US administration in the aftermath of the Soviet Union collapse, according to the author, was to ensure the transfers of nuclear arsenal from the three countries to Russia and enforcement of the START-II accord on reduction of nuclear capacities of both the USA and Russia, rather than expansion of NATO to Eastern Europe. The sudden death of the Soviet Union turned the tables and produced other US priorities in international relations.

If there is politically tragic person during this era it is undoubtedly Mikhail Gorbachev, the last president of the Soviet Union. The author, with substantial justification, believes that he should be blamed for it, as “Gorbachev, an idealistic visionary, was undone by the overwhelming failures of the Soviet system and his own ineptitude as a leader and negotiator. He could not weather the political storm of 1991” (p. 144). A year later, his US counterpart was removed from office, as George H.W. Bush was voted out of the White House. The time had come for new *dramatis personae* – Bill and Boris.

Part Two of the book (“Clearing”), focused on the 1993–94 period, explores the clearing in US-Russian relations after the storm in Moscow and the potential that it revealed. Despite the upheaval in Moscow, the author points out, reactionaries did not regain control as Kohl had feared. Instead, remarkably, there was a precious second chance for the East-West cooperation. The period ends with, according to the author, Yeltsin’s tragic use of force against political opponents in Moscow and in the war in

⁷ Officially the accord is a set of agreements under title Agreements Establishing the Commonwealth of Independent States. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(1994\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e) (last visited 31 July, 2022).

Chechnya, the resurgence of the Republican Party, and skilled manoeuvring by insiders in Washington – all these developments cleared the way for NATO expansion to the East.

It was precisely during this period that the political stage was set for the expansion of NATO. The reader infers that there were three main players (nations or groups of nations) with a substantial number of actors with different scripts in the process. One player was Russia, at the time in deep turmoil, both economic and political, as it experienced three major transitions simultaneously: a political one, from authoritarian political institutions to a democracy; an economic one, from a command to a market-based economy; and one in the area of international relations, from superpower and empire to a country of shrunken postimperial frontier and at peace with its neighbours. Quite a demanding agenda!

There was one blow after other in all these areas, and all of them had implications on the Russia's relations with the West and further NATO expansion to the East. The first significant political crisis, points out the author, was Yeltsin's decision in September 1993 to disband the parliament and then to use military force against deputies, with tanks shelling the parliament house, killing 145 and wounded 800 not only unarmed civilians, but also fellow citizens. This was a domestic political success for Yeltsin, but "While successful in the short run domestically, his use of violence was a Pyrrhic victory abroad. It sent chills throughout Europe, particularly Germany" (p. 172). The caveat was clear: if Russian executive government is prepared to do this to its own citizens... Well, the reader makes out that September 1993, with Yeltsin showing an unexpected willingness to use violence to achieve political ends, demonstrated (it seems unintentionally) to all abroad that the "Russian bear" was still alive and well.

On 31 August 1994 Russian troops left Germany for good. Although this was envisaged four years earlier, by the Treaty on the final settlement with respect to Germany, significant Russian leverage in relation with the West was removed at that very moment. As Sarotte points out: "The farewell ceremony marked a humiliating low point in Russian foreign policy. The victory over the Nazis had been a central component of Soviet and Russian identity, politics, and life for decades. Now Moscow was having to beat what felt to Russians like an unworthy retreat." (p. 192). The humiliation was augmented by an inebriated Russian President who attended the ceremony and made a spectacle of himself.

The First Chechen War, which started at the end of November 1994, featured brutality that was supposed to offset the incompetence of the engaged Russian military forces, which was televised across the world and

inevitably, producing a bad image of Russia, and made an adverse impact on Russia's international relations. "The conflict also reduced Russia's ability to oppose NATO expansion because it seemed to prove that the states insisting Russia remained a military threat were right. Seeking allies to defend themselves against that threat suddenly seemed reasonable rather than paranoid" (p. 206).

The other main player in the process of NATO expansion were the nations of Eastern Europe that had escaped the Soviet empire and regained their substantive independence. The appalling experience of the Soviet rule and communism made that memory an unavoidable guidance for the new post-communist political elites in these countries. For them, the first best solution was full NATO membership, with security guarantees embedded in Article 5 of the Charter.⁸ According to the author, the two crucial countries and leaders for the process were Poland with Lech Wałęsa and the Czech Republic with Václav Havel. Both of them were dissidents-turned-presidents, with substantial moral credit internationally (somewhat boosted by the US media). It seems, according to the evidence provided in the book, that Wałęsa was more effective. With the support of the Catholic Church, with the straightforward approach – "we are all afraid of Russia" – of an electrician from Gdańsk (without the sophistication of a playwright), with his rude charm, and with a substantial US constituency of Polish origin, especially in the swing states – such an outcome was not a big surprise.

Nonetheless, Wałęsa was aware that NATO expansion would not sit well with Moscow. According to the author, "over dinner and drinks [...], Walesa fairly easily persuaded Yeltsin to go along with a statement indicating that Russia had no objection to Poland joining NATO. Yeltsin agreed to issue a remarkable declaration that Polish membership in NATO was not contrary to the interest of any state, also including Russia" (p. 164).⁹

The author provided ample evidence that it was not NATO that marched in Eastern Europe, like Red Army did in 1944–45, but it was the desire of these nations to obtain the Article 5 insurance policy against a repeat onslaught of

⁸ Although spelled out in sophisticated legal language, Article 5 effectively stipulates that an attack against one of the members is an attack against all of them. It is "all for one" rather than "one for all".

⁹ Perhaps, or at least it should not be ruled out, Yeltsin was rather drunk, but there was an important sideshow: "an implicit understanding that the Poles would not intervene in the Ukraine in any dispute involving Russia except in the event of a military attack." (p. 164–165). Poland has not broken this "understanding" for the time being: there has been no misunderstanding even with the ongoing Russia's military attack.

the Red or any Russian army of any colour on these territories that moved NATO to the East. It is Czech writer Milan Kundera who once defined a small nation as “one whose very existence may be put in question at any moment; a small nation can disappear, and it knows it”. The small nations in Eastern Europe realized at the end of 20th century that the best protection was to integrate themselves in the modern international structures. So, celebrations in the capitals of the new NATO members in 1999 were quite expected.¹⁰

The third and unquestionably the most important player in this game was the United States. The basic dilemma for the first Clinton administration was how to handle the question: should there be new frontiers? Should the priority of the US administration be long-term collaboration with Russia (at some inevitable costs) or providing security for the former communist, now democratic countries in Eastern Europe (at the costs of deteriorating relations with Russia)? From the other viewpoint, the same dilemma could be formulated as should a new security line be drawn, and if so – where should it be? Perhaps the most important framework question was: should Russia be considered a partner or an adversary? Friend or foe?

It was the US Department of Defence (civilians) and Pentagon (military) people who wanted partnership with Russia, i.e. not antagonising the country about NATO expanding to the East but creating an inclusive framework for security and military cooperation. According to Sarotte, they did not want new lines to be drawn, mainly because their priority was managing the aftermath of the Soviet Union nuclear arsenal and creating a viable structure that would enable the American military to be redeployed in other troublesome places on the planet. Accordingly, it was US Secretary of Defence William Perry and Chairman of the Joint Chief of Staff General John Shalikashvili who proposed the Partnership for Peace (PfP). This was inclusive and well-balanced concept that enabled all the nations in the East to move freely, depending on their political preference, within this framework and to select the speed of security and military adjustments. The author points out numerous virtues of the PfP, perhaps the most important one being that the Russian political elite liked it. President Yeltsin labeled it as “a brilliant idea, it is a stroke of genius”. With all these political advantages, President Clinton accepted the idea and its implementation started at earnest at the beginning of 1994.

¹⁰ There were simultaneous celebrations in Warsaw, Prague, and Budapest in March 1999 with magnificent fireworks, the festivities quite distinctive from many recurring fireworks of other sort over Belgrade, Serbia that started few weeks later, in the first NATO war operation in its history against a sovereign nation, conducted entirely outside of its jurisdiction.

Nonetheless, the author points out, there was strong opposition in the US administration to the PFP, from the people whose strategic vision was drawing a new line further to the East, entailing NATO Article 5 protection (from Russia) for selected, not all countries. Sarotte points out that Russia, naturally, was to be excluded from the club. In short, Russia was considered to be a foe, and arrangements would be made accordingly. After President Bill Clinton launched the PFP in January 1994, skilled bureaucratic in-fighters, like National Security Advisor Antony Lake and Assistant Secretary of State Richard “Bulldozer” Holbrooke, immediately, according to the author, mounted an extended attack, with generous support from the US Ambassador to the UN Madeleine Albright. With the 1994 mid-term elections being a disaster for the Democratic Party, signalling that public opinion was much more pro-Republican than expected, President Clinton changed his view, sinking the idea he advocated earlier (PFP) for NATO expansion to the East.

In September 1994, when Clinton already had made up his mind to expand NATO, he told Yeltsin that there “will be an expansion of NATO... we’re going to move forward on this.” (p. 197). Trying, the author points out, to bring everyone along, he reportedly softened the blow by reassuring Yeltsin “that there were three ‘nos’ in place: no surprises, no hurry, and no exclusion of any state from the expanded alliance” (p. 197). Yeltsin did not erupt in response, but obviously remembered the pledge very well. The 1994 pledge wasn’t about not expanding NATO to the East; it was about how NATO would expand to the East.

Nonetheless, out of the blue, at the NATO ministerial meeting on 1 December 1994, at which Russia was to sign accession to the PFP, a press release was issued that “we expect and would welcome NATO enlargement that would reach to democratic states to our East.” (p. 201). It was humiliating for Russia, as its president learned about it from media reports. Sarotte points out that “Yeltsin now felt angry and cheated. Despite Clinton’s promise of three ‘nos’—no surprises, no hurry, and no exclusion—he now faced all of them. He decided Russia would not sign the detailed PFP accords after all” (p. 202). This was the pledge that was broken – not the ostensible “not one inch”. The momentum of US-Russia collaboration was lost. Irretrievably, the reader would add, in hindsight.

On January 13, 1995, Clinton gave a speech at a conference in Cleveland on trade and investment in Central and Eastern Europe, during which he described NATO expansion as “inevitable” (p. 208). In politics something is “inevitable” only if a firm political decision has been made. This was the end of any hope for a balanced solution, one that would take care of the security concerns of both the Eastern Europe countries and Russia.

