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Andreas SERAFIM, PhD*

REVISITING THE HILL OF PNYX: THE PHYSICAL, RHETORICAL, AND SOCIOCULTURAL CONTEXTS

This paper offers a holistic reconsideration and reexamination of what the transmitted texts say about the political and rhetorical processes on the hill of Pnyx in classical Athens. It has three specific aims: (1) to explore existing ancient literature references to the Pnyx as a physical and constitutional/political place; (2) to identify and discuss a wide range of aspects of rhetoric in action, or performance, in a suitable sample of symbouleutic (or political) speeches – specifically, the three Olynthiacs and the four Philippics of Demosthenes; and (3) to offer answers to the question about the how physical conditions and the architectural form of the Pnyx might have affected acoustics and delivery of speeches, and why the hill was chosen to be the location of the Athenian Assembly meetings.

Key words: *Pnyx. – Assembly. – Political speeches. – Performance. – Acoustics.*

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1. INTRODUCTION

The Pnyx is rightly considered the most important landmark of the mature phase of Athenian democracy.[1] Yet, despite intense interdisciplinary research, many questions remain unanswered. It is also notable that in classical scholarship references to the Pnyx are mostly concentrated in studies about its function within the system of Athenian democratic politics, and its legislative importance as the location of the meetings of the *ecclēsia*, the Assembly (see Hansen 1991, 128–129 for a succinct description of the physical construction of the Pnyx in a book that discusses Athenian democracy; Bicknell 1987, 51–92; Bicknell 1989, 83–100 on the constitutionalized character of political conventions on the Pnyx). A prominent exception is H.M. Hansen's full-scale study, entitled *The Athenian Ecclesia: A Collection of Articles 1976–1983* (Hansen 1983; also, Hansen 1985, 129–141; Hansen 1986, 143–153). Another striking common feature of most publications is that they are early (on archaeological evidence, following the excavations of the 1930s, and the function of the hill as the meeting place of the Athenian Assembly see Kourouniotes, Thompson 1932, 96ff.; Thompson 1936; and Thompson, Scranton 1943, 299ff.), leaving the question why there was no up-to-date interest in intriguing cultural aspects of the hill. Studies are also focused on technical aspects, e.g., how many Athenians were allowed to gather on the hill, and where and how they were seated in the auditorium (see Hansen 1976, 130–132; Hansen 1982, 241–249; and Hansen 1989, 129–153). The most influential, fully-fledged, and comprehensive study of several aspects of the Pnyx is *The Pnyx in the History of Athens*, by Forsén and Stanton. This volume contains chapters, specifically, on the archaeological construction of the hill, the shape and size of the place of the Assembly meetings, the date of its construction, and matters that

[1] Aristophanes, *Knights* 42: "We two have a master who's rustic in his bad temper, a bean-chewer, quick to be irritated — Demos of the Pnyx (*Δῆμος πυκνίτης* or *Δῆμος Πυγκίτης*), a peevish little hard-of-hearing old man"; translation: Sommerstein 1981, 15. The assumption of Sommerstein 1981, 146 that the reference may be to an individual, as in *Wasps* 98 ("And, by Zeus, if he sees scribbled on a door anywhere 'Pyrilampes' son of Demos is beautiful', he goes on and writes close beside it 'the voting-urn's funnel is beautiful'"; translation: Sommerstein 1983, 13), seems to be erroneous for two reasons: first, because in the whole of *Knights* the Orchestra represents the Pnyx in Athens; and second, because there is a reference to the Pnyx in relation to Demos, which corroborates the idea that the latter is a reference to the democratic body of citizens in classical Athens. The combination of two passages from Aeschines 3, *Against Ctesiphon*, leaves no doubt that the Pnyx and *ecclēsia* are used interchangeably: in §35, where a law is cited, specifying the crowning of the Athenians who contributed to the protection of the city on the site of the Pnyx, and §32, where it is mentioned that the crowning should take place in the *ecclēsia*.

underline its religious function in the Athenian *polis* (see Forsén, Stanton 1996). C. L. Johnstone's combination of textual investigation and field work on the acoustics of the Pnyx is also memorable in posing and answering (regrettably, not invariably in a fully satisfactory way) questions about the physical context of the Pnyx and the practical restraints this imposed on political speech-making (including the audibility of vocal delivery; on acoustics on the Pnyx see Johnstone 1996, 122–127; on performance in the Assembly see Johnstone 2001, 121–143; Johnstone and Graff 2018, 2–88; and Bers 2013, 27–40).

This paper has three interrelated aims, as per each of the main sections it comprises. The first is to explore the references that exist in ancient literature to the Pnyx as a physical and constitutional/political place; hence, the search for two specific words, *Πνύξ* and *ἐκκλησία*, was carried out, to compile an annotated compendium of references, which will help readers to find information and passages relating to the Pnyx. The second aim of this paper is to provide an analysis of rhetoric in action, i.e., performance, in a suitable sample of symbouleutic (or political) speeches – specifically, the three *Olynthiacs* and the four *Philippics* of Demosthenes. Beyond the most obvious aspect of performance, *hypocrisis*, i.e., vocalics and kinesics, two other aspects are considered – first, the means of establishing and facilitating the communicative relationship between the speaker and the audience, and, second, *ēthopoiia* and *pathos*. A comparison between forensic (court) and symbouleutic (Assembly on the Pnyx) performance is carried out, with the aim of drawing conclusions about the difference in rhetorical tactics between the two institutional contexts. The third and final aim of the paper is to offer some answers to two questions that are still largely under-researched and unanswered by researchers, exploiting the texts of ancient (Greco-Roman) literature and applying the knowledge of archaeoacoustics (a field that adopts theories and research tools from a wide range of disciplines such as archaeology, audio production, and sensory history). The first question concerns the physical conditions and architectural form of the place and how these affected the political and rhetorical mechanisms, specifically what the acoustics on the hill might have been like and whether they allowed speeches to be delivered to the whole audience of 6,000 Athenians who could gather on the Pnyx at once, or many times to rotating audiences. The other question concerns the sociocultural significance of the Pnyx, which has left the scholarly community wondering why it was chosen to be the location of the Athenian Assembly meetings.

2. TEXTUAL REFERENCES TO THE PNYX AND THE *ECCLĒSIA*

This section, using *The Diorisis Ancient Greek Corpus*, a digital collection of 820 ancient Greek texts (from Homer to the early 5th century AD), explores and presents passages that reference the Pnyx, and discusses both its political function as the nucleus of Athenian democracy in the 4th century and other practical issues (e.g., seating and buildings). Particularly examined is the use of two Greek words (in various cases): *Πνύξ* and *ἐκκλησία*. The references to the latter, discussed below, are those that strictly refer to the Pnyx as the meeting place of the Assembly in the 4th century BC. Surprisingly, there are only three references to the first term, while there are 104 to the second; but despite references to the *ecclēsia* evidently being more numerous than references to the Pnyx, the frequency is still low – the quotient of the number of references and the total number of words in the corpus of Attic speeches is ca. 0.05%.

The dearth of references cannot easily be explained; it presumably may be due to the self-evident character of the information that is conveyed by the two terms, i.e., every Athenian (and possibly even non-Athenian) knew that the *ecclēsia* was assembled on the Pnyx. The three references to the Pnyx are all in Aeschines' speeches. The only reference to the political function of the place can be found in 3.34: "You hear, fellow citizens, how the lawgiver commands that the man who is crowned by the people be proclaimed among the people, on the Pnyx, at a meeting of the assembly, 'and nowhere else.'" The mention of the Pnyx in 1.81 has nothing to do with the political function of the place, but rather concerns topography and residential matters,[2] while the mention in 1.82 refers to the reputation of the place. As such, this is discussed in the third section of this paper, which examines the sociocultural reasons why the Pnyx was used as the physical setting for the meetings of the Assembly.[3]

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[2] Aeschines 1.81: "The Senate of the Areopagus appeared before the people in accordance with the resolution that Timarchus had introduced in the matter of the dwelling-houses on the Pnyx. The member of the Areopagus who spoke was Autolycus, a man whose life has been good and pious, by Zeus and Apollo, and worthy of that body." Translations of texts in this paper are from LOEB Classical Library Editions, unless otherwise stated.

[3] Aeschines 1.82: "Now when in the course of his speech he declared that the Areopagus disapproved the proposition of Timarchus, and said, 'You must not be surprised, fellow citizens, if Timarchus is better acquainted than the Senate of the Areopagus with this lonely spot and the region of the Pnyx,' then you applauded and said Autolycus was right, for Timarchus was indeed acquainted with it."

References to the *ecclēsia* were made most frequently when it was necessary for the speaker to describe what had happened in the past and can be classified in three major categories. The first category consists of references to the Athenians, mainly with the purpose of castigating the unconstitutional behavior of the audience when, by means of uproar, they created impediments to the fully free expression of the speakers, or when the audience members let themselves be beguiled by mere rhetoric, rather than rational arguments; this kind of references could be labeled as *internal*. The second category of references contains those that indicate the presence of non-Athenians in the *ecclēsia*, or about matters that regulate or determine the relation between the Athenians and groups of foreigners; this kind of references could be labeled as *external*. The third category includes what could be labeled as *neutral* references, i.e., those that simply convey information about the political gathering of the Assembly.

The following is an annotated list of the references to the political functioning of the Pnyx.[4]

[4] It is important to note, at this point, that not all attestations of the word *ecclēsia* refer to various functions of the Athenian political decision-making body. Those mentioned in the annotated compendium provided in this paper are those that relate to the political space of the Pnyx.

Table 1 - An annotated list of the references to the political functioning of the Pnyx

Internal references	External references	Neutral references
Demosthenes 8.32, in a plea for the unimpeded right of speakers to express themselves at the meetings of the *ecclēsia* (the so-called *parrhēsia*),[5] Demades 1.54[6] and 9.1, about foreign threats that are discussed;[7] Demosthenes 8.33, for the benign behavior that people should exhibit in the Assembly, most likely indicating that the *ccle* used to boo or shush the speaker,[8] and Aeschines 2.72 on ways of manipulating the audience in the Assembly; [9]	Demosthenes 7.19, Aeschines 1.180, 2.53, 3.68, Lycurgus 13.8, with references to the presence of foreign ambassadors at the Assembly; Isocrates 8.59, on the relationship between the Athenians and foreigners.[16]	Aeschines 1.110, 121, 2.63, 65–67, 82–85, 95, 158, 3.69,[17] 71 (2 references), 125–126, 146, 149, 175, 224, on the presence of people from Athens and other Greek cities in the Assembly,[18] 251, Andocides 1.11, 82, Dinarchus 1.42, 99, Hyperides 1.3, 3.32, Isaeus 1.38, Lycurgus 1.16, Lysias 12.71–72, 75–76, 13.32, 55, 19.49, 28.9;

[5] Demosthenes 8.32: "But as to the reason for this—and in Heaven's name, when I am pleading for your best interests, allow me to speak freely—some of our politicians have been training you to be threatening and intractable in the meetings of the Assembly, but in preparing for war, careless and contemptible."

[6] Demades 1.54: "War, like a cloud, was threatening Europe from every quarter, suppressing my right to speak my mind in the assembly and taking away all power of free and noble utterance."

[7] Demosthenes 9.1: "Many speeches are delivered, men of Athens, at almost every meeting of the Assembly, about the wrongs that Philip has been committing, ever since the conclusion of peace, not only against you but also against the other states."

[8] Demosthenes 8.33: "For it ought to have been the reverse, men of Athens; all your politicians should have trained you to be gentle and humane in the Assembly, for there you are dealing with rights that concern yourselves and your allies, but in preparing for war they should have made you threatening and intractable, because there you are pitted against your enemies and rivals."

[9] Aeschines 2.72: "And Philip from his base in Macedonia was no longer contending with us for Amphipolis, but already for Lemnos, Imbros, and Scyros, our own possessions, while our citizens were abandoning the Chersonese, the undisputed property of Athens. And the special meetings of the assembly which you were forced to hold, in fear and tumult, were more in number than the regular meetings."

[16] Isocrates 8.59: "But now matters have taken such a turn that the Thebans are saving us and we them, and they are procuring allies for us and we for them. So that if we were sensible, we should supply each other with money for our general assemblies; for the oftener we meet to deliberate the more do we promote the success of our rivals."

[17] Aeschines 3.69: "When now, fellow citizens, the Dionysia were past and the assemblies took place, in the first assembly a resolution of the synod of the allies was read, the substance of which I will give briefly before having it read to you."

[18] Aeschines 3.224: "When I convicted you of this in the presence of all Athens and charged you with being the murderer of your host, you did not deny the impious crime, but gave an answer that called forth a cry of protest from the citizens and all the foreigners who were standing about the assembly."

Internal references	External references	Neutral references
Aeschines 1.178, Demosthenes 8.34, 9.4, and Isocrates 8.52, where instructions are given to audience members about how to listen to the essence of arguments and the gist of a case, not to flattery or unreasonable thinking that deprives them of the right to make the best decision; Aeschines 3.2, on the proper constitutional way of functioning of the *ecclēsia*; and Aeschines 2.60–61, 3.24, 27, 32, 35 (2 references), 39, 43–45, 47–48, 204 (2 references), 211 on the constitutional uses of the place, e.g., for the election of magistrates, Aeschines 1.22 and Dinarchus 2.16 on the importance of the proceedings in the Assembly;[10] Demosthenes 9.6 on the malpractice of rhetoric in the Assembly, when speakers are accused of propagating the arguments of foreigners;[11] Aeschines 1.26,[12] 1.33 (2 references), 1.86, 2.71, 2.92 (on falsifying the accounts about the meetings of the		Aeschines 1.35 (2 references), 1.81, 3.95 on procedural issues, such as speech-making by others, not the speaker himself (these are not simply references that convey information, but have an ironic dimension, which is, however, only implicit and indirect), Andocides 4.14;

[10] Aeschines 1.22: "For when the lawgiver had finished with these laws, he next turned to the question of the proper manner of conducting our deliberations concerning the most important matters, when we are met in public assembly." Dinarchus 2.16: "Like the early lawgivers, Athenians, who made laws to deal with those addressing your ancestors in the Assembly, you too should try, by your behavior as listeners, to make the speakers who come before you better. What was the attitude of the lawgivers to these men? In the first place, at every sitting of the Assembly they publicly proclaimed curses against wrongdoers, calling down destruction on any who, after accepting bribes, made speeches or proposals upon state affairs, and to that class Aristogiton now belongs."

[11] Demosthenes 9.6: "If, then, we were all agreed that Philip is at war with Athens and is violating the peace, the only task of a speaker would be to come forward and recommend the safest and easiest method of defence; but since some of you are in such a strange mood that, though Philip is seizing cities, and retaining many of your possessions, and inflicting injury on everybody, you tolerate some speakers who repeatedly assert in the Assembly that the real aggressors are certain of ourselves, we must be on our guard and set this matter right."

[12] Aeschines 1.26: "See now, fellow citizens, how unlike to Timarchus were Solon and those men of old whom I mentioned a moment ago. They were too modest to speak with the arm outside the cloak, but this man not long ago, yes, only the other day, in an assembly of the people threw off his cloak and leaped about like a gymnast, half naked, his body so reduced and befouled through drunkenness and lewdness that right-minded men, at least, covered their eyes, being ashamed for the city, that we should let such men as he be our advisers."

Internal references	External references	Neutral references
Assembly),[13] 3.67, 3.73; Dinarchus 1.46, on other forms of malfunctioning in, and of, the Assembly (e.g., the improper nonverbal behavior of orators the unconstitutional election of the presiding officer in the Assembly, as in Aeschines 1.26 and 33); Isocrates 8.25, on how to keep peace;[14] Lysias 13.17, on the meeting of the Assembly examining a peace treaty; [15] Aeschines 2.145, Dinarchus 1.99, Isocrates 8.129–130 and 12.13, with references to two kinds of menace against Athenian democracy, i.e., sycophancy and the exaggerated love the Athenians have for participation in trials and Assembly meetings.		Isocrates 7.68 on economic examination of a debt payment.[19]

Source: Author

[13] Aeschines 2.92: "And now do you imagine that there is one word of truth in his account of what was done in Macedonia or of what was done in Thessaly, when he gives the lie to the senate-house and the public archives and falsifies the date and the meetings of the assembly?"

[14] Isocrates 8.25: "But I think we should not go forth from this assembly, having merely adopted resolutions in favor of the peace, without also taking counsel how we shall keep it […]." Lysias 13.17: "Theramenes and the others who were intriguing against you took note of the fact that there were some men proposing to prevent the subversion of the democracy and to make a stand for the defence of freedom; so they resolved, before the Assembly met to consider the peace, to involve these men first in calumnious prosecutions, in order that there should be none to take up the defence of your people at the meeting. Now, let me tell you the scheme that they laid."

[15] Lysias 13.17: "Theramenes and the others who were intriguing against you took note of the fact that there were some men proposing to prevent the subversion of the democracy and to make a stand for the defence of freedom; so they resolved, before the Assembly met to consider the peace, to involve these men first in calumnious prosecutions, in order that there should be none to take up the defence of your people at the meeting. Now, let me tell you the scheme that they laid."

[19] Isocrates 7.68: "But the best and strongest proof of the fairness of the people is that, although those who had remained in the city had borrowed a hundred talents from the Lacedaemonians with which to prosecute the siege of those who occupied the Piraeus, yet later when an assembly of the people was held to consider the payment of the debt, and when many insisted that it was only fair that the claims of the Lacedaemonians should be settled, not by those who had suffered the siege, but by those who had borrowed the money, nevertheless the people voted to pay the debt out of the public treasury."

3. RHETORIC IN ACTION: PERFORMANCE IN DEMOSTHENES' *OLYNTHIACS* AND *PHILIPPICS*

3.1. Performing in the Court and the Assembly: Convergences and Divergences

This section aims to examine "rhetoric in action", a term that is comparable to and almost synonymous with "performance": both describe how rhetorical strategies were used by speakers in public speaking forums in antiquity, with the aim of communicating effectively with the audience and winning it over cognitively – both in terms of reason and emotion. Seven high-profile symbouleutic (political) speeches of Demosthenes (the three *Olynthiacs* and the four *Philippics*)[20] are selected for a case study about what were the features of rhetoric in the Assembly and how they were used for agonistic political processes, to achieve the principal desired outcome – persuasion. Three categories of rhetorical stratagems are examined: those used to establish a relationship between the speaker and the audience, enabling the former to win over the latter; techniques of *ēthopoiia* (presentation of the character and general behavior of individuals and collectives, e.g., the Athenians or foreign ethnic/cultural communities) that rouse emotions (*pathopoiia*); and *hypocrisis*, i.e., the clues in the text that point to the use of vocalics and kinesics of all sorts.