Part Three of the book (“Frost”), chronicles the 1995–99 period, during which the Clinton administration took a more aggressive stance on NATO expansion, with the first three new members from Eastern Europe being included under the umbrella of Article 5 of the NATO Charter and with the disagreements with Russia over NATO military action in Kosovo. The author points out that at the end of this period, “with both Moscow and Washington having failed to create lasting cooperation in the thaw after the Cold War, the Russian forces of reaction that Kohl had feared back in 1990 win out after all” (p. 14). The advent of Vladimir Putin was a landmark political development, although it did come out of the blue.

Compared to the previous two periods, this period, although longer, was not as eventful – at least not in diplomatic terms. The US administration decision to expand NATO was made in the previous period, so it was only, according to the author, that two questions needed to be answered: when and how? As to “when”, the answer was straightforward – after the 1996 presidential elections in both the USA and Russia, which both incumbents eventually won. As to “how”, the question was twofold: which countries should be invited to join NATO and what would be Russia’s role in this? The US administration’s decision was to invite only three countries to join the NATO in the first bout of expansion and to signal that the doors will be kept open for the others. As to Russia’s role, the US answer was – none. Of course, there was a PR demonstration of cooperation between NATO and Russia, like the high-profile signing of the Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, but the document was, as author demonstrated, more about principles than about well-specified rights and obligations of the signatories – it was far more declaratory than binding, but it created the illusion that Russia was onboard.

Although President Clinton’s concept was to buy-out the Russian political elite once again – with G7 membership making it the G8 from that moment on, accession to the OECD, WTO and the Paris Club – dark clouds gathered in Moscow regarding collaboration with the West. Kozyrev was out and the new foreign minister was Yevgeny Primakov, an old-school apparatchik and a KGB breed of official. The change was noticeable immediately, as pointed out by Strobe Talbott, a leading State Department officials during this period,¹¹ as

¹¹ With President Clinton being a lame duck because he was completely preoccupied with the Lewinski scandal and its political outcome, key persons for dealing with NATO expansion Russia during this period were Albright and Talbott, a close friend of Clinton’s from their days at Oxford, both ardent supporters of NATO expansion to the East.

he found Primakov “to be a true believer in ‘Lenin’s maxim that all history can be explained by answering one question, imaginatively translated by Talbott as ‘who kills/beats/screws whom?’” (p. 250).¹²

Primakov was trying to minimise the impact of the now unstoppable expansion of NATO to the East by proposing various restriction regrading further NATO expansion and deployment of personnel and military hardware in soon-to-be new NATO members (Poland, the Czech Republic, and Hungary) but all proposals were rejected by the US administration. Russia was in the midst of the 1998 financial crisis and needed financial support, and this was the leverage used for the unconditional NATO expansion. It was, as the author points out, “‘not one inch’ was gaining a new meaning: not one inch was off-limits to the alliance” (p. 261).

The Kosovo War was a shock for the Russian political elite. Sarotte emphasis that “Yeltsin and his advisors were horrified not only that NATO would take the unprecedented step of bypassing the UN Security Council in order to bomb a country but that it would do so for reasons unrelated to either Article 5 or aggression against another state. Instead, unbelievably in his view, the alliance was taking this dramatic step simply because of actions inside a country’s own borders. Coming at the same time as the implementation of enlargement, it seemed to prove irrefutably that the claim NATO expansion would bring peace to Europe had been pure deceit. As one US diplomat put it, ‘Yeltsin’s critics warned him: Belgrade today, Moscow tomorrow!’” (p. 316). Of course, the reader concludes, it was Chechnya that was on the mind of the Russian political elite. Not only Chechnya, but it was definitely high on the list. Nonetheless, it was the end of benevolent attitude of the Russian political elite towards the West.¹³

Meanwhile, on the home front President Yeltsin suffered not only from bad health but also from involvement in the largescale corruption, effectively as part of “the Family”, a crime organisation run by his daughter Tatyana and her soon-to-be third husband, the author explains. They all felt under siege because Russia’s chief prosecutor, Yuri Skuratov, was looking into presidential largescale corruption. Hence, President Yeltsin needed someone

¹² The cynical reader would comment that not only the translation is imaginative, but it is also even creative. What a pity that Talbott did not realise that his deeds related to the relentless expansion of NATO to the East – regardless of Russia’s interest – fit perfectly into ostensibly Lenin’s maxim.

¹³ One of the early reformers from the start of Yeltsin’s tenure, Yegor Gaidar, a private citizen at the time, contacted Talbott with a lament: “if only you knew what a disaster this war is for those of us in Russia who want for our country what you want” (p. 319).

who would fix all these troubles. He found the man, the head of the FBS – the successor organization to the KGB – and he got the job done, very well done. His name was – Vladimir Putin. The rest is history.

In the final chapter of the book, Sarotte points out (before Russia's invasion of Ukraine) that "American and Russian choices, in a series of cumulative interactions, had [...] yielded [...] a post-Cold War order that looked much like its Cold War predecessor, but with a more easterly European dividing line" (p. 339). Without disputing the claim, the reader can be somewhat disappointed in such an outcome.

The author asks and answers the critical question: in hindsight (the one before Russia's invasion of Ukraine, as such was the timing of the publication of the book), was NATO expansion a bad idea? Any serious response to the question, specifies the author, demands another: bad for whom? "The Central and Eastern European countries that pushed hard to join had a right to choose their alliances, and were rightly thrilled when they succeeded in joining NATO as full members, protected by Article 5 from the start" (p. 348). In hindsight (before Russia's invasion of Ukraine), NATO membership had been good for them. Nonetheless, the author points out that "Ukraine was left in the lurch, as were some other post-Soviet republics" (p. 348–349).

The other question is: was it bad for the United States? The author does not provide an unequivocal answer to that question, although the book provides ample evidence regarding superior policies from a US point of view, such as PfP and the partnership with Russia regarding nuclear armament control and reduction. The most direct answer to this question is a quotation: "As the historian Odd Arne Westad wrote in 2017, it is 'clear that the West should have dealt with post-Cold War Russia better than it did,' not least because 'Russia would under all circumstances remain a crucial state in any international system because of its sheer size'" (p. 350). The reader infers that the author's position is that NATO expansion to the East was not so good for the United States and that superior policies were available. After all, Churchill did not recommend magnanimity in victory for nothing.

Interestingly enough, the book does not include the question: was it bad for Russia? But the book provided ample evidence, enough food for thought in this respect – enough for a few insights for the reader. The NATO expansion to the East undermined the position of liberal and democratic political stakeholders and was not beneficial for their efforts to transform Russia into a liberal society and free-market economy. On the contrary, NATO expansion provided wind in the sails of hardliners, who had believed in an authoritarian political order (with them in the office, of course) and tycoon

infested crony capitalism, with multiple exchanges between the political and business elites. And that very expansion created the perception in Russia of an external threat, which in turn helped authoritarian-prone political actors to be more effective in their impact on day-to-day political life in Russia, especially in defining the political agenda. In short, the reader concludes that NATO expansion had an impact on Russia – it contributed that Russia today being worse country than it could have been. The historical responsibility for Russia being what it is today is not only on one side.

Perhaps, at the end of the review, the reader should share just a few additional takeaways from the book. The first one is that for a long time there was nothing akin to the monolith American policy towards NATO expansion to the East, but only ups and downs of the concepts and their political success. The PfP concept was reasonable; it was a sound compromise and acceptable to the Russian side, but then due to the political dynamics in Washington, the other political notion ultimately prevailed. Those who advocated different concepts did so for some specific even pragmatic reasons, for their ideology and political and individual interests, not solely because they believed in the ideas they were pursuing and advocating. These insights are to some extent along the lines of the political economy of international relations. Only somewhat, because what was predominant was the battle of ideas, the battle of interests was only secondary.¹⁴

Nonetheless, it is instructive that when the firm attitude of the US political elite towards NATO expansion to the East was established, there was effectively no deviation from it anymore.¹⁵ Perhaps, the reader infers, demonstrating credibility was a paramount for these US administrations – even if the policy is wrong, it should not be publicly admitted; let us

¹⁴ This was not the case with the US engagement in Afghanistan, featuring not only the lack of a clear goal of the intervention and incompetence, but also substantial private interests conflicting with each other, influencing political decision regarding the aims of the involvement and, especially, the methods for accomplish those aims. Recently published documents about the American involvement in Afghanistan (Whitlock 2021) demonstrate vividly the political economy of that involvement, with corporate interests influencing quite inconsistent and shifting political goal.

¹⁵ Since the book covers the period up to 2000, the reader lacks information about internal debates in the US administrations after that period, if any, but from the decisions of the subsequent administrations, it seems that there was hardly any hesitations about it. Possibly with the exception of the Donald Trump administration, but that administration is an aberration one way or the other.

continue to apply it to demonstrated to the world that we are consistent in policy making and credible in its implementation. In short, to uphold the reputation of the United States.¹⁶

The other observation of the reader, on the margins of the book, is that the NATO expansion to the East did not happen in a Yalta-style framework, with the great powers unmitigatedly deciding about everything. Important players included countries in Eastern Europe just emerging out from the Soviet empire and with determined leaders with substantial moral credit. The world was quite different in 1990s compared to in 1945. In the 1990s, it was not only sheer military power and prowess that counted. Hence the rhetoric question, attributed to Stalin as a reply to US President Roosevelt at Yalta – “The Pope, the Pope? How many divisions does he have in battle?” – was irrelevant in the 1980s and 1990s. At that time the Pope was part of this battle – he was Polish, he was an ardent anticommunist and anti-Soviet, he inspired and encouraged many people not only in his home county but across Eastern Europe, he supported firm security arrangements for the countries in Eastern Europe. He was the most effective (spiritual) nuclear warhead in the last chapter of the Cold War and a fulcrum for many nations in Eastern Europe in the first chapter of post-Cold War history.

Furthermore, what is evident from the book is the idealism and amateurism of the Russian political elite of the 1990s, at least the majority of it, especially *Kozyrev et al.* This is quite similar, according to Morson (2022), referring to early work of Aleksandr Solzhenitsyn, to the attitude of 1917 Russian post-revolutionary political elite (*Kerensky et al.*). It should not be ruled out that the political elites of the new democracies, those who succeeded in overthrowing authoritarian leaders, seem to have been under the illusion that liberal democracy itself, almost at a stroke of magic wand, would solve all the problems and sort out all dilemmas. As if all the problems, discrepancies and legitimately confronted interests, within the country or in international relations, were actually the consequence of the previous authoritarian regime. “We are friends now” was the attitude of the majority of the new Russian political elite in the early 1990s. For the other, American side, it was business as usual – taking care of what the political elite believed was the US strategic interest against the other side.