The recently published book *Attic Oratory and Performance* (Serafim 2017) offers a full theoretical reinterpretation of performance, how it was practically applied to the ancient forensic oratorical context, and what impact this may have had on the trial audience. By examining the same aspects of performance that have been examined in recent studies, it is the aim of this paper to reconstruct a picture of the convergences and divergences between forensic and symbouleutic performance – a topic that

[20] A note on the selection of the seven specific speeches is necessary at this point. The decision to discuss these speeches was made for two reasons. The first is that these speeches were given at crucial points in Athenian political and military history, when the escalation in the relationship between Athens and Macedon was at its peak, requiring urgent action by the former to diminish the strength of the latter and impede its expansion into mainland Greece. The second reason for exploring these seven symbouleutic speeches was that they are by Demosthenes, whose speeches 18 and 19 have recently been a topic of updated discussion in Serafim (2017). Given that in this chapter, performance in forensic and symbouleutic oratory are compared, it was necessary to choose speeches by the same author, since arguably performance differs from author to author. Oratorical performance is neither simply a matter of place (e.g., law court or Assembly) nor is it only tailored to the expectations of the occasion (e.g., the need for military action), but it is also determined by the distinctive personal and rhetorical style of the speaker.

remains, in classical scholarship, an essential research enquiry (for attempts to examine oratorical performance, centered on forensic speeches, see Hall 1995, 39–58; 2006, 353–392; Serafim 2017). Johnstone and Bers argue that the performative style of speakers (with special reference to *hypocrisis*) was vastly determined by the architectural and topographical development of the Pnyx, and that for this reason performance of symbouleutic oratory was significantly different from that of forensic oratory (see Johnstone 1996, 128–133; Bers 2013, 27–40).[21] I argue for the opposite: that, despite some differences between rhetoric in forensic and symbouleutic oratory, mainly in style and frequency, the similarities are noteworthy, effectively implying that persuasion was uniform in public speaking settings, despite the variations in the character and etiquette of the institutional contexts in Athens. The notable difference in the approach to and analysis of performance and persuasion in forensic and symbouleutic oratory between this paper and the work of Bers (2013, 34, 36) is perhaps due to the approach adopted by the latter: it bases its conclusions about the relationship between symbouleutic and political oratory largely on rhetorical theory (despite occasional glimpses into the use of language, e.g., the particles *οὖν*, *τοίνυν*, and *τε...τε*). On the other hand, I explore symbouleutic passages themselves to discern linguistic, stylistic, and rhetorical patterns, and compare these aspects of rhetoric in action/performance with those that can be found in Attic forensic oratory.

Before proceeding to the core of this research inquiry into the texts themselves, it is worth mentioning and shedding light on the notion of performance. Performance is, as Bauman (1990, 41) suggests, "an aesthetically marked, heightened form of communication, framed in a special way, and put on display for an audience," or, as Taplin (1999, 33) argues, "an occasion on which appropriate individuals enact events, in accordance with certain recognized conventions, in the sight and hearing of a larger social group, and in some sense for their benefit." This "benefit" is strong in political speech-making on the Pnyx, since all the meetings evidently were regarding important political, military, and economic matters, and discussions determined the decisions of the Athenians, which had the greatest impact on the *polis*. The following definition of the notion of performance adds another dimension that enhances the "benefit" that Taplin mentions in his book: "performance is the [kind of] communication between a performer and an audience, which is informed by the etiquette of a specific occasion and is based on the interactive communication, explicit or otherwise, between the transmitter of a message and its receiver" (Serafim 2017, 16–17). Benefit can be obtained from the communication between the

[21] On the three phases of the construction of Pnyx, see Section 4.1. below.

speaker (performer) and the audience, especially inasmuch as the audience is not a passive recipient of stimuli but rather an active co-producer of them via *thorubos* (the vocal or nonverbal reaction, such as booing or applauding the speaker (see Bers 1985, 1–15; Thomas 2011, 175–185).[22] The reactions of the audience, which are sometimes described in the speeches themselves (such as, e.g., in Demosthenes 18.52),[23] regardless of whether accurate or not, convey to us the opinion of the wider public about individuals and actions alike (on fake news in oratory, see: Worthington 2020, 15–31; Serafim, forthcoming).[24] Therefore, the available texts reveal a lot about the mindset and practice of ancient civic and cultural communities.

The similarities that have been argued above exist among the seven symbouleutic speeches (of Demosthenes), which were delivered in the Assembly on the Pnyx and law court speeches, cover all three broad areas of features of rhetoric in action that this paper examines. The techniques that Demosthenes uses to establish a channel of communication with the audience, in both the *Olynthiacs* and the *Philippics*, are addressed to the audience specifically: the presentation of the speaker in the role of the good advisor to the Athenian *dēmos*, criticism of the Athenians for inertness and indecisiveness, and the importance of the proverbial synergy between divine will and human determination. The techniques of *ēthopoiia* in forensic and in symbouleutic speeches also share commonalities in that in both oratorical genres the speaker constructs and deconstructs the *ēthos* of the Athenians and his/their opponents, depending on the circumstances and the purposes he aims to serve. *Hypocrisis*, finally, is indicated in the transmitted texts by

[22] Cf. Aristophanes, *Acharnians* 40–42: "Oh! Athens! Athens! As for myself, I do not fail to come here before all the rest, and now, finding myself alone, I groan, yawn, stretch, break wind, and know not what to do." It is of course necessary to say that there were no provisions for direct and unimpeded conversation between the speaker and the audience in the law court and perhaps possibly in the Assembly on the Pnyx, but the reaction of the audience, which revealed its knowledge of and attitude towards the matter of discussion, was important in determining or altering the arguments of the speakers and their way of communicating them to the audience.

[23] Demosthenes 18.52: "But it is not so. How could it be? Far from it! I call you Philip's hireling of yesterday, and Alexander's hireling of today, and so does every man in this Assembly. If you doubt my word, ask them; or rather I will ask them myself. Come, men of Athens, what do you think? Is Aeschines Alexander's hireling, or Alexander's friend? You hear what they say."

[24] We can say, as a matter of principle, that the transmitted oratorical speeches are not "objective" accounts of historical reality or actions, but rather a biased means by which the speakers present (part of the truth about) what happened. In other words, fake news is not simply occasional in speeches, but an inherent feature of the speeches themselves.

figures of speech (such as repetition); the accumulation of questions and/or their elaborate use (e.g., when questions are asked without the need for or expectation of answers, or in the form of *hypophora*, when the speaker answers his own questions) to make the speech more forcible; direct speech; use of strong moralistic terms and other expressions that denote emotions; and references to religion, which are accompanied, at least according to ancient sources, by gestural and vocal ploys.

The similarities between the law court and the Assembly indicate that, when persuasion is the purpose and desired outcome of political or public speaking processes, the techniques employed do not vary considerably. The setting that accommodates speech-making, the specific occasion to which an oration is tailored, and institutional processes, i.e., what happens in the settings of forensic, symbouleutic, and epideictic orations, determine the use of argumentative and stylistic modes (see Serafim 2021, especially Chapters 1 and 2). This conclusion about the patterns of using religious discourse is in full alignment with the theory of New Institutionalism, according to which different institutions have different "logics of appropriateness" that condition the ways in which discourses interact and affect society. The findings of the present paper, however, indicate that, when it comes to persuasion, the difference between forensic and symbouleutic oratorical texts and public speaking contexts does not generate significant divergences, despite what scholars argue about the differences between other generic oratorical dichotomies, i.e., public and private cases (on how appeals to emotion are made in speeches and how other rhetorical techniques are used, see Rubinstein 2004, 187–203; 2005, 129–145).

The only considerable identified divergence concerns the use of tragic and comic markers, i.e., themes, language, and imagery that draw on ancient drama, mostly for *ēthopoiia*, the depiction of characters. The lack of such techniques in symbouleutic speeches is easily discernible. In the seven Demosthenic speeches examined in this paper, the only identified passage that may, arguably, have some affinities with tragedy is in Demosthenes 2.18 (the *Second Olynthiac*), where Philip is told to put aside the soldiers who prove themselves skillful and talented on the battlefield – because they overshadowed him.[25] This is reminiscent of the behavior of tyrants, as presented in tragedy, who, being suspicious of their (apparent) allies, do not

[25] Demosthenes 2.18: "If there is anyone among them who can be described as experienced in war and battle, I was told that Philip from jealousy keeps all such in the background, because he wants to have the credit himself of every action, among his many faults being an insatiable ambition. Any fairly decent or honest man, who cannot stomach the licentiousness of his daily life, the drunkenness and the lewd dancing, is pushed aside as of no account."

hesitate to put them aside or even kill them (e.g., the depiction of Creon in *Antigone*, *Medea*, and *Oedipus at Colonus*). But this is merely a intuition, as there is nothing in the text itself – no specific word, for example, as we have in forensic speeches – that points unambiguously to tragedy (on the use of language, themes, and imagery that have implications for or strong affinities with tragedy in forensic speeches, see Serafim 2017, 99–105). After all, the depiction of tyrants as suspicious and cruel toward their allies is also made in non-dramatic works (cf. Herodotus 3.39 and Polyaenus, *Στρατηγήματα* 1.23, where Polycrates is depicted as having obtained power unlawfully and killed his associates; and Periander in Herodotus 3.49, 5.92, who killed his wife).

Demosthenes 2.18 is the only section of the seven speeches that vaguely resembles a theme that appears in and is thematized by tragedy. It has been argued – and rightly so – that the law courts and the Assembly share significant features, given the politicized nature of trials that are, at times, about important political matters, as are the meetings in the Assembly. As argued elsewhere, "often, it was the synergy between forensic rhetoric and political momentum that determined the outcome of trials" (Serafim 2021, 68). The key suggested for answering the intriguing question about why there is a significant lack of dramatic patterns in symbouleutic oratory (at least in the seven speeches of Demosthenes examined in this paper) is that histrionic and theater-related techniques may have been deemed indecorous and inappropriate when there were urgent matters of discussion and decisions to be made, which would have benefited or harmed the *polis* as a whole, rather than a single individual. Speakers in trials – even in those that had to do with political affairs, both within the city and in the Hellenic world in general – had the convenience of discussing the past without the pressure of persuading the judges to make decisions that would affect the historical present of the entire city. One can be as elaborate and sophisticated as one likes in articulating arguments in a way that appears decorous, proper, and potentially persuasive, when there is time to do so, but it is necessary to be to the point, without using theatricalized ornaments, when the decisions one is convincing the audience to make will instantly affect the entire civic community. Knowing one's audience and being specific, clever, and effective in using rhetorical strategies for persuasion, but not diverting from the core political, military, and moral argumentation is key when fellow citizens need to urgently make up their minds and pass their verdict. Carefully targeted, not "literary" and thus also a bit vague, arguments are necessary in times of political and military crises, such as those at the center of the seven speeches

of Demosthenes explored in this paper.[26] One of the most notorious features of the forensic speeches of Demosthenes, which leaves him vulnerable to the accusation of insincerity, especially speeches 18 and 19, is the extensive use of probability arguments and the overelaboration of rhetoric, not least the use of theatrical quotations and dramatic patterns for the presentation of his character and that of Aeschines.

The following sections discuss passages that show how rhetoric was set in action in the Assembly to satisfy persuasive ends. Emphasis is placed on two levels: the *macroscopic* (the overarching), i.e., how the speakers try to communicate with and engage the audience, and what their purpose is in each case; and the *microscopic*, examining the pragmatic features of the text (e.g., language, religious discourse, issues of morality), which reflect the socio-political and cultural context of the time when the speech was given and indicate the beliefs, customs, and general mindset of the Athenians.

3.1.1. Speaker–Audience

It is reasonable expect – at least from a modern standpoint – that the speaker, whether at a political convention, other occasions for public speaking, or even in the private company of friends, will try to win over the audience through cajoling, establishing in them a sense of self-value and self-importance, in order to indicate how much he supports and admires them and how many values they all share within the group. Sustaining groups to which the speaker and the audience both belong is an effective way of swaying the decision-making body to accept the speaker's propositions and arguments. As Burke (1969, 54–55) argues, rhetoric can generate unity (which presupposes exclusion); it focuses on appealing to core groups and defining oneself against others. A speaker gives signals to the audience that indicate that his "characteristics" are the same as or similar to those of the audience, thereby affirming a shared community.

Of all the means that Demosthenes uses in the political meetings of the Assembly, the most puzzling, yet intriguing, is the criticism that he hurls at the Athenians regarding their inaction and indecision. It is undoubtedly risky

[26] Cf. Dionysius of Halicarnassus, *Isaeus* 4, on the claim that the process of construction of Demosthenes' speeches aroused suspicion in people. Dionysius refers to Pythias' allegation that the speeches of Demosthenes, like those of his teacher Isaeus, were generally suspected of chicanery and deception "because of their great rhetorical skill" (4.23–24: *τῆς πολλῆς ἐπιτεχνήσεως*). Plutarch, *Demosthenes* 8.4–6 refers to Pythias' barbed comments on Demosthenes' speeches as having the "smell of lamp" because he prepares them in advance.

to accuse the members of the decision-making audience of not being worthy of their ancestral glory and of being unable to defend the *polis* and promote its best interests because they cannot make up their minds about the actions that should be undertaken. But the Pnyx is not called the cradle of democracy for nothing: the speakers had *parrhēsia*, the freedom and determination to express themselves without restraint and at any cost to them as politicians; this is a diachronically praiseworthy virtue not only of speakers but also of all citizens who might want to prove themselves useful to their country and fellows. I do not argue that Athenian (what is erroneously called Greek) democracy was perfect: it evidently was not. It was marred by exclusion (e.g. of women, slaves, and metics), socio-economic discrepancies that affected the right of some people to speak (those who could not afford to pay for the services of a speechwriter did not have any chance of preparing and delivering an effective oration in court, let alone winning a case), procedural malfunctions and undemocratic deliberations described and complained about by the speakers themselves (e.g., Demosthenes in 4.29).[27] Rhetoric was misused in the Athenian forums of public speaking for deceiving or misleading the audience and distorting the truth. Yet, the orators on the Pnyx showed integrity, decency, and sincerity whenever it came to matters that concerned the *polis*. This is perhaps because their own lives were not in immediate danger that they had the license to speak freely and criticize the audience for what they thought was not right for the city.[28]

In the Pnyx orations that are examined in this paper, Demosthenes steadily accuses the Athenians of inaction. Examples of this accusation can be found in 1.8, 9–11, 14–15, 19–20; 4.2, 8; 9.5; and 10.1, 6, 8–9, 20, 29. There is, unsurprisingly, yet also interestingly, an incessant play between the notions of inaction and action, and indecision and decisiveness. Demosthenes says, specifically, that the Athenians are slow in making decisions and taking action (if they ever do so), while it is decisive communities (and individuals) who see themselves as benefitting from the gods and prospering. A good example of this line of criticism can be found in 2.20:

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[27] Demosthenes 4.29: "Your habit, then, is not to listen until, as now, the events themselves are upon you, and not to discuss any question at your leisure but whenever Philip makes his preparations, you neglect the chance of doing the same, and you are too remiss to make counter-preparations; and if anyone speaks out, you drive him from the platform, but when you learn of the loss of this place or the siege of that, then you pay attention and begin to prepare."

[28] Criticism of the audience also happened in the law court, but the frequency at which such tactics were used in the Assembly is significant.

> καίτοι ταῦτα, καὶ εἰ μικρά τις ἠγεῖται, μεγάλ', ὦ ἄνδρες Ἀθηναῖοι, δείγματα τῆς ἐκείνου γνώμης καὶ κακοδαιμονίας ἐστὶ τοῖς εὖ φρονοῦσιν. ἀλλ', οἶμαι, νῦν μὲν ἐπισκοτεῖ τούτοις τὸ κατορθοῦν: αἱ γὰρ εὐπραξίαι δειναὶ συγκρύψαι τὰ τοιαῦτ' ὀνείδη: εἰ δέ τι πταίσει, τότ' ἀκριβῶς αὐτοῦ ταῦτ' ἐξετασθήσεται. δοκεῖ δ' ἔμοιγ', ὦ ἄνδρες Ἀθηναῖοι, δείξειν οὐκ εἰς μακράν, **ἂν οἵ τε θεοὶ θέλωσι καὶ ὑμεῖς βούλησθε.**
>
> These are perhaps trivial things, and yet, Athenians, to wise men they afford an important proof of the infatuation of his character. For the present, however, his prosperity throws all this into the shade (for success is apt to cover a multitude of faults); but if he trips, then we shall know all about his vices. And it seems to me, Athenians, **that we shall not have to wait long for the exposure, if heaven wills and you so resolve** (emphasis by the author).

The speaker claims that the success of Philip is not due to his ability, but to the supineness of the Athenians. But if Demosthenes' fellows take decisive action and Philip fails, the entire Hellenic world will realize how weak the king of Macedon truly is. By mingling divine will with human determination in stating that together they make things happen in human (political and military) history, Demosthenes underlines the value of self-initiative, while also reminding his fellows of the cultural belief that the gods (and *tychē*) intervene in human affairs, and that prosperity is the result of the synergy between them and people (whether individuals or communities).[29] Beyond the speaker himself, who, a few paragraphs later, in 2.23, repeats that "one who is himself idle cannot possibly call upon his friends, much less upon the gods, to work for him," other sources also underline the synergy between the gods and humans as the determining factor of progress; cf. Aeschylus (fr. 395) notes, "*φιλεῖ δὲ τῷ κάμνοντι συσπεύδειν θεός*" ("god loves to aid the man who toils"); Sophocles fr. 407: "*οὐκ ἔστι τοῖς μὴ δρῶσι σύμμαχος τύχη*" ("good luck never accompanies those who do not work"). Aesop (6th century BC) also underlines the significance of action in his notable phrase "*σὺν Ἀθηνᾷ καὶ χεῖρα κίνει*" ("along with Athena, move also your hand") (*Fables*

[29] References to the belief that the gods and fortune intervene in human affairs: for Eubulides' prayer to the gods that a son might be born to him as a daughter had been see *Against Macartatus* 12, for rituals devoted to specific gods in order for them to issue a divine portent and send good fortune see §66). References to the belief that individuals are attached to ill fortune for the misfortunes that befell the Athenians because of Theocrines, see *Against Nicostratus* 7; *Against Theocrines* 60. On *tychē* in particular, see Demosthenes 1.1, 3, 10–11.

30: *Shipwrecker*; cf. *Proverbs* 36). Demosthenes, perhaps capitalizing on these established cultural patterns, many times in his symbouleutic speeches (as indeed in 2.1)[30] points out that the gods (and *tychē*, as in 4.12)[31] favor the city of Athens.

A question that may readily occur to modern readers of Demosthenes is why in some parts of his speeches he presents Philip's success as being fragile, while mentioning in others (as in 4.42 and 10.23)[32] that it is stable because it is the admirable result of his steadfast determination and hyperpolitical and skillful military action. This is because the speaker has different purposes to serve at different points in his speech. The central argument remains the same throughout his three *Olynthiacs* and four *Philippics*: Philip is exploiting the inactivity of the Athenians – and he has the gods on his side for this very reason. If the Athenians change course, Philip's luck will, almost Surely, vanish and be overturned; in Demosthenes' words, "[w]herever, I believe, we send out a force composed partly or wholly of our citizens, there the gods are gracious and fortune fights on our side."

A clearer example of Demosthenes' claim about the instability of Philip's power can be found in 4.8:

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[30] Demosthenes 2.1: "On many occasions, men of Athens, one may, I think, recognize the manifest favour of heaven towards our city, and not least at the present crisis. That Philip has found men willing to fight him, situated on his frontiers and possessed of considerable power, above all so determined that they regard any accommodation with him as both delusive and fatal to their own country— this has all the appearance of a superhuman, a divine beneficence."