¹⁶ Economic theory predicts that in the situation of asymmetric information, huge investments that are sunk costs are a credible signal of the agent’s intention not to exit the market. By initiating NATO enlargement, the US government made substantial political sunk cost investments, demonstrating that the process would go on – no exit from the strategy whose implementation has already started.

There is a significant side effect of the US administration's management of its relations with Russia and its ardent support of Boris Yeltsin, the candidate preferable to the US in the 1996 Russian presidential elections. The author points out that the Clinton administration succeeded in convincing the IMF to give Russia a USD 10.2 billion loan. As the author emphasises "Even better, the loan did not commit Moscow to the IMF's usual onerous requirements for economic reform. [...] 'the political purpose of this IMF credit was obvious to everybody: helping re-elect President Yeltsin in the face of a potent Communist threat. The IMF lost its credibility'" (p. 247). Exactly the same manoeuvre was performed with IMF engagement in Ukraine when the government favourable to the US was in the office. Accordingly, the US' way of supporting "friends" undermined international institutions and ruined their credibility. Following these exercises, the IMF reports and decisions on any country are always taken with a pinch of salt. That was not the case during the Cold War.

In hindsight, which includes the war in Ukraine, it is tempting to reconsider the Russian political elite's concern that NATO's bombing of Serbia was a precedent for the bombing of Russia, as Yeltsin's critics had warned him: Belgrade today, Moscow tomorrow! If the Russian invasion of Ukraine has demonstrated something, it is, at least for the time being, that the West red line is that it should not be involved in military conflict with Russia. After all, Russia is – unlike Serbia – a nuclear power. Taking that into account in hindsight, the concern of the Russian political elite at the time was exaggerated and it seems almost paranoid. Nonetheless, in the words of Golda Meir "Even paranoids have enemies",¹⁷ hence the Russian concern was legitimate. The other side at the time, it seems, could not have cared less about that concern.

In post-24 February 2022 hindsight – with the war in Ukraine (a special military operation, in Kremlin's parlance) entering its sixth month when this review goes to press – many more questions can be asked, and many tempting counterfactuals can be explored. For example, Kaplan (2022) asks if Estonia, Latvia and Lithuania had not joined NATO, would they still be independent states, and answers that from the viewpoint of the ongoing war in Ukraine, that it is doubtful. Nonetheless, an equally legitimate counterfactual is that had NATO not declared at the 2008 Bucharest Summit that Ukraine and

¹⁷ Although the insight is frequently attributed to Henry Kissinger, it is the reply that Golda Meir is said to have made to Henry Kissinger who, during the 1973 Sinai talks, accused her of being paranoid for hesitating to grant further concessions to the Arabs.

Georgia “will” join the alliance, would Russia – even with all the subsequent changes of governments in Kiev – have attacked Ukraine.¹⁸ The reader is simply not certain what the answer is.

Nonetheless, what is crucial is the great counterfactual. What if NATO had not expanded one inch to the East? Technically, that would have meant that NATO stepped a few inches, rather hundred kilometres back to the West, with unified Germany as a neutral country. A distinctive new security structure for Europe would have been established in this case, with a substantially smaller possibility for drawing new lines, with a strong – not only economically – and quite independent Germany in the middle of Europe – a nightmare for many past generations. One way or another, there would have been no pressure on Russia from a NATO expansion to the East.¹⁹ The key element for verifying this counterfactual is that post-Soviet Russia demonstrated substantial political and economic instabilities, but almost none of them were related to international relations, but to the nation’s internal features. The other insight of this counterfactual is that the re-emergence of the imperial mentality and nostalgia for the old imperial times (whoever the Tzar is) among the Russian political elite, after the shock collapse of the empire, has not been only the consequence of the NATO expansion to the East. And it is well documented in the book that Vladimir Putin’s rise to political prominence has nothing to do with the expansion of NATO to the East, through some of his policies could have been facilitated by this expansion. His early rhetoric emphasising that “the demise of the Soviet Union was the greatest geopolitical catastrophe of the 20th century” had, it seems, little to do with the NATO expansion to the East, but resonated well with the political elite and some segments of the public. Obviously, imperial nostalgia has deep roots – it did not need NATO expansion to flourish, but the expansion helped.²⁰

¹⁸ It is Kaplan (2022) who considers that this move, inviting Ukraine to join the NATO, was “a profound error” and explains that it was an outcome of the irresponsible drive of George W. Bush for glory (“to lay down a marker”) following the fiasco of spreading democracy Iraq and the lack of democratic spill-over effects in the Middle East that were expected in Washington. Even for reckless players like Richard Holbrooke “Ukraine is the most delicate issue” (p. 217). Not for George W. Bush!

¹⁹ Another great counterfactual, similar to this one in terms of consequences, would have been the united Germany being in NATO, but without any NATO expansion east of the eastern borders of Germany. In short – not one inch beyond the Oder and the Nissa border.

²⁰ Independently of Russian imperial nostalgia, the book provides ample evidence of the US imperial stance in international relations during the post-Cold War period. It is intriguing for the reader that senior US officials have apparently not been aware

The main problem, from the considered standpoint, is that the Soviet empire crashed. It was the Soviet Union that lost the Cold War. It was Russia left, actually volunteered to deal with the aftermath of the Cold War defeat. It was surprising that the Soviet empire collapsed so peacefully (both in Eastern Europe in 1989 and in the Soviet Union in 1991), with negligible casualties. That was, according to Lieven (2022), a deviation from the historical regularity that empires have broken-up violently, inevitability creating death and destruction in many cases with a time lag that can be substantial. Hence, for Lieven, the Ukraine war is just an expected, though a somewhat delayed consequence of the dissolution of the Soviet empire. “The invasion of Ukraine is the belated revenge of the old Soviet security apparatus for what it sees as 30 years of humiliation, retreat and defeat.”

Nonetheless, the reader is not convinced that this was inevitable. Which also applies to the deterioration of the US-Russia relations. As Michael McFaul, the former US ambassador to Moscow, is quoted as saying, “Russia was not destined to return to a confrontational relationship with the United States or the West. What happened did not have to happen” (p. 345). This is quite a convincing insight. As pointed out by MacMillan (2013), in analysing the origin of the Great War, almost nothing in history is inevitable. In the post-Cold War era, mistakes and bad judgments has been made on both sides and the book provides ample evidence that both the US and Russian sides should be found responsible for that deterioration. The relative contribution is definitely hard to measure.

As to the recent bout of deterioration, it seems to the reader that perhaps one of the problems has been bad communication, especially from the Russian side and especially after 2000. No firm red line – a line that should not be crossed – was clearly signalled by the Russian political elite regarding NATO expansion. After the 2004 expansion, which included the Baltic republics, former republics of the Soviet Union,²¹ there was rather a mild

of it or just take it for granted. As Madeleine Albright put it, “the key issue was how to manage the devolution of Russia from an imperial to a normal nation” (p. 210). By applying this standard, America has not been a normal nation, at least since the end of the Cold War.

²¹ Though the Baltic republics became part of the Soviet Union after their annexation in 1940, the 2004 expansion was a precedent, because for the first time former Soviet Union republics entered NATO and NATO countries stepped up to the border of Russia proper (apart from the border of the Kaliningrad enclave). Nonetheless, as pointed out (Banka, 2019) in 2001, during a radio interview with *National Public Radio*, when asked if he opposed the admission of the three Baltic Republics into NATO, Russian President Vladimir Putin responded that the issue could not be summed up in “a yes or a no.” He later added that “we cannot forbid people to make certain choices if they want to increase the security of their

reaction, and the 2007 Munich conference speech by Russian President Putin was a list of complaints about what had already happened, not a list of the future actions that should be off the table. Even after the 2008 kick-off of the process of NATO membership for Ukraine, President Putin's public reaction was rather mild, with rather friendly gestures towards US President George W. Bush at the opening ceremony of 2008 Peking Olympic Games. Perhaps, Putin has subscribed to Stalin's principle that "Cadres decide everything";²² therefore as long as his close allies, controllable "cadres", are in the office in Ukraine and Belarus, there is no reason for concern. Nonetheless, the problem surfaced when his "cadre" Viktor Yanukovich was removed from office. So the statement that "Ukraine in NATO" is the red line for Russia – if that has been the case – was not properly communicated to NATO by the Russia's side.²³

A private conversation with a person from the Russian Putin-supporting intellectual elite, and effectively a member of incumbent political elite, perhaps even its inner circle, which took place in the summer of 2008, was quite revealing. To the provocative question "Why is Ukraine so important to Russia?" the brisk and bitter answer was "Because Ukraine it to Russia what Kosovo is to Serbia!". Be that as it may, the crucial difference is that Serbia has not recognized Kosovo's independence, and Russia, with ratified international treaties, the Belavezha Accords and Budapest Memorandum, has explicitly recognized Ukraine as an independent state, and acknowledged its sovereignty and integrity. Also, neither Serbia and Kosovo have signed,

nations in a particular way". In another appearance, Putin declared that Baltic membership was "no tragedy" for Russia. These statements clearly were not a ringing endorsement. However, by historical standards, this was the least public resistance put up by the head of the Russian state. Vershbow (2019), insists that during his stint as the US Ambassador to Moscow, at the time of NATO enlargement, he heard few complaints from the Russian side when the Baltics formally joined the alliance.

²² From: Iosif Visarionovich Stalin, Address delivered in the Kremlin Palace to the graduates of the Red Army Academies, 4 May 1935, available at: <https://soviethistory.msu.edu/1936-2/year-of-the-stakhanovite/year-of-the-stakhanovite-texts/cadres-decide-everything/> (last visited 31 July, 2022).

²³ Mearsheimer (2022) claims that, according to a respected Russian journalist, after the April 2008 NATO decision to start the accession of Ukraine, Vladimir Putin "flew into a rage" in private and warned that "if Ukraine joins NATO, it will do so without Crimea and the eastern regions. It will simply fall apart." The reader infers that had these words been told in straightforward manner to the other (NATO) side, perhaps the accession of Ukraine would have been put on hold, with some assurances to Russia that it would remain so for the foreseeable time. Furthermore, had that message been sent to the American side before the April 2008 NATO summit, one could not rule out that the outcome of the Summit regarding Ukraine's membership would have been different.

like Russia and Ukraine in 1997, a friendship agreement, pledging mutual respect for “territorial integrity” and the “inviolability of borders”. It seems, in hindsight, that the incumbent Russian political elite, which has violated all these ratified legal documents and complains about the broken ostensible one-inch pledge, would like to undo the things that happened in 1990s, with the demise of the Soviet Union, and to Make Russia Great Again. Launching an invasion of Ukraine will hardly achieve that aim. Although Sarotte’s book vividly demonstrates that this war did not come out of the blue, that both the Western and Russian sides contributed to the conditions in which it started, the responsibility for this aggressive war against Ukraine rests only with the Russian political elite and its decision to trigger it. As already pointed out, nothing is inevitable in history – it is always about decisions. And with decisions comes the responsibility for the outcomes.