[31] Demosthenes 4.12: "Nor is this all. If anything happened to him, or if Fortune, which always cares for us better than we care for ourselves, should bring that result about, remember that you must be on the spot if you want to take advantage of the general confusion and to control the situation at your pleasure; but in your present condition you would be unable, even if the opportunity offered, to take over Amphipolis, having neither a force nor a policy ready to hand."

[32] Demosthenes 4.42: "It seems to me, Athenians, as if some god, out of very shame for the conduct of our city, had inspired Philip with this activity. For if he did nothing more but were willing to rest satisfied with what he has already captured and subdued, I believe some of you would be quite content with what must bring the deepest disgrace upon us and brand us as a nation of cowards. But by always attempting something new, always grasping at more power, he may possibly rouse even you, if you have not utterly abandoned hope." 2.23: "No wonder that Philip, sharing himself in the toils of the campaign, present at every action, neglecting no chance and wasting no season, gets the better of us, while we procrastinate and pass resolutions and ask questions. I cannot wonder at this: the contrary would rather surprise me, that we, performing no single duty of a combatant, should overcome the man who fulfils them all."

> **μὴ** γὰρ ὡς θεῷ **νομίζετ**᾽ ἐκείνῳ τὰ παρόντα πεπηγέναι πράγματ᾽ ἀθάνατα, ἀλλὰ καὶ *μισεῖ* τις ἐκεῖνον καὶ *δέδιεν*, ὦ ἄνδρες Ἀθηναῖοι, καὶ *φθονεῖ*, καὶ τῶν πάνυ νῦν δοκούντων οἰκείως ἔχειν: καὶ ἅπανθ᾽ ὅσα περ κάν ἄλλοις τισὶν ἀνθρώποις ἔνι, ταῦτα κάν τοῖς μετ᾽ ἐκείνου χρὴ νομίζειν ἐνεῖναι. Κατέπτηχε μέντοι πάντα ταῦτα νῦν, οὐκ ἔχοντ᾽ ἀποστροφὴν διὰ τὴν ὑμετέραν βραδυτῆτα καὶ ῥᾳθυμίαν: ἣν ἀποθέσθαι φημὶ δεῖν ἤδη.
>
> **Do not believe** that his present power is fixed and unchangeable like that of a god. No, men of Athens; he is a mark for the *hatred and fear and envy* even of those who now seem devoted to him. One must assume that even his adherents are subject to the same passions as any other men. At present, however, all these feelings are repressed and have no outlet, thanks to your indolence and apathy, which I urge you to throw off at once (emphasis by the author).

Apostrophizing the Athenians directly, Demosthenes claims that Philip's power conceals his great weakness, that he is isolated from the rest of the Macedonians, a situation that is in turn caused by his high-handedness, as indicated in the text by three strongly emotional verbs: Philip is accused of hating (*μισεῖ*), fearing (*δέδιεν*), and envying (*φθονεῖ*). It is notable that the speech in 4.8 starts with an imperative, which issues a forceful and prompt exhortation to the audience to realize that Philip's power is not as stable as that of the gods. Present-stem, or *imperfective/durative*, imperatives denote that the order, i.e., the request of the speaker to the addressees, is constant, continuous, and repeating; "[this] is the obvious choice for an imperative when there can be no doubt as to *what* action the person addressed is supposed to be taking – whether 1) because this action has been mentioned or implied earlier or 2) because he is already performing it – and the imperative serves to ask him or her either to continue or stop doing so" (Sicking 1991, 157, emphasis in original). Imperatives, as in the context of 4.8, do not have an abrasive, aggressive, or impolite character or force, but they do aim to instill forcibly in the mind of the audience members the need to take immediate action (see Serafim 2021, 388–417). The first part of the text in 4.8 links well to the last part: "do not believe Philip's power is stable," Demosthenes asks the Athenians, and "take action against him" ("*βραδυτῆτα*

καὶ ῥᾳθυμίαν ἀποθέσθαι"). Imperatives that urge actions are regularly used both in forensic and in symbouleutic orations (as in 1.25 and 4.14; for more on imperatives in symbouleutic orations see Serafim 2022).[33]

An interesting feature of Demosthenes 2.20 is the use of the civic address, *ὦ ἄνδρες Ἀθηναῖοι*. It has been argued that any speaker in Athens had at his disposal three stock formulas of address: in addition to the civic address, he also had the judicial address (*ὦ ἄνδρες δικασταί*) and the descriptive one (*ὦ ἄνδρες*). And however reasonable and expected the use of the civic address in political orations may be, it is also important to underline the persuasive role this pattern serves by reinforcing the belief in the Athenians that their decision is important for the entire city, and that they should, therefore, cast their vote responsibly (on addresses to the audience see Martin 2006, 75–88; Serafim 2017, 26–41; 2021, 71–98). The speaker thinks that he has an important message to convey to his audience, as indeed indicated at the beginning and end of 2.20, where he states emphatically the need for the Athenians to act, so that they would have the support of the gods. The use of the civic address in this context makes it abundantly clear that the audience, as members of the city, should take immediate and decisive action. Because the addresses have this important message to communicate to the audience, they are used heavily in all seven speeches that are explored in this paper, and they occur evenly, i.e., from exordium to peroration: *Olynthiac 1*, 14 instances; *Olynthiac* 2, 19 instances; *Olynthiac* 3, 20 instances; and *Philippic* 1, 25 instances; *Philippic* 2, 5 instances; *Philippic* 3, 10 instances; *Philippic* 4, 14 instances.

The civic addresses to the audience also enable Demosthenes to undertake the political role he always reserves for himself: he is talking to the men of the city as their virtuous advisor. In his words in 6.1:

> If the question before us were a new one, men of Athens, I should have waited until most of the regular speakers had delivered their opinions, and if satisfied with any of their

[33] Demosthenes 1.25: "One point more, men of Athens. Do not forget [*μηδὲ... λανθανέτω*] that you can today choose whether you must fight there, or Philip must fight here. If Olynthus holds out, you will fight there, to the detriment of his territory, while you enjoy in security the land that is your home. But if Philip takes Olynthus, who is to prevent his marching hither? The Thebans?"; 4.14: "Wait till you have heard everything before you pass judgement [*κρίνατε*]. Do not be premature [*μὴ πρότερον προλαμβάνετε*]; and even if at the outset I seem to be suggesting a novel kind of expeditionary force, do not imagine that I am trying to postpone our operations. It is not those who cry 'at once' or 'today' that really speak to the purpose, for no dispatch of forces now could prevent what has already happened."

> proposals, I should have remained silent, but if not satisfied, I should then have tried to express my own views. Since, however, it is our fortune to be still debating a point on which they have often spoken before, **I can safely claim your indulgence if I am the first to rise and address you [ἠγοῦμαι καὶ πρῶτος ἀναστάς]**. For if in the past their advice had been sound, there would be no need for deliberation today (emphasis by the author).

Demosthenes claims that he alone can offer the best advice to the Athenian *dēmos* on the Pnyx, whereas the other speakers are failed advisors whose help has led the city into misfortune and political turmoil. This strongly resembles the phraseology in 18.172–173, where Demosthenes, after describing the panicked reactions of the Athenians to the news that Philip had captured an allied *polis*, Elatea, claims that he was the only citizen willing and able to stand up in the Assembly and advise the Athenians about how to cope with their foreign enemy (for further details see Serafim 2015, 103–105).[34]

3.1.2. Ēthos and Pathos

It is well established in both ancient and modern theory that the presentation of character is persuasive because it stirs up emotions. Aristotle, to mention an important figure in the process of systematizing ancient rhetorical theory, says that to persuade is "to put the hearer into a certain frame of mind" ("*τὸν ἀκροατὴν διαθεῖναί πως*"; *Rhetoric* 1356a1–4), a condition achieved by means of the portrayal of moral character and *pathos*. *Ēthopoiia*, the process of presenting character, often mentioned in works of modern scholarship (Serafim 2017, 25), aims to create groupings that unite or divide people – both those present on the Pnyx and those absent from the political proceedings of the Assembly. It is important to note that symbouleutic speeches were made for political reasons (as indeed trials were politicized), not simply to sway those citizens present in the audience, but

[34] Demosthenes 18.172–173: "But, it seems, that day and that crisis called not only for the patriot and the rich man, but for the man who had followed the course of events from the beginning and had calculated correctly the reason and purpose of Philip's actions. For anyone who had not grasped those purposes, or had not studied them long beforehand, however patriotic, and however wealthy he might be, was not the man to appreciate the needs of the hour, or to find any counsel to offer to the people. Well, I was the man who came forth on that day and addressed you."

also all the Athenians in the *polis*. This is the distinction between *immediate* and *distant audience* that has been made elsewhere by the author (Serafim 2017). Unity and division, as argued in modern sociological theories, e.g., the *social identity* in Tajfel, Turner (1979) and the *emotional community* in Rosenwein (2002), determine the cognitive attitudes toward persons and actions (see Tajfel, Turner 1979; Miller *et al.* 1981, 494–511; Conover 1984, 760–785; Lau 1989, 220–223; Rosenwein 2002, 821–845; Huddy 2003, 511–558; Hall 2006, 388; Rosenwein 2006; Arena 2007, 151; Michalopoulos *et al.* 2021). The speaker presents himself in such a way as to denote that he belongs to the same group as the other audience members because they all espouse the same values, the most important of which is love of the *polis*, and must cope with common dangers that are fondly encapsulated by their opponents within and outside the *polis*, both individuals and hostile communities. This is close to the Aristotelian assertions that "the orator persuades by moral character when his speech is delivered in such a manner as to render him worthy of confidence" (*Rhetoric* 1356a4–6) and "character has almost, so to speak, the greatest authority in winning belief" (1356a13; cf. 1377b20–24; 1378a6–15). *Ēthopoiia* also generates division, alienation or dissociation, and prolongs hostility, denigrating individuals against the background of societal preconceptions, with the aim of isolating them from the community, and persuading the audience by setting up people, matters and ideas as antithetical to the listeners.

The construction (positive presentation) and deconstruction (negative presentation) of character is a common feature of both symbouleutic and forensic oratory. There is a difference in technique, however, in that, in symbouleutic oratory, *the character of collectivities*, i.e., civic/ethnic and cultural communities, is presented positively or negatively, whereas, in forensic oratory, it is mostly *the character of individuals* that is depicted. This is reasonable, given that forensic speeches are accusations or apologies about a past legal incident, in which individuals are involved either as perpetrators or as victims of the illegality. Symbouleutic orations, on the other hand, are about matters that concern and affect the entire city – that is why there are abundant references to the city itself: its ancestral past, its historical successes and failures, and the attitude its people have toward important matters of inter– and intra-state politics. It is not surprising, therefore, that in the symbouleutic speeches that are examined, Demosthenes at times praises the Athenians as a political whole and at times castigates them, depending on his aim at crucial points in the process of speech-making in the Assembly on the Pnyx.

His accusations mostly revolve around the supine attitude that he accuses the Athenians of showing toward Philip, as he does in *Olynthiac* 1.24. What marks this attempt of the speaker to deconstruct the collective *ēthos* is the use of terms that have strong emotive value. The text is as follows:

> δεῖ τοίνυν ὑμᾶς, ὦ ἄνδρες Ἀθηναῖοι, τὴν ἀκαιρίαν τὴν ἐκείνου καιρὸν ὑμέτερον νομίσαντας ἑτοίμως συνάρασθαι τὰ πράγματα, καὶ πρεσβευομένους ἐφ᾽ ἃ δεῖ καὶ στρατευομένους αὐτοὺς καὶ παροξύνοντας τοὺς ἄλλους ἅπαντας, λογιζομένους, εἰ Φίλιππος λάβοι καθ᾽ ἡμῶν τοιοῦτον καιρὸν καὶ πόλεμος γένοιτο πρὸς τῇ χώρᾳ, πῶς ἂν αὐτὸν οἴεσθ᾽ ἑτοίμως ἐφ᾽ ὑμᾶς ἐλθεῖν; **εἶτ᾽ οὐκ αἰσχύνεσθε**, εἰ μηδ᾽ ἃ πάθοιτ᾽ ἄν, εἰ δύναιτ᾽ ἐκεῖνος, ταῦτα ποιῆσαι καιρὸν ἔχοντες οὐ τολμήσετε;
>
> Look then, Athenians, upon his difficulties as your opportunity. Be prompt to take up the challenge. Send embassies when necessary. Take the field in person. Rouse all the other states. Reflect how eagerly Philip would march against you, if he had such a chance as we have, and if the war were on our frontiers. **Are you not ashamed if**, having the opportunity, you lack the courage to do to him what he would certainly do to you if he could (emphasis by the author)?

The speaker addresses the Athenians directly (this is why the civic address is most pertinent in the given context) to exhort them strongly as to what decisions they should make and what actions should be urgently undertaken against Philip of Macedon. This part of the Demosthenic speech ends climactically with a rhetorical question, a means of argumentative *auxēsis*, i.e., the strengthening of the argument that a speech puts forward, which adds to the liveliness of the speech and generates emotional reactions, given also that a word that carries strong emotional force is used (*αίσχύνεσθε*). By its very lack of restraint – meaning that this word has an innate aggressive character, as it is used to accuse the audience of inertness and exert moral and emotional pressure – *αίσχύνεσθε* works well in the general context of the question, as a means of grasping the attention of the audience and affecting the way its members think of others (i.e., Philip and how to oppose him), but above all of themselves (i.e., what to do to regain self-confidence and protect themselves from the infamy of inaction). Demosthenes is clever here in twisting the standard version of character assassination: instead of claiming that the Athenians have a blameworthy collective character, he says they will acquire such a character if they do not stand up to Philip. The deconstruction of character is, thus, forthcoming, imminent, and potentially perdurable, in the sense that the Athenians will be ashamed whenever they

do not stand up to their enemies, especially when they have opportunities to do so effectively. This negative *ēthopoiia* is intended to intimidate the Athenians, who are emphatically urged by the speaker to avoid shameful inaction *in perpetuum*; the burden on their shoulders is extremely heavy.

Regarding the use of questions in particular, ancient theory acknowledges that, if skillfully used, they serve strategic purposes. For Longinus in *On the Sublime* 18.1–2, for example, questions add to the vehemence of a speech. Demetrius, in his treatise *On Style* 279, points out that "in speaking it is sometimes forcible to address questions to the audience without disclosing one's own view. For instance: 'nay, he was appropriating Euboea and establishing a fortress to command Attica; and in so doing was he wronging us and violating the peace, or was he not?' The orator forces his auditor into a sort of corner, so that he seems to be brought to task and to have no answer. If the positive statement 'he was wronging us and violating the peace' were substituted, the effect would be that of precise information rather than of cross-examination." Tiberius, in *Figures* 13, recognizes four functions of questions: to engage the audience and grasp the attention of its members, to clarify matters, to create vividness or convey excitement, and to refute an opponent's arguments (Serafim 2020, 229–248; Hall 2022).

Therefore, *ēthopoiia*, which is achieved by means of combined rhetorical techniques, such as questions and carefully chosen wording, increases the emotional power of political oration and perhaps its effectiveness in controlling the audience. An intriguing aspect of the emotions that the speeches of Demosthenes delivered on the Pnyx aim to stir up (e.g. intimidation in 1.24, 1.2, 12–14, and 4.11, and anger in 1.8–11, 4.42) is that they aim unambiguously to lead to decisive actions. Fear can thus be defined as "an intervening variable between sets of context-dependent stimuli and suites of behavioral response" (Adolphs 2013, 1). It has been proved by experimental psychological and neurophysiological research that fear scenarios, such as danger and inescapability, may lead to *passive* or *active behavioral responses*. Passivity in responses describes an utter lack of physical or mental/cognitive action (e.g., fear leads to freezing and immobility). Unlike anxiety, which leads to prediction and preparedness, fear may cause people to "cringe" when they see or must face a shocking incident and are unable to perform cognitive processes. To be in fear means, in some cases, to be in a state of helplessness, having no way to extricate yourself from excruciating difficulties. Activeness in behavioral responses is when a living creature that faces a threatening stimulus reacts by physical movement (both kinetic, e.g., running, and vocal, e.g., screaming) and cognitive activity (e.g., working out how to overcome danger; see Adolphs 2013, 1). Researchers seek to explain the difference between passive and active responses to fear through the lens

of physiology. Adolphs notes, for example, that "switches from passive to active fear responses ([from] freezing to fleeing) are tightly dependent on distance from a predator, because different behaviors would be adaptive at different distances (for example, the possibility of evading detection *versus* the need to engage). [...] A major contextual factor in the evaluation of fear-inducing stimuli is whether or not escape might be possible, or whether the threat seems inescapable, a distinction related to the modulatory factor of control that we noted earlier. The former is typically associated with flight, whereas the latter is typically associated with freezing and defense" (Adolphs 2013, 10).

Thousands of years before Adolphs and other researchers thought of and undertook experiments to explain the difference between passive and active responses to fear, Demosthenes himself presented these two kinds of behavior when, in 18.170, he described his fellow Athenians as being so terrified by the news that Philip had conquered an ally of theirs, the city of Elatea, that they did not even dare to ascend the *bēma* in the Assembly to debate how they could escape the dire consequences of Philip's imperialism.[35] They rather ran around (this is an example of a kinetic, active response to fear), as we are told in §169,[36] but were unable to think, make decisions, or implement them.

It is noteworthy that in the speeches delivered on the Pnyx, which are examined in this paper, where emphasis is placed on the actions of the Athenians against Philip, Demosthenes makes sure his fellow citizens receive as clearly and forcefully as possible the message that they should act in a cognitively coherent and effective way. A good example is in 4.11:

[35] Demosthenes 18.170: "The Council arrived, the presiding Councilors formally reported the intelligence they had received, and the courier was introduced. As soon as he had told his tale, the marshal put the question, 'Who wishes to speak?' No one came forward. The marshal repeated his question again and again, but still no one rose to speak, although all the commanders were there, and all the orators, and although the country with her civic voice was calling for the man who should speak for her salvation; for we may justly regard the voice, which the crier raises as the laws direct, as the civic voice of our country."

[36] Demosthenes 18.169: "Evening had already fallen when a messenger arrived bringing to the presiding councillors *https://www.perseus.tufts.edu/hopper/text?doc=Dem.+18+169&fromdoc=Perseus:text:1999.01.0072* the news that Elatea had been taken. They were sitting at supper, but they instantly rose from table, cleared the booths in the marketplace of their occupants, and unfolded the hurdles, while others summoned the commanders and ordered the attendance of the trumpeter. The commotion spread through the whole city. At daybreak on the morrow the presidents summoned the Council to the Council House, and the citizens flocked to the place of assembly. Before the Council could introduce the business and prepare the agenda, the whole body of citizens had taken their places on the hill."

> "Is Philip dead?" you ask. "No, indeed; but he is ill." And what is that to you? Even if something happens to him, you will soon raise up a second Philip, if that is the way you attend to your affairs; for even this Philip has not grown great through his own unaided strength so much as through our carelessness.