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Ермолович, Виктор Иванович. 2021. Основные институты гражданского права средневековой Сербии и стран континентальной Европы (X-XV вв.). Минск: Белорусский государственный экономический университет, 301.

Srpskom pravnom istorijom, sasvim razumljivo, primarno se bave domaći naučnici. U međunarodnom naučnom diskursu primarno je zastupljena u radovima koje istraživači iz Srbije objavljuju u časopisima i zbornicima na stranim jezicima, mada se u poslednje vreme ponovo pojavljuje i dobrodošla tendencija objavljivanja monografskih dela za stranu čitalačku publiku (na primer, Popović 2021). Još su ređa dela stranih naučnika na teme iz srpske pravne istorije i plod su uglavnom ličnog interesovanja pojedinaca za određenu pojavu (Angelini 2014; Angelini 2019) ili ličnost (Zimmermann 1962). Međutim, za razliku od dela stranaca o srpskoj i jugoslovenskoj političkoj istoriji koja u nešto većoj meri privlače pažnju domaće stručne javnosti (verovatno zbog širine teme)¹, dela iz pravne istorije Srbije najčešće prolaze pretežno nezapaženo. To se delimično može objasniti očekivanjem da se u njima neće naći nova saznanja i da su to samo izdanja

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¹ Sa srpskom i jugoslovenskom političkom istorijom stvari stoje nešto bolje, te postoji veći broj autora koji su se na nju usredsredili u svojim istraživanjima – na primer, Konstantin Nikiforov (*Константин Никифоров*) ili Julija Lobačeva (*Юлия Лобачева*) u Rusiji, Holm Zundhausen (*Holm Sundhaussen*) i Mari-Žanin Čalić (*Marie-Janine Calic*) u Nemačkoj i dr. Posebno ima smisla izdvojiti interesovanje ekonomskih istoričara, kao što je Džon Lamp (*John Lampe*), za istoriju Srbije, Jugoslavije i šire Balkana, kao siromašnog regiona bogatog evropskog kontinenta. Naravno, čitanju svih dela uvek treba pristupiti kritički, naročito kada postoje indikacije o predubedenjima autora – ali glavno je da postoje istraživanja van domaćeg terena koja daju mogućnost za naučni dijalog iz različitih perspektiva.

koja, pretežno na osnovu domaće literature, tematiku približavaju publici koja ne čita srpski jezik. Neka dela su, nesporno, takva. Ali čak ni tada, čini se, nije zgoreg da domaći istraživači znaju kako se tematika naše pravne istorije predstavlja stranom čitaocu te i da, po potrebi, sami napišu radove na stranom jeziku u kojima će nešto dopuniti ili demantovati. Međutim, čak i kada ne naprave naročit doprinos istraživanju domaćih izvora, strani istraživači mogu u svoj rad uneti novu, drugačiju perspektivu – naročito ako delo obogate uporednopravnim pristupom – koja može dati vredne putokaze za dalja istraživanja. Stoga bi na strana dela koja se bave domaćom pravnom istorijom uvek valjalo obratiti pažnju.²

Autor ove knjige Viktor Jermalóvič (*Виктор Ермолович*), istoričar po obrazovanju, predaje pravnu istoriju na Pravnom fakultetu Beloruskog državnog ekonomskog univerziteta u Minsku. U svojim dosadašnjim istraživanjima primarno se bavio pravnim sistemima slovenskih zemalja u srednjem veku te je već objavio dve monografije u kojima daje kratak pregled pravnog sistema srednjovekovne Srbije (Ермолович 2003) i Češke (Ермолович 2015), uz izvesna poređenja sa srodnim pravnim sistemima. Ovoga puta, autor je pred sebe postavio ambiciozniji zadatak: da nešto produbljenije analizira građansko pravo srednjovekovne Srbije, uz širi uporedni pregled pravnih sistema drugih srednjovekovnih država.

Već na prvoj stranici predgovora, nažalost, autor otkriva problematično nekritički odnos prema literaturi, pozivajući se na tekstove Jovana Deretića i Svetislava Bilbije, koji tvrde da je antički obelisk (stela) iz Ksantosa (konkretno, tekst na njemu na likijskom jeziku) spomenik drevne srpske pismenosti i prava!³ Mada se, na sreću, autor tim spomenikom ne bavi u knjizi već ga spominje uzgred, ta i slične neoromantičarske tvrdnje potkrepljene radovima autora koji se u našoj nauci dominantno smatraju pseudonaučnim (osim pomenutih, pojavljuje se i Pešićeva teorija o vinčanskom pismu) provlače se mestimično kroz celu knjigu. Kako se autor već decenijama bavi srpskim pravom, ne može ga izviniti slučajna greška: štaviše, on se poziva na svoje ranije radove – ne pominjući, naravno, da su njegovo oslanjanje na te dubiozne tekstove već ozbiljno kritikovali drugi autori na ruskom jeziku (Шахин 2019). Slično se može zameriti i srpskom recenzentu knjige prof. dr Zoranu Čvoroviću, koji je morao bolje znati o kakvim je napisima reč. Naravno, ne može se decidno tvrditi ni da se istraživanje koje na prvi pogled izazove skepsu u naučnim krugovima ili čiji autor nije po obrazovanju

² Verujem da se isto, *mutatis mutandis*, može primeniti i na radove koji se bave pozitivnim pravom.

³ Kratku kritiku ovih tvrdnji i grubih metodoloških grešaka u njihovom iznošenju, namenjenu široj čitalačkoj publici, već je izneo Radivoj Radić (2005, 219–231).

specijalista za oblast kojom se bavi ne može ispostaviti kao tačno⁴, ali kada je reč o tekstovima koji se opšteprihvaćeno smatraju pseudonaučnim, koji su već u više navrata demantovani i na metodološkom i na činjeničnom planu (npr. Radić 2005), bilo kakva eventualna tvrdnja da je u njima skrivena zanemarena istina morala bi biti potkrepljena veoma ozbiljnim dokazima i metodičnom analizom. Jermalovič ništa od toga ne čini: on tvrdnje pseudoistoričara uzima zdravo na gotovo, čak ih naziva „poznatim naučnicima“ („известными учеными“) – iako pritom Bilbiji prezime uporno piše kao „Bilbi“ – a njihove radove „ozbiljnim istraživanjima“ („серьезными исследованиями“) u okviru „nove“ istorijske škole (str. 27). Takav pristup na samom početku knjige, nažalost, ne sluti na dobro. Pogledajmo dalje.

Knjiga se sastoji iz dva dela. U prvom, uvodnom, koji čini oko četvrtine monografije, govori se o izvorima srednjovekovnog građanskog prava razmatranih zemalja. Podeljen je na dve glave: prva se bavi recipiranim izvorima, a druga onima domaćeg porekla. Redosled može delovati neobično, ali ima hronološku logiku, budući da je, barem u Srbiji, recepcija romejskih tekstova (u Zakonopravilu Svetog Save) prethodila opsežnijoj domaćoj kodifikaciji. Jermalovič, ipak, o Zakonopravilu govori u odeljku o domaćim izvorima (usled originalnosti kompilacije – str. 35), ali krug recipiranih neopravdano širi, postulirajući primenu Zemlji radničkog zakona i Ekloge u Srbiji već od 9. veka. Za Eklogu to obrazlaže postojanjem slovenskih rukopisa (mada i sam dopušta da su možda bugarskog porekla), dok za Zemlji radnički zakon samo iznosi svoje mišljenje da je dospeo u Srbiju u 9. veku i da se morao široko upotrebljavati jer je zemlja bila primarno poljoprivredno orijentisana – ne dajući nikakav dokaz za to datiranje (str. 15). Zatim ovde dodaje i Zakon sudnji ljudem, povodom čijeg porekla se ne opredeljuje ni za jednu od postojećih teorija (koje relativno detaljno iznosi) već tvrdi da ga treba smatrati opšteslovenskim srednjovekovnim pravnim zbornikom te samouvereno pretpostavlja da je upotrebljavan u Srbiji, pozivajući se samo na geografsku bliskost Bugarske (str. 18–21), iako literatura koja se tim spomenikom ozbiljnije bavi takvu mogućnost – sasvim razumljivo – ni ne pominje (na primer, Максимович 2002; Nikolić 2012).

Osim srpskog prava, Jermalovič u manjoj ili većoj meri koristi i impresivno širok izbor drugih izvora: Vinodolski zakonik, neke povelje bugarskih vladara, Rusku pravdu (ponegde i druge izvore srednjovekovnog ruskog

⁴ Reprezentativan za pravnu istoriju je primer Majkla Ventrisa (*Michael Ventris*), poznatog po dešifrovanju linearnog B pisma, koje je dozvolilo istraživanje prava antičke Gortine. Ventris je u ovome uspeo uprkos tome što je po primarnom obrazovanju bio arhitekta, a njegovi prvi lingvistički radovi iz mladalačkih dana počivali su na pogrešnom ubeđenju da je jezik analiziranih natpisa bio etrurski. (Robinson 2002.)

prava), poljske Statute (Zakonik) Kazimira Velikog, češke Statute Konrada Otona, Rožmbersku knjigu i (nesuđeni) zakonik *Maiestas Carolina*, litvanski Zakonik Kazimira IV i Statut Velike kneževine Litvanije, nemačko Saksonsko ogledalo, francuski Zbornik običaja Bovezija te švedski Zakonik kralja Magnusa Eriksona; doduše, neke od njih u prevodu na ruski i sa relativno malo prateće literature.

U drugom, glavnom delu knjige prikazane su osnovne ustanove srednjovekovnog građanskog prava. Autor u tekstu ne prati ni rimsku ni savremenu institucionalnu ili pandektnu sistematiku već primenjuje specifičnu podelu prilagođenu materiji. Prvi odeljak se tiče oblika svojine – i u njemu se pominju svi oblici karakteristični za srednji vek, uključujući i feudalnu, ali i zadružnu svojinu. Tako taj odeljak – nestandardno za danas, smisleno za srednji vek – sadrži i osnove porodičnog prava. Drugi odeljak je posvećen pravnoj i poslovnoj sposobnosti fizičkih lica, treći pojmu pravnog lica u srednjem veku, četvrti obligacionom i peti naslednom pravu. Bračno pravo (ni porodično van pitanja porodične imovine) nije razmatrano u tekstu: kako autor za to ne daje nikakvo objašnjenje, verovatno je da se rukovodio savremenom ruskom sistematikom prema kojoj porodično pravo ne spada u građansko pravo već predstavlja odvojenu granu, te stoga nije ni obuhvaćeno naslovom.⁵

Nažalost, celu knjigu karakteriše veliki stepen površnosti: ponegde je izazvana propustima u korišćenju literature, ponegde nepažljivošću u zaključivanju i potkrepljivanju tvrdnji izvornim podacima. Tako, primera radi, autor iznosi smelu tvrdnju da su Stefan Prvovenčani i Sveti Sava zajednički sastavili Zakonopravilo (str. 31, 35, 63–64, 200, 260), ne navodeći pritom nikakav izvor osim sopstvene ranije knjige o srpskom pravu. Usaglašenost reformi crkve i države braće Nemanjića nije upitna: u brojnoj literaturi to se razmatra iz različitih uglova (na primer, Bubalo 2016, 103–122; Kršljanin 2019), ali ne postoji nijedan izvorni podatak koji bi sugerisao koautorstvo srpskog kralja u nastanku Zakonopravila. Dalje, govoreći o vrstama svojine u srednjovekovnoj Srbiji, Jermalović pominje milosnike kao da je u pitanju posebna vrsta držalaca uslovnih poseda – neka varijacija na temu pronijara (str. 131–132). Autor je očigledno nesvestan da se termin koristio da označi lice koje je posredovalo, odnosno pomagalo u izvršenju ‘milosti’ (najčešće vladareve), to jest vladareve volje da zaključi neki posao ili daruje neko lice (Blagojević 2001, 99–139). Nimalo čudno – jer za tu temu koristi samo izdanja izvora, a ne i literaturu. Kada govori o ropstvu, propušta da prikaže

⁵ Alternativni razlog, bliži izvornoj građi, bio bi taj što je bračno pravo u najvećoj meri regulisano kanonskim pravom; međutim, pre bi se očekivalo da to autor pomene.

već viševekovnu naučnu polemiku o tome da li se otroci srednjovekovnog srpskog prava mogu smatrati robovima⁶, a na jednom mestu, u kontekstu trgovine robljem, koristi nezgrapnu formulaciju kojom kao da sugeriše da su Dubrovnik i Bosna u poznom srednjem veku bili deo Srbije (str. 141).⁷ Za slovensku reč „gost“ tvrdi, bez ikakvih referenci, da je potekla od latinskog „*hostis*“ u značenju „neprijatelj“, iako u savremenoj lingvistici dominira shvatanje da obe reči potiču od neutralnog indoevropskog pojma u značenju stranca, došljaka, i da je reč „*hostis*“ tek kasnije, tokom upotrebe, stekla sada prihvaćeno negativno značenje (Benvenist 2002, 58–61).

Pitanju gradova kao pravnih lica autor posvećuje neujednačenu pažnju, više se usredsređujući na uporedne paralele nego na srpske izvore (str. 159–175), te ne pravi dovoljno jasnu diferencijaciju između različitih kategorija gradova, koja je odavno uobičajena u našoj pravnoj istoriji (Taranovski 1996, 122–128). Time naročito stvara pogrešnu sliku o većoj inkorporisanosti primorskih gradova u srpski pravni sistem nego što je zapravo bilo posredi, a neupućenom čitaocu ne objašnjava dovoljno jasno ni koje su od jadranskih komuna ulazile u sastav Srbije, a koje se pominju kao uporedni primeri. Iz odredaba članova 169. i 170. Dušanovog zakonika o zlatarima izvodi zaključak o državnoj zaštiti esnafske organizacije (str. 165–166), ni ne pominjući u literaturi dominantno tumačenje da je država štitila regalno pravo na kovanje novca (Taranovski 1996, 188–189).⁸ U uvodu odeljka o

⁶ Bubalo (1997) daje kratak pregled polemike i kvalitetnu analizu izvora.

⁷ „Tokom perioda svog postojanja kod Južnih Slovena (do početka 15. veka) ova ustanova [ropstvo – prim. prev.] pretrpela je izvesne izmene, mada su i dalje osnovni izvori ropstva u feudalnoj Srbiji, kao i u drugim slovenskim državama, ostali ratni плен i dužničko ropstvo. Godine 1400. odlukom Senata grada Dubrovnika trgovina robljem je zabranjena. Do tada se obavljala u Bosni i drugim primorskim oblastima zemlje.“ (*„За период своего существования у южных славян (до начала XV в.) этот институт претерпел некоторые изменения, хотя по-прежнему основными источниками рабства в феодальной Сербии, как и в других славянских государствах, были военный плен и долговая кабала. В 1400 г. постановлением Сената г. Дубровника работорговля была запрещена. До этого она велась в Боснии и других приморских районах страны.“*)

⁸ U Prizrenskom prepisu, koji je i Jermalovič koristio, čl. 169. (po Bubalovoj numeraciji 169b) glasi: „Ako li se nađe zlatar izvan gradova i trgova carstva mi, u nekom selu, da se to selo raseli, a zlatar da se spali.“ („Аште ли се шбрѣте златарѣ шсвѣнь градовъ и тръгов царства ми, оу коемъ селѣ, да се този село распе и златарѣ иждеже.“); u čl. 170. se dodaje: „I u gradovima carevim da borave zlatari i da kuju druge potrebe.“ („И оу градовѣхъ царевѣхъ да стое златарѣ и да ковоу ине потрѣбе.“). (Bubalo 2010, 112, 214). Jermaloviču promiče relevantni čl. 169a, koji ne postoji u Prizrenskom, ali se javlja u Atonskom i još nekoliko rukopisa, koji glasi: „Ako se nađe zlatar u gradu da kuje novac tajno, da se zlatar spali, a grad da plati globu koliko rekne car.“ („Ако се шбрѣте златарѣ оу градоу ковѣ динаре таино, да се златарѣ иждеже и градъ да плати глобу што рече цар.“)

obligacionom pravu iznosi potpuno nepotkrepljen nalaz da je stanovništvo rane srpske države koristilo norme rimskog privatnog prava, budući da se naselilo na teritoriji nekadašnjeg Rimskog carstva (str. 176). U odeljku o obligacionom pravu dvaput se ponavlja gotovo isti pasus o Zakonopravilu kao izvorniku rukopisa ruske Krmčije, uz kozmetičke izmene, ali sa istom suštinom i istim spiskom fragmenata iz romejskih izvora (str. 189–190 i 201), očigledno kao posledica toga što je autor u monografiju inkorporisao svoje ranije članke o različitim ugovorima, u kojima su navođeni isti podaci. Ni samo inkorporisanje nije izvedeno na sasvim korektan način jer se tekst preuzima u celini bez napomene da je reč o već objavljenom članku – uz samo takvu izmenu da se dotični članak ponegde citira.

Kao naročito negativan primer te prakse može se istaći odeljak o ugovoru o zajmu, u kojem na jednom mestu (str. 208–209) Jermalovič tvrdi da je zabrana uzimanja kamate crkvenim licima ukinuta... hrisovuljom kesara Gregura (*sic*) manastiru Svetih Arhangela iz 1388. godine! Referenca na kraju tog pasusa upućuje na njegov članak o realnim ugovorima u rimskom i srednjovekovnom srpskom pravu (Ермолович 2017, 102), u kojem se nalazi isti tekst gotovo *ad verbum*, samo bez ikakve reference. A činjenično stanje je daleko od onog koje je prikazano u knjizi. Autor može misliti jedino na Svetoarhandelovsku hrisovulju cara Dušana, izdatu između 1348. i 1352. godine (Mišić i Subotin Golubović 2003, 16–17)⁹, u kojoj se pominje da je kesar Grgur, uz carevo odobrenje, priložio crkvi i „Dabiživa kamatnika“, s obavezom da daje manastiru osamnaest lisica godišnje (*Ibid.* 91, 122). Istraživači su iznosili različita mišljenja o tome – od uverenja da se iza „kamatnika“ krije neko drugačije zanimanje (Taranovski 1996, 658), do stava da se nije smatralo problematičnim da crkvi bude podređen svetovnjak koji se legalno bavi davanjem novca na zajam uz kamatu (Mijatović 2012, 496; Gojković 2021, 67) – ali niko nije izvodio zaključak da je time ukinuta zabrana crkvenim licima da se koriste kamatom. Kako i bi – kad se ista zabrana izričito pojavljuje kasnije u istoj hrisovulji.¹⁰ O svemu tome kod Jermaloviča nema ni reči.

Primer, nažalost, ima još i ne bi bilo smisleno sve ih navoditi. Može se zapaziti i nedovoljno korišćenje relevantne savremene literature na srpskom jeziku. Jermalovič koristi klasike (Stojana Novakovića, Teodora Taranovskog,

⁹ Moguće je da je od 1348. godine štamparskom greškom nastala Jermalovičeva 1388. godina.

¹⁰ Norma glasi: „I koji se kaluđer nađe da daje u zakup, žito ili vino, ili dinare daje u kamatu, da se istera.“ („И кто се обрѣте калоугѣрь закоупоуе жито или вино, или динаре дае у кмату – да се иждене.“). (Mišić i Subotin Golubović 2003, 112, 141).

Aleksandra Solovjeva) i neke relevantne savremene autore (Srđana Šarkića, Biljanu Marković), mada ni njih u dovoljnoj meri, ali neke (na primer, Đorđa Bubala, Zorana Mirkovića) potpuno preskače. Bolji odnos prema literaturi – korišćenje relevantnih savremenih dela, a ne oslanjanje na nepouzdana 'neoromantičarske' spise – pomogao bi autoru da izbegne najveći deo grešaka. Kao sistemski problem može se istaći i autorovo podrazumevanje da su se svi izvori romejskog porekla u Srbiji primenjivali i u praksi – povodom čega su domaći autori daleko oprezniji, zbog značajnih razlika između srpskog i romejskog prava i zbog veoma oskudnih izvora iz prakse (na primer, Mirković 2019).