Demosthenes calculatedly tries to present Philip as a threat, and thus a source of fear – *in perpetuum* (as in 1.24, discussed above): even if "the current Philip" dies, another will emerge to move against the Athenians. Audience members and citizens are made the center of actions and events; they bear all the responsibility for whatever might happen. They cause the problem because of inactivity, i.e., character deconstruction or negative *ēthopoiia*, but they have a solution to that: changing their collective character and showing dynamism in dealing with their enemies. Inaction is what causes fear in this passage, so it can no longer be the Athenians' choice.

More bitter and thorny are the words of Demosthenes in 4.42. Fear is no longer the emotion that he thinks will best serve his purposes; instead he chooses to elicit anger from the Athenians, but without simply referring to Philip's *ēthos* – how rapacious he is and how aggressive toward Athens he shows himself to be (e.g., in 2.5 where Philip is accused of perjury and chicanery; or in 4.9 and 10.2, passages that derogate Philip systematically, from beginning to end).[37] Demosthenes 4.42 is as follows:

> It seems to me, Athenians, as if some god, **out of very shame** [*αίσχυνόμενος*] **for the conduct of our city**, had inspired Philip with this activity. For if he did nothing more but were willing to

[37] Demosthenes 2.5: "Now to call a man perjured and faithless, without drawing attention to his acts, might justly be termed mere abuse; but to describe his conduct in detail and convict him on the whole count fortunately requires only a short speech. Moreover, I have two reasons for thinking the story worth the telling: Philip shall appear as worthless as he really is, and those who stand aghast at his apparent invincibility shall see that he has exhausted all the arts of chicanery on which his greatness was founded at the first, and that his career has now reached its extreme limit." 4.9: "For observe, Athenians, the height to which the fellow's insolence has soared; he leaves you no choice of action or inaction; he blusters and talks big, according to all accounts; he cannot rest content with what he has conquered; he is always taking in more, everywhere casting his net round us, while we sit idle and do nothing." 10.4: "Now the extent of the recklessness and rapacity that Philip shows in his dealings with all men is indeed as great as it has been described to you; but how impossible it is to stay him in this career by argument and declamation, assuredly no one is ignorant. For indeed, if no single thing else can teach a man the truth of that, let him weigh the following consideration. When we have had to speak in defence of our rights, we have never yet been defeated or proved in the wrong, but in every case we vanquish all our opponents and have the best of it in argument."

> rest satisfied with what he has already captured and subdued, I believe some of you would be quite content with what must bring the deepest disgrace upon us and brand us as a nation of cowards. But by always attempting something new, always grasping at more power, he may possibly rouse even you, if you have not utterly abandoned hope. (emphasis by the author)

It appears that the target of anger in this passage is not only Philip, however covetous, insolent, and reckless he is presented to be. The target of anger is mostly the Athenians themselves, since the actions that Philip undertook are masterfully correlated in the passage with their inertness. Rhetoric is put into action superbly here. Demosthenes identifies the target audience by means of the address – the Athenians are the recipients of the central message that they need to become active agents by deciding to stand up to Philip, immediately and decisively. Therefore, the agents are directed by the speaker to blame themselves for the actions of the king of Macedon. "Self-anger" leads to the urgent undertaking of actions before it is too late to act. Anger at Philip may have theoretically been caused by the events themselves, since he had conquered the allied cities of Athens one after another; this, however, led to no action by the Athenians if we are to believe Demosthenes. But the feeling that the Athenians themselves should be ashamed – specifically, that the gods feel that the citizens of Athens have brought shame on their city through their political and military conduct – aims to move them decisively forward. Shame generates a sense of guilt, and this leads to self-anger, relief from which is achieved by removing the cause of shame and guilt – inaction, in the case of the Athenians (on the phenomenology of shame and guilt see Gilbert, Pehl, and Allan 1994, 23–36; Deonna, Rodogno, and Teroni 2011).

Because anger is mostly other-directed (at individuals, groups, and institutions), its self-direction is left vastly understudied in modern interdisciplinary phenomenology, as also in classical scholarship on the Attic orators (see Ellsworth, Tong 2006, 572–586). Current research unambiguously indicates that anger is, of all humanly felt emotions, the one that generates action; as L. Silva points out, "unlike other negative emotions such as sadness, where coping potential is paradigmatically low (little can typically be done to change the saddening event or its consequences), anger involves an element of optimism regarding the agent's capacity to change the triggering event, keep it from repeating itself, or seek reparations for

it" (Silva 2022, 2; cf. Roseman 1991, 161–200; Scherer 2005, 312–324). A superb description of self-directed anger is offered by Plato at *Republic* 439e–440b (see also Jimenez 2020, 285–307).[38]

The construction, i.e., the positive depiction, of the collective *ēthos* of the Athenian community is also made by means of the presentation of exceptional examples of citizens who encapsulate the ancestral glory and the civic ideal of *kalokagathia*, virtue and goodness. Heroes and respected statesmen, and the stories told about them, frame a community's consciousness, worldview, and perception of the past. As James Mayer pointed out, "[t]hey are seen as exemplars of the community ideal and they attain (semi-)divine status in the worldviews of those who are imagined as their descendants. [...] Constructing myths around the stories of heroic figures is a straightforward means to streamline a complex history into a simple and instructive narrative. Heroic figures carry preconceived associations that can be easily attached to new narratives, and the form of the epic or other heroic narrative is an entertaining and easily memorable structure to transmit and perpetuate understandings of the community's past" (Mayer 2011, 15–16). One such an example of how exceptional individuals represent the whole Athenian body politic is given in Demosthenes 3.26:

> ὥστε τὴν Ἀριστείδου καὶ τὴν Μιλτιάδου καὶ τῶν τότε λαμπρῶν οἰκίαν εἴ τις ἄρ᾽ οἶδεν ὑμῶν ὁποία ποτ᾽ ἐστίν, ὁρᾷ τῆς τοῦ γείτονος οὐδὲν σεμνοτέραν οὖσαν: οὐ γὰρ εἰς περιουσίαν ἐπράττετ᾽ αὐτοῖς τὰ τῆς πόλεως, ἀλλὰ τὸ κοινὸν αὔξειν ἕκαστος ᾤετο δεῖν. ἐκ δὲ τοῦ τὰ μὲν Ἑλληνικὰ πιστῶς, **τὰ δὲ πρὸς τοὺς θεοὺς εὐσεβῶς**, τὰ δ᾽ ἐν αὐτοῖς ἴσως διοικεῖν μεγάλην εἰκότως ἐκτήσαντ᾽ εὐδαιμονίαν.
>
> The houses of their famous men, of Aristides or of Miltiades, as any of you can see that knows them, are not a whit more splendid than those of their neighbors. For selfish greed had

[38] Plato, *Republic* 439e–440b: "Leontius, the son of Aglaion, was going up from the Piraeus along the outside of the North Wall when he saw some corpses lying at the executioner's feet. He had an appetite to look at them but at the same time he was disgusted and turned away. For a time, he struggled with himself and covered his face, but, finally, overpowered by the appetite, he pushed his eyes wide open and rushed towards the corpses, saying, 'Look for yourselves, you evil wretches, take your fill of the beautiful sight! I've heard that story myself. It certainly proves that anger sometimes makes war against the appetites, as one thing against another. Besides, don't we often notice in other cases that when appetite forces someone contrary to rational calculation, the person reproaches himself and gets angry with that in him that's doing the forcing, so that of the two factions that are fighting a civil war, so to speak, spirit allies itself with reason?'"

> no place in their statesmanship, but each thought it his duty to further the common weal. And so by their good faith towards their fellow Greeks, **their piety towards the gods**, and their equality among themselves, they deserved and won a great prosperity (emphasis by the author).

As argued elsewhere by the author, Demosthenes makes a tacit yet skillful association between religion and politics: one of the praiseworthy qualities that the two prominent Athenians share, beyond their integrity, honesty, love for the *polis* and care for Hellas as a whole, and sense of justice, is reverence for the gods. "By choosing to refer specifically to these two historical Athenian statesmen, Demosthenes invites the Athenians to identify themselves with Aristides and Miltiades and all they represent, including piety" (Serafim 2021, 134–135). Religion is closely connected with patriotism and politics, an association that is succinctly described in theory as *polis*-religion (see Sourvinou-Inwood 1988, 259–274; 1990, 295–322). The reference to *Ἑλληνικά*, fellow Greeks or Greek affairs, is also important in the context of 3.26, where Demosthenes' aim is to persuade his fellow Athenians to stand up to Philip and protect Olynthus. Two of the exemplified and ideal personages of the glorious ancestral past cared for Hellas – and so should the Athenians. The message of the speaker becomes, in context, crystal clear: to become as *kaloi kagathoi* as Aristides and Miltiades were, encapsulating the glory of Athens, they should stand up for their allies and the entire Greek world.