Uprkos ozbiljnim manama, knjiga ima i vrlinu koja se ne sme zanemariti – širok uporednopravni pristup i stavljanje srednjovekovnog srpskog prava u širi evropski kontekst. Tako autor stavlja Zakonopravilo Svetog Save – mada uz već pomenutu dubioznu tezu o koautorstvu Stefana Prvovenčanog – u kontekst savremene Magna karte (str. 35–36) i u više navrata ističe njegov značaj, zahvaljujući kasnijoj recepciji, i u drugim slovenskim zemljama, pre svega Rusiji (na primer, str. 200–201). Umesno primećuje da se iz normi Dušanovog zakonika može steći slika o razvijenom feudalnom društvu, koja pobija u nekim (zapadnim) krugovima uvreženu predstavu o ekonomskoj i društvenoj zaostalosti srednjovekovne Srbije te pokazuje da su samo osmanska osvajanja zaustavila njen razvoj sličan drugim evropskim zemljama tog vremena (str. 145–146). Na nekoliko primera ističe nepostojanje obenskog prava (prava vladara da nasledi stranca koji je umro na teritoriji njegove države, umesto srodnika u inostranstvu) u srpskom i ruskom pravu kao naprednu i pravednu praksu (str. 150–151).

Ipak, poučen greškama koje Jermalovič pravi u analizi srpskih izvora, čitalac ne može potpuno mirno da prati njegove uporednopravne paralele: ako autor u srpskom pravu, koje je u glavnoj žiži njegovog istraživanja, pravi propuste pomenute vrste, može biti da mu se slične greške potkradaju i u analizi drugih pravnih sistema, a da čitalac koji za njih nije stručan to ne može da primeti. Autorova poređenja nekad ostaju samo na nivou deskripcije, dok nekada izvodi previše smele zaključke o jednom pravnom sistemu putem paralela sa drugima, poput već pomenutog statusa gradova i esnafskog uređenja. Katkad kao zaključke iznosi potpuno podrazumevane činjenice. Na primer, među zajedničkim osobinama konsenzualnih ugovora u razmatranim pravima ističe saglasnost volja kao formu, činjenicu da su (kao i kod drugih vrsta obligacija) njihov predmet mogle biti stvari u prometu te (zasebno izdvojeno) da se za njihovo zaključenje nije zahtevala ni predaja stvari ni pisana isprava (str. 205). U odeljku o naslednom pravu daje veoma zanimljive uporedne primere nasleđivanja ženskih srodnika (str. 233–

245) koji bi, možda, mogli pomoći da se rasvetli da li se iza „dece“ u čl. 41 Dušanovog zakonika krije prioritet nasleđivanja sinova u odnosu na kćeri¹¹ – ali se u takvu analizu uopšte ne upušta.

Konačni sud mora biti negativan: Jermalovičeva knjiga se ne može preporučiti kao štivo ni poznavacima srpskog prava, a još manje onima koji bi sa njime tek želeli da se upoznaju: previše je u njoj propusta, diskutabilnih ili potpuno pogrešnih sudova. Međutim, onima koji su zainteresovani za produbljeno bavljenje pravnom istorijom itekako se može preporučiti da je otvore i pogledaju šta je ona *mogla* biti da je autor temeljnije i strpljivije pristupio temi; šta druga knjiga slične vrste *može* biti kada se izvedba podigne na odgovarajući nivo – i zašto je potrebno da do toga dođemo.

Malo je ozbiljnih uporednopravnih analiza u našoj skorašnjoj pravnoj historiografiji – i one kojih ima uglavnom se tiču moderne istorije (na primer, Mirković 2020; Popović 2020). U međuratnom periodu na Pravnom fakultetu Univerziteta u Beogradu izučavana je Istorija slovenskih prava, a predavali su je i pisali za nju udžbenike velikani naše pravne nauke (Taranovski 1923; Соловьев 1937). Danas, nažalost, ne samo da takvog predmeta nema već se druga slovenska prava ne izučavaju ni na kursu iz Usporedne pravne tradicije – ako se ne računaju pokoja rečenica o glavnim ruskim i češkim zakonicima u lekciji o izvorima srednjovekovnog prava i kratka lekcija o pravnoj tradiciji socijalističkih zemalja, napisana pretežno na osnovu zapadne literature (Avramović i Stanimirović, 145–146; 312–317). Ako se izuzme poneki kratak uporednopravni izlet autora koji se bave srpskom pravnom istorijom (već pomenuti Mirković 2020; Кршљанин 2017; Kršljanin and Milinković 2019), naši nastavnici se ne bave pravnom istorijom slovenskih zemalja ni u svom naučnom radu. Ovde nećemo zalaziti u pitanje da li je izostanak naučnog interesovanja izazvao promene u nastavnom planu ili obratno. U istraživanju slovenskih prava, naročito ruskog, znatno su aktivniji Dragan Nikolić (2000; 2016) i Aleksandar Đorđević (2018) sa Pravnog fakulteta Univerziteta u Nišu, te Zoran Čvorović (2018; 2021) sa Pravnog fakulteta Univerziteta u Kragujevcu.

Pre desetak godina, skrenula sam pažnju na opšte pouke koje bi današnji pravni istoričari mogli izvući iz Bogišićevog (2004) članka „O naučnoj obradi istorije slovenskoga prava“ (Kršljanin 2011a/Kršljanin 2011b). I danas

¹¹ „Koji vlastelin bude imao dece, ili pak ne bude imao dece te umre, i po njegovoj smrti baština pusta ostane, gde se nađe od njegova roda do trećeg bratučeda, taj da ima njegovu baštinu.“ („Кѡи властелинь оузьима дѣт „цоу, а или пакы и не оузьима дѣт „цоу тере оумреть, и по неговѣ сьмрѣти баштина поуоста встане, где се шбрѣте шт негова рода до третѣга братоучеда, тѣзи да имат егову баштиноу.“) Bubalo 2010, 83, 164.

ostajem pri tim stavovima, ali bih im decidnije dodala još jedan: ponovo nam je potrebna Istorija slovenskih prava – obogaćena novim naučnim saznanjima i metodologijom. Jermalovičeva knjiga je neuspeli korak ka tome: neka bude uspešna barem kao putokaz i pokaže nam smer u kojem bismo morali da se krećemo – samo pažljivije, temeljnije i studioznije.

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Đorđe STEPIĆ, master prava*

Kršljanin, Nina, Uroš Stanković (ur.) 2021. 150 godina od donošenja Ustava iz 1869. godine. Beograd: Pravni fakultet Univerziteta u Beogradu, 227.

Ako se jezik bogova može gde iz ljudskih usta čuti, to je u Istoriji... kad se strasti stišaju i ostanu samo dela kao jedine polazne tačke za ocenu naših nazora i naših trudova.

(Ristić [1901] 2021, 16)¹

Pravna nauka je, od kraja prethodne godine, bogatija za još jedno delo iz ustavne istorije. Iz štampe je izašao zbornik radova posvećen obeležavanju jednog i po veka od donošenja Ustava iz 1869. godine, koji je nastao na osnovu izlaganja autora sa skupa upriličenog na Pravnom fakultetu Univerziteta u Beogradu. Tom izuzetno važnom pravnom spomeniku i ranije je posvećivana određena pažnja, mahom u pojedinačnim radovima i širim studijama.² Razlog za to je često pominjan u našoj pravnoj historiografiji, pa i u samom zborniku.

Naime, Namesnički ustav se najčešće posmatra kao svojevrsna prelazna faza između svojih prethodnika i svog sledbenika. Najpre, on jemči mnogo više u pogledu ljudskih prava i organizacije političkih institucija nego Ustav

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¹ Tu Ristićevu misao ([1901] 2021, 16) navodi i Živanović ([1922] 2021, 371).

² To je osobito vidljivo u prethodnih nekoliko godina, pošto su se brojni istraživači bavili i analizom normi i analizom porekla tog ustava i ustavnih nacrti koji su mu prethodili, primerice, Mirjana Stefanovski (2016) i Dragoljub Popović (2021).

iz 1838. godine (Popović 2021, 51–52) i potomje ustavno zakonodavstvo kneza Mihaila Obrenovića, ali ostaje daleko od političkih sloboda i ustrojstva parlamentarnog sistema dosegnutih u Ustavu iz 1888. godine.

U ocenama njegovog kvaliteta ističe se i da je to naš najdugovečniji ustav, mada anahron za kraj 19. veka kada se, kao najviši pravni akt Kraljevine Srbije (Novaković 1912, 90–95; Jovanović 1990b, 257–258), vraća našem prvom samostalno donetom ustavu, iako je to bila više posledica složene pravne i diplomatske akrobatike nego složene borbe za suverenost u ustavnim pitanjima (Jovanović 1990a, 67–68; Ristić 2021, 185–194), te prvom ustavu koji donosi prodor liberalnih ideja u naš pravni poredak, premda stidljivo i nevoljno, na način da se dotadašnji politički sistem nadogradi uz što manje potresa.³

Zbornik o Ustavu iz 1869. godine podeljen je na tri tematske celine, kojima prethode predgovor i reč urednika, a zatim sledi fototipsko izdanje teksta Ustava koje „upotpunjuje i čini življim samo sećanje na sam Ustav“ (13). „Prethodnica“, kao i u vojnoj taktici, ima zadatak da ispita teren na koji će „glavne (naučne) snage“ zakoračiti. Tako, Dragoljub Popović u predgovoru daje kratak istorijski uvod o ustavnopravnom stanju Srbije od 1838. do 1869. godine i komparativistički osvrt na norme koje su sastavljačima Ustava mogle poslužiti kao uzor. Zaključujući, on prepoznaje početke okvira za razvoj parlamentarnog sistema već u njegovim normama, iako je takav sistem formalno uobličen tek dve decenije docnije.

Urednici, osim prigodnog dela svog uvoda, u kome su pobrojani izlagači i teme izlaganja, postuliraju značaj Ustava iz 1869. godine, napominjući njegovu dugotrajnost, ali i dotičući pitanje njegovih *alias*-a, te prikladnost epiteta „namesnički“, s obzirom na pokušaje ustavnih reformi koji su mu prethodili i čiji su rezultati ugrađeni u njegove norme.

Prvi deo zbornika, u kojem se govori o donošenju Ustava, sadrži radove Suzane Rajić („Međunarodni aspekti donošenja Ustava iz 1869. godine“), Danka Leovca („Ustavno pitanje šezdesetih godina 19. veka – pogledi konzervativaca i liberala“) i Danijela Radovića („Namesnici i Ustav iz 1869. godine“). Svi autori su sa Filozofskog fakulteta Univerziteta u Beogradu.

Osnovnoj tezi proučavanja uticaja međunarodnih odnosa na postanak Namesničkog ustava – da se Srbima toleriše apsolutna sloboda uređivanja unutrašnjih pitanja kako bi im se skrenula pažnja sa spoljnopolitičkih ambicija – Rajićeva u svom radu daje za pravo, potkrepljujući takvo stanovište brojnim

³ Tu ocenu su iznosili mnogi naši pravni pisci i istoričari, primerice Jovanović ([1926] 1990a, 80–87), Stefanovski (2016), Živanović ([1922] 2021, 406).

primarnim izvorima. Stavljajući podršku ili surevnjivost prema ustavnoj promeni u kontekst ne samo zvaničnih politika dvorova i vlada već i ličnih stavova diplomata (najvidljivije u vertikali Kalaj – Andrašić – Bajst), autorka uspeva da sumarno prikaže političke pozicije svih relevantnih stranih aktera: garantnih sila Pariskog mira, Otomanske carevine, kao sizerena autonomne Srbije, te Ruske imperije, kao zagovornika održavanja postojećeg sistema i saveznika konzervativnih političara.

Diplomatsko uparivanje domaćeg ustavog pitanja sa eventualnom vlašću nad Bosnom (i Hercegovinom) pokazuje neodvojivost proširenja autonomije i teritorije kao glavnog usmerenja politike Srbije. Paradoksalno, evropske sile, prethodno suprotstavljene u svojim stavovima o ustavnom preuređenju, saglasile su se da su reorganizacija Turske i teritorijalne izmene preuranjene, premda su diplomate u Carigradu i Beogradu (po ustaljenoj praksi) podešavale svoje stavove kako su se prilike razvijale. Najposle, poznato je kakav je bio izlaz iz te krize: rešavanje Istočnog pitanja je odgođeno, Rusija je prihvatila usvajanje Ustava, a Turska je u svemu tome imala sporednu ulogu – zbog čega joj, verovatno, autorka posvećuje vrlo malo pažnje u svom radu. Ipak, njegova vrednost je u sistematičnosti kojom se bavi međunarodnim učesnicima u rešavanju ustavnog pitanja, uglavnom u meri u kojoj su se i angažovali.

Osim međunarodnih činilaca, značajno (ne)zadovoljstvo ustavnom reformom na unutrašnjem planu, prirodno, iskazuju pristalice dve vodeće političke opcije – liberalne i konzervativne. Danko Leovac čitaocu ukazuje na izostanak opšteg mnjenja i u samim tim „taborima” – prvo, o pitanju nužnosti novog Ustava, a zatim i o njegovoj sadržini – vrlo kratko se osvrćući na ustavne nacрте Marinovića i Grujića. Tri nepomirljive težnje, kneževa Miloša i Mihaila – da ojačaju vladarsku vlast, konzervativaca – da ojačaju položaj Saveta i liberala – Narodne skupštine, oblikovale su sliku političkog pejzaža u kojoj su prva dva činioca bila upućena na saradnju, uz brojne kompromise i česta formiranja „poslovnih ministarstava“.

Sledeći deo rada predstavlja kratak pregled nekih pitanja Stojkovićevog nacрта ustava, spremljenog za potrebe Preobraženjske skupštine iz 1861. godine, čije će mesto u našem pravnom poretku ipak zauzeti organski zakoni, i Milojkovićevog, koji je imao zadatak da ispravi manjkavosti „preobraženjskog režima“ u nešto liberalnijem duhu, što konzervativci, osobito Garašanin, nisu primili sa oduševljenjem. Ipak, nakon ubistva kneza Mihaila, rad na ustavnoj reformi preuzimaju namesnici, preigravši u „političkom preferansu“ konzervativnu opciju, na čelu sa predsednikom Saveta Marinovićem, već po pitanju izbora kneza, a zatim i u Nikoljskom odboru i na Velikoj narodnoj skupštini iz 1869. godine. Autor završava rad sumarno dajući poglede pojedinih liberala, koji podržavaju generalno usmerenje Ustava, ali ne i

nivo prava i sloboda koji se njime propisuju, uspešno dajući skicu političkih odnosa u vezi sa ustavnim pitanjem šezdesetih godina 19. veka, premda bi nekim od obrađenih motiva možda trebalo više razrade.

Posle spoljnih i unutrašnjih činilaca, poslednji rad u ovom odeljku bavi se uticajem ličnosti i politike namesnika na donošenje Ustava. Radović se posebno bavi odnosom između kneza i liberala 1867–1868. godine i okolnostima koje su nastale nakon njegovog ubistva. Čitaoci zatim dobijaju pregled najbitnijih događaja koji vode donošenju Ustava – Nikoljskog odbora i Velike narodne skupštine, kroz prizmu političke visprenosti i dovrtljivosti namesnika Blaznavca i Ristića.

Kao i u prethodnom radu, posebno se analiziraju pribavljanje podrške liberala za novi Ustav i supresija političkog delovanja konzervativaca (osobito u Državnom savetu). Na kraju se letimično prelaze bitne odredbe Ustava, u kontekstu Milojkovićeovog nacarta, i Ristićeva odbrana Ustava pred grafom Ignjatijevim, kako bi se dodatno istakao njegov angažman. Ipak, čini se da autor ambiciozno prati tok istorijskih događaja, pomalo se udaljavajući od srži teme.

Sledeća celina zbornika posvećena je ređe analiziranim odredbama Ustava. Baveći se pitanjima kao što su temeljna ljudska prava, politički sistem i druga, neke teme su mahom izmicale interesovanju proučavalaca normi ovog akta. Na tom mestu se nalaze rad Nine Kršljanin („Pre svega Knjaz? Analiza prve glave Ustava iz 1869. godine“) i rad Dalibora Đukića („Priznate veroispovesti u Ustavu iz 1869. godine“), sa Pravnog fakulteta Univerziteta u Beogradu.

Nina Kršljanin izlaže rad, po prirodi najbliži (delimičnom) ustavnom komentaru, baveći se regulama prve glave Namesničkog ustava, premda se njegova sistematika usmerava na srodnost tema pre nego na redosled članova. Sva rešenja su komentarisana u svetlu prethodnih ustava (Sretenjskog i Turskog), zakonske regulative te i ustavnog nacarta Radivoja Milojkovića.

Temeljno se osvrćući na norme koje se tiču vladara, vladarskog doma, prestolonasleđa i namesnika, manje na državnu „ličnu kartu“, autorka se posebno zadržava na praktično i teorijski problematičnim odredbama. Primerice, na pitanju tumačenja vladarevog „plemena“ kod nasleđivanja prestola, tumačenju teksta kneževske zakletve, normi za mogući izbor bivših ministara („ministara na raspolaganju“) za namesnike – krojenoj po meri Jovana Ristića, pravnoj praznini kod formiranja namesništva za nesposobnog vladara itd., ona pokazuje da ustavni tekst ostavlja brojne nedoslednosti i široko polje tumačima. U zaključku, Kršljanin sintetiše objašnjenje za zajedničku motivaciju donošenja obrađenih odredaba – reč je o zbiru normi koje ili slede postojeća rešenja (i predloge) ili se menjaju prema potrebama

(tada) poslednjeg Obrenovića i vodećih političkih aktera. Iako je njegov epilog možda očekivan, ovaj rad ipak predstavlja dašak svežine u izučavanju Namesničkog ustava.

Na tragu ređe doticanih odredaba Ustava, Dalibor Đukić predstavlja ustavni položaj priznatih veroispovesti. Najpre, autor skreće pažnju na propise o nepravoslavnim verskim organizacijama donete pre 1869. godine, a naročito se zadržava na terminu „veroispovedanja“ iz Sretenjskog ustava te zakonu o verskoj slobodi svih hrišćana, kojim su propisani nužni uslovi za priznavanje delovanja crkava u Srbiji – minimalan broj vernika i ekonomska samoodrživost. Zatim se kratko pominje regulativa položaja muslimana i jevrejske verske zajednice.

Analizu normi Namesničkog ustava pisac otvara u dva smera: najpre kao generalno izlaganje o slobodi veroispovesti, a zatim govori o konkretnom položaju priznatih veroispovesti. U tom segmentu rada obrađena pitanja se razvojno gledaju, počevši od Milojkovićevog ustavnog nacrtu, preko brojnih radnih verzija, zaključno sa usvojenim tekstom Ustava. Poslednja glava je kratak uporedni pregled rešenja grčkog ustava iz 1864. godine, koji je samo u funkciji identifikovanja izvesnog zajedničkog uzora po kome su srpske (i grčke) ustavne norme o veroispovestima sastavljane.

Najzad, poslednji radovi govore o ustavnom životu u svetlu prakse i reakcija savremenika. U tom delu se nalaze radovi Zorana Mirkovića („Tri priče iz Narodne skupštine za vreme važenja Ustava iz 1869. godine“), Uroša Stankovića („Namesnički ustav u memoaristici“) i Tanasija Marinkovića („Naprednjački i radikalni nacrti promene Namesničkog ustava“).

Autor prvog teksta analizira protokole i stenografske beleške sa sednica Narodne skupštine u Kragujevcu (1870) i Beogradu (1874/5) i čitaocima predočava tri događaja koja su obeležila parlamentarnu praksu sedamdesetih godina 19. veka. Prvi je programsko obraćanje namesnika i jednog od tvoraca Ustava Jovana Ristića o važnosti njegovog donošenja, napretku države pod tadašnjom vladom te funkciji Narodne skupštine, prema odredbama (n)ovog akta. Sledeće je pitanje odnosa skupštinske adrese (kao i njene prirode – kao „otpozdrava knezu“ ili kao „izraza potreba narodnih“) i prestone besede vladara. Najposle, autor izdvaja i prvo raspuštanje parlamenta i okolnosti koje su mu prethodile.

Mirković svaku od tih celina, bogatu citatima i propraćenu svojim objašnjenjima u pitanjima konteksta, zatvara posebnim zaključkom. Najpre, on prenosi Ristićev stav da pre 1869. godine u Srbiji nije bilo ustavne vlade (kao ni parlamentarne), da je pitanje pravne prirode skupštinske adrese u praksi ishodovalo „pad Vlade“ (iako ne u Parlamentu već njenu ostavku pred knezom) te da je obrnut slučaj – raspuštanja Skupštine od kneza – bio

uslovljen dvostrukom opstrukcijom njenog rada, prvo od liberalnih, a zatim i od konzervativnih poslanika, po različitim osnovama. Ti događaji, svaki od njih „prvi“ u našoj političkoj istoriji po svom pravu (programsko obraćanje po donetom ustavu, faktički pad Vlade u Skupštini i raspuštanje do tada „poslušne“ skupštine), posmatrani sintetski, pokazuju razvoj parlamentarnog režima *praeter legem*, ostavljajući široko polje budućim istraživačima da proučavaju njihove različite aspekte.

Sledeći rad ima zadatak da na osnovu više vanpravnih izvora (služeći se mahom memoaristikom) dočara mišljenja pojedinih političkih aktera (često po pozivu i pravnika) o donošenju Ustava i njegovom važenju – primeni normi u praksi. Uroš Stanković pominje oko dvadeset pet ličnosti čiji će zapisi biti relevantni za njegovu analizu, različitih stranačkih opredeljenja i struka. Premda je najviše prostora dao Nikoli Krstiću (kao pravniku), zastupljeni su (manje-više) i stavovi ostalih.

U uporednom prikazu mnjenja (ne)pouzdanih naratora, praćenom mnogim faktografskim i juridičkim ispravkama, koje često potiču iz primarnih izvora, autor prati najbitnije etape ustavotvornog procesa: od Nikoljskog odbora i pitanja pravovaljanosti tog pitanja u svetlu člana 14 Zakona o Narodnoj skupštini, krize u Državnom savetu povodom inicijative za donošenje Ustava, Duhovske skupštine te reakcija na njegovo donošenje u domaćim i stranim političkim krugovima.

Poslednji odeljak tog rada čine osvrti savremenika na česte primere loše državopravne prakse iz perioda važenja Ustava: odstupanja od pravila o prenosu vladarskih ovlašćenja, propisanih u članovima 9 i 10, zloupotreba vanredne zakonodavne procedure po članu 56 i vraćanje na snagu Ustava posle državnog udara kralja Aleksandra iz 1894. godine. Osim izvornog doprinosa, rad poseduje i pregledne kvalitete, upravo zbog autorovog pristupa temi.

Zbornik se završava radom o ustavnim nacrtima iz osamdesetih godina 19. veka, poteklim od dve vodeće političke opcije tih godina – Napredne i Radikalne stranke. Tanasije Marinković započinje svoju analizu osvrtnom na političke okolnosti koje pokreću pitanje promene ustava već sa prvom naprednjačkom vladom Milana Piroćanca, koja je smatra toliko značajnom da je proglašava za jedno od svojih programskih načela.

Nakon objašnjenja razloga neuspeha promene ustava, autor se fokusira na izlaganje osnovne sistematike naprednjačkog i radikalskog nacrtu ustava, dajući pregled njihovog sadržaja i pominjući neke osobito značajne članove. Kako sam napominje, dalji fokus rada nije detaljna komparativistička studija oba nacrtu već njihovo kratko poređenje sa svojim prethodnikom,

Namesničkim ustavom, koji je trebalo da zamene, te sa potonjim, Ustavom iz 1888. godine, na čiji su tekst na više mesta uticali. Ova ograda, ipak, delimično opravdava tako ambiciozan odabir teme.

Marinković upoređuje odredbe o sudijskoj nezavisnosti, pravima građana i sistemima vlasti, kao ugaonim kamenima ustavnog uređenja. U svima njima se vidi značajan pomak u odnosu na postojeću regulativu te stremljenje za onovremenim trendovima evropskog konstitucionalizma, pa čak i njihovo prevazilaženje. Zaključujući, autor notira da je uticaj tih nacrti na docniji ustav lako uočljiv, čak više na naprednjački negoli na radikalni nacrt.

Najposle, imajući u vidu brojna dela koja se bave Namesničkim ustavom, šta bi ovaj zbornik moglo da izdvoji kao posebno vredan čitalačke pažnje? On ne predstavlja sistemsko istraživanje koje obuhvata sve norme Ustava, poput kakvog komentara. Takođe, to nije sveobuhvatno delo političke istorije koje priča o nastanku Ustava niti o hronici državopravne prakse. Značaj ovog dela je u tome što korača putem kojim se ređe ide – autori biraju teme koje su nešto ređe privlačile pažnju naučne javnosti, bilo da se tiču donošenja, teksta normi ili „ustavnog života“, pri čemu jedan broj njih koristi neobjavljene i teže dostupne izvore, dajući svež pogled na složena pitanja Ustava kojim je Srbija stvarala svoj identitet ustavne (ograničene) monarhije. Krećući se njegovim stranicama, može se steći novo poštovanje za ustavni tekst, ne kao za razmeđu prethodnog i sledećeg već kao za nomotehničko dostignuće po svom pravu.

Njegov „umereni liberalizam“ je posejao seme za razvoj parlamentarne vlade, dok je njegov „preterani liberalizam“ odlučno isključio mogućnost vraćanja starih apsolutističkih težnji monarha i gorku borbu između zakonodavnih činilaca. Idealizovati ga, samo zbog prethodnog stanja ustavnog zakonodavstva, pogrešno je koliko i oduzimati mu vrednost pouzdanog saveznika nešto docnije vladarske samovolje. Ustav iz 1869. godine jeste predstavljao zavidno rešenje za Srbiju koja je, za njegovog važenja, doživela nekoliko istorijskih vododelnica, te ga tako, čini se, poimaju i autori zastupljeni u ovom zborniku. Kroki koji oni iscrtavaju u svojim radovima (manje ili više detaljan) može da posluži kao sjajan podsticaj za čitaoce, bez obzira na njihov profil, za dalje zanimanje Namesničkim ustavom, kojim je „Srbija postala na polju državnoga prava kovač svoje sreće“ (Ristić [1901] 2021, 187).

LITERATURA

- [1] Jovanović, Slobodan. [1926] 1990. *Vlada Milana Obrenovića*. Knjiga I. Beograd: BIGZ.
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- [3] Novaković, Stojan. 1912. *Dvadeset godina ustavne politike u Srbiji: 1883–1903*. Beograd: Knjižarnica S. B. Cvijanovića.
- [4] Popović, Dragoljub. 2021. *Constitutional history of Serbia*. Paderborn: Brill.
- [5] Ristić, Jovan. [1901] 2021. *Spoljašnji odnošaji Srbije novijega vremena, knjiga 3, 1868–1872*. Niš: Talija Izdavaštvo.
- [6] Stefanovski, Mirjana. 2016. *Postanak Namesničkog ustava*. Beograd: Pravni fakultet Univerziteta, Centar za izdavaštvo i informisanje.
- [7] Živanović, Živan. [1922] 2021. *Politička istorija Srbije u drugoj polovini devetnaestog veka. Knjiga I, Od Sveto-Andrejske skupštine do proglašenja nezavisnosti Srbije: 1858–1878*. Niš: Talija Izdavaštvo.

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2. apstrakt i ključne reči,
3. rukopis i spisak literature,
4. dodaci, tabele i slike.

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Naslovna strana rukopisa treba da sadrži sledeće podatke:

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- ime, prezime, godinu rođenja i afilijaciju svih autora,
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Tekstu prethodi apstrakt koji je strogo ograničen na 150 reči. Apstrakt ne sme da sadrži neodređene skraćenice ili reference.

Molimo vas da navedete pet ključnih reči koje su prikladne za indeksiranje.

Radovi na srpskom jeziku treba da sadrže apstrakt i ključne reči i na srpskom i na engleskom jeziku. U tom slučaju, apstrakt i ključne reči na engleskom jeziku treba da se nalaze iza spiska literature.

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- margine: 2,5 cm,
- font: Times New Roman,
- razmak između redova u glavnom tekstu: 1,5,
- razmak između redova u fusnotama: Easy,
- veličina slova u glavnom tekstu: 12 pt,
- veličina slova u fusnotama: 10 pt,
- numeracija stranica: arapski broj u donjem desnom uglu stranice.

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Evropska unija – EU,

The United Nations Commission on International Trade Law – UNCITRAL

Brojevi od jedan do devet pišu se slovima, veći brojevi pišu se ciframa. Datumi se pišu na sledeći način: 1. januar 2012; 2011–2012; tridesetih godina 20. veka.

Fusnote se koriste za objašnjenja, a ne za navođenje literature. Prosto navođenje mora da bude u glavnom tekstu, sa izuzetkom zakona i sudskih odluka.

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1.1.1. Prvo slovo veliko kurziv

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- Prema Miloševiću (2014, 224–234)...

- Rimski pravници su poznavali različite klasifikacije stvari (Milošević 2014, 224–234)

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- Prema Kociolu (Koziol 1997, 73–87)...
- O tome je opsežno pisao Kociol (Koziol 1997, 73–87).
- Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags- und Universitätsbuchhandlung.

Domaća dela se citiraju pismom kojim su štampana. U spisku literature delo štampano latinicom navodi se samo latinicom, a delo štampano ćirilicom navodi se ćirilicom i latinicom, pri čemu se latinična referenca stavlja u zagrade:

- Prema Miloševiću (2014, 347–352)...
- Milošević, Miroslav. 2014. *Rimsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu – Dosije studio. (Milošević, Miroslav. 2014. *Rimsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu – Dosije studio.)
- Vukadinović (Vukadinović 2015, 27) ističe da jemac ispunjava tuđu, a garant svoju obavezu.
- U literaturi se navodi (Vukadinović 2015, 27)...
- Vukadinović, Radovan. 5–6/2015. O pravnom regulisanju posla bankarske garancije u novom Građanskom zakoniku. *Pravni život* 64: 17–36.

Poželjno je da u citatima u tekstu bude naveden podatak o broju strane na kojoj se nalazi deo dela koje se citira.

Isto tako i / Isto / Kao i Konstantinović (1969, 125–127);

Prema Bartoš (1959, 89 fn. 100) – *tamo gde je fusnota 100 na 89. strani*;

Kao što je predložio Bartoš (1959, 88 i fn. 98) – *tamo gde fusnota 98 nije na 88. strani*.

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(videti, na primer, Bartoš 1959; Simović 1972)

(videti posebno Bakić 1959)

(Stanković, Orlić 2014)

Jedan autor

Citat u tekstu (T): Kao i Ilaj (Ely 1980, broj strane), tvrdimo da...

Navođenje u spisku literature (L): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

T: Isto kao i Avramović (2008, broj strane), tvrdimo da...

L: Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup*. Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu. (Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup*. Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu.)

T: Vasiljević (2007, broj strane),

L: Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu. (Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu.)

Dva autora

T: Kao što je ukazano (Daniels, Martin 1995, broj strane),

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

T: Kao što je pokazano (Stanković, Orlić 2014, broj strane),

L: Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo*. Beograd: Nomos. (Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo*. Beograd: Nomos.)

Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

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

Više od tri autora

T: Prema istraživanju koje je sproveo Turner 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 interkompanijskoppravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46. (Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskoppravni 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 (Švarn, Georgijev 2018) da...

L: Švarn, 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.

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L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

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L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilogima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilogima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

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