3.2.3. Hypocrisis

The transmitted symbouleutic speeches of Demosthenes contain specific textual markers that give us clues to the likely use of gestures and vocal ploys (such as the elevation of tone and volume to give emphasis to his arguments). Unfortunately, we cannot be more assertive, given the lack of any visual records of what was said and happened on the Pnyx. The markers that point to *hypocrisis* include direct speech, questions (either rhetorical or followed by immediate answers, which is known as *hypophora*), figures of speech (such as repetition, as in 2.10, 3.33, 4.46, and antithesis, as in 2.5 and 10.70), ritualistic dicta, such as prayers and invocations to the gods and oaths (as in Demosthenes 3.17; 9.54; 10.7, 20, 25), which would have been accompanied, according to sources, by gesticulation and sonorous vocal recitation (on *hypocrisis* that accompanies ritualistic dicta in Attic

oratory see Serafim 2021, 83–95),[39] and the use of words that have strong emotional value and point to the vehemence and forcefulness of the oration. The purpose of *hypocrisis*, as already recognized in ancient rhetorical theory, is to emphasize the arguments and maximize the persuasive potential of orations. As Aristotle, for example, notes in *Rhetoric* 1404a1–5, "since the whole business of rhetoric is to influence opinion, we must pay attention to it, not as being right, but necessary. Now, when *hypocrisis* comes into fashion, it will have the same effect as acting. Wherefore people who excel in this in their turn obtain prizes, just as orators who excel in delivery; for written speeches owe their effect not so much to the sense as to the style." Several other sources also highlight the significant persuasive potential of *hypocrisis* in public speaking, e.g., Plutarch, *Lives of the Ten Orators* 845b1–5; *Demosthenes* 11.2–3 (on the potential of *hypocrisis* to add verve to the features of an oration and maximize its persuasive impact upon the audience see Serafim 2017; 2021, 83–84).

A notable feature of the seven Assembly speeches of Demosthenes that are examined in this paper is that they are full of questions, which are used evenly, from exordium to peroration.[40] This is evidently because questions, as has already been argued, introduce a sense of liveliness and immediacy to the speech; their use is a signal by the speaker of his will to communicate with the audience. This communicative approach to the audience is rather artificial, of course, as there was no institutional provision for the speakers and audience on the Pnyx to formally engage in conversation during an oration. Questions are also a means of highlighting important arguments by grasping the attention of the audience: interrupting the narrative to ask a question indicates that the point that follows, due to the change in the mode of expression, is "special", noteworthy and important, especially when questions accumulate in the narrow space of a few sections (as in 3.16–17 and 4.43–44, where nine and six questions respectively are used in a row, and 9.32–35 where twelve questions are used). It is Demosthenes 4.43–44

[39] According to Demosthenes 18.259–260, in praying, the performer would have raised his voice, while also raising his hands to the heavens. Pseudo-Aristotle says that people in antiquity raised their hands to the sky when praying (*On the Universe* 400a16), a reference that is also made in Demosthenes 43.66. In *Laws* 717a, Plato also informs us that whenever someone called on the Olympian gods he would raise his right hand, whereas when he prayed to chthonian gods, such as Earth, he would raise his left hand.

[40] Questions can be found in the following sections of Demosthenes' seven symbouleutic speeches, which are examined in this paper: 1.15, 24; 3.6, 16–17, 19, 22, 29, 27, 30; 4.10, 26, 43–44; 6.20; 9.27; 10.65–66.

that Longinus discusses in *On the Sublime* 18 to illustrate the vehemence that *hypophora*, a pattern of asking and answering questions,[41] injects into an Assembly (or any other) oration.[42]

A superb example of rhetoric in action through *hypophora* – or *pathētikē*, to borrow the Longinus' expression in *On the Sublime* 18 – i.e., its aim to stir up emotions in the Athenians and urge them to take action, can be found in Demosthenes 10.64–66:

> §64: **[1]** What do you imagine is his motive in **outraging [ὑβρίζειν]** you now—I think no other term describes his conduct—or why is it that, in deceiving the others, he at least confers benefits upon them, but in your case he is resorting to threats**?** For example, the Thessalians were beguiled by his generosity into their present state of servitude; no words can describe how he formerly deceived the miserable Olynthians by his gift of Potidaea and many other places; the Thebans he is now misleading, having handed over Boeotia to them and relieved them of a long and trying war.
>
> §65: So each of these states has reaped some benefit from him, but while some have already paid the price by their sufferings, the others have yet to suffer whatever shall fall to their lot. As for you, I do not say how far you have been robbed, but in the actual making of the peace, how completely you were deceived, how grievously you were robbed! **[2]** Were you not deceived about Phocis, Thermopylae, the Thrace-ward districts, Doriscus, Serrium, Cersobleptes himself**? [3]** Is not Philip now holding the city of the Cardians, and admitting that he holds it**?**

[41] Examples of *hypophora* can be found in Demosthenes 1.25; 2.3, 26; 4.2, 11, 25, 20, 22, 27, 34; 6.7, 31; 9.15, 18, 56, 70; 10.44, 51, 58, 61, 64–66.

[42] Longinus notes in *On the Sublime* 18: "The impassioned rapidity of question and answer and the device of self-objection have made the remark, in virtue of its figurative form, not only more sublime but more credible. For emotion (*τὰ παθητικά*) carries us away more easily when it seems to be generated by the occasion rather than deliberately assumed by the speaker, and the self-directed question and its answer represent precisely this momentary quality of emotion (*μιμεῖται τοῦ πάθους τὸ ἐπίκαιρον*). Just as people who are unexpectedly plied with questions become annoyed and reply to the point with vigor and exact truth, so the figure of question and answer arrests the hearer and cheats him into believing that all the points made were raised and are being put into words on the spur of the moment."

> §66: **[4]** Why then does he deal in that way with the other Greeks, but with you in this way**?** Because yours is the one city in the world where immunity is granted to plead on behalf of our enemies, and where a man who has been bribed can safely address you in person, even when you have been robbed of your own. It would not have been safe in Olynthus to plead Philip's cause, unless the Olynthian democracy had shared in the enjoyment of the revenues of Potidaea (emphasis by the author).

Four questions (numbered) can be found in the three sections that are cited above: they function, in context, as repeated "punches" to the audience, an incessant stimulus of the mind, conscience, and collective civic/cultural ego of the Athenians. Demosthenes, calculatedly, starts by levelling a heavy accusation against Philip – that he is insulting the Athenians in an outrageous way (*hybris*), which leads to infamy and humiliation. Then, to maximize the effect of the question that will almost certainly trigger anger and exasperation among the Athenians, he claims that Philip is crueler toward them than toward the other Hellenes. But instead of making this point by means of narrative, he exploits the surprise element of the first question in §64, while also enhancing the vehemence of the accusation and inviting the audience to get involved in the game of negatively evaluating Philip's hostile behavior toward Athens. The answer to the first question is not given in the next section, §65, but rather Demosthenes prolongs the excruciation of the audience by continuing to ask upsetting questions about Philip's stance toward the Athenians. These questions are designed to incite anger and direct it against the enemy. The final blow to the audience is given in §66: it is here that the question of §64 is repeated and answered. In other words, the *hypophora* starts in §64 and is concluded two sections later. Extending the emotional pressure that is place on the audience from section to section, asking questions that force the Athenians to think and feel – putting them, in other words, in a sort of inescapable cognitive "corner" – Demosthenes aims to elicit a reaction, which in fact is an action against Philip. To keep up the forcefulness of *hypophora* from the first to the last section of this part of his oration, and to thus maximize its effect on the audience, it is likely that Demosthenes would have used vocal ploys – such as raising his tone of voice – when he asked the four questions and when he gave his answer.

In addition to questions, direct speech is also ubiquitous in all the parts of Demosthenic symbouleutic orations: exordium, main part (*pistis*/*apodeixis* and narrative), and peroration.[43] The combined use of direct speech and questions (as in 3.19, 22, 29) aims to maximize the liveliness of the speech and its communicative efficacy. A possible reason why Demosthenes uses direct speech so frequently throughout his speeches could be because it has the effect of surprising and engaging the audience, in the sense that it breaks up the "normal", and perhaps also "dull", succession of narrative sections, adding to the verve and immediacy that a speech delivered before a live audience should have. It is very likely that, to strengthen the sense of immediacy, the speaker would have used vocal ploys, inasmuch as it appears that some instances of direct speech invite sarcastic or playful mimicry, especially when the alleged utterances of enemies or excuses of the Athenians – which the speaker considers petty – should be emphasized. A caveat is necessary here: the examination of the markers that oratorical (and any other) texts contain as indicators of mimicry (and, more broadly, *hypocrisis*) is mostly based on the intuition of individual or group readers (known in theory as *interpretative communities*). The textual markers that point to aspects of *hypocrisis* can, arguably, be of two kinds: "objective", i.e., those that give us unambiguous clues as to what aspects of gesticulation and vocality are used by speakers (e.g., *deixis*, manifested usually by pronouns, almost certainly requires the use of hand or head gestures to direct people's gaze toward the intended target); and "subjective", i.e., those that take meaning from the ways in which readers understand the text.

Mimicry belongs to the second category. It is my view that it is the context, not every instance of direct speech independently of it, that creates the need for mimicry. One such context is in Demosthenes 3.22:

> But ever since this breed of orators appeared who ply you with such questions as **"What would you like? What shall I propose? How can I oblige you?"** ["*τί βούλεσθε; τί γράψω; τί ὑμῖν χαρίσωμαι;*"] the interests of the state have been frittered away for a momentary popularity. The natural consequences follow, and the orators profit by your **disgrace** [*αἰσχρῶς*] (emphasis by the author).

[43] Instances of direct speech can be found in 1.14; 3.10, 19, 22, 29; 4.44; 9.27, 42; 10.11, 27, 70.

Not only does the text contains three staccato questions that are placed in direct speech, it is also that the context is adversarial, in the sense that the speaker is accusing his opponents – whom he deems irresponsible – of bringing disgrace upon the Athenians because they are cajoling their fellows to gain temporary popularity, despite the dire consequences this behavior may have for the *polis*. The severe accusation that is levelled against his opponents – enhanced by the use of the strong moral term αίσχρῶς, which aims to incite anger and indignation toward the alleged perpetrators – arguably demands the use of vocal emphasis. To undermine the public/political status and authority of the orators to whom he scathingly refers, he would surely have delivered the utterance he calculatedly attributes to them in a such a way as to highlight their boldness and shamelessness. After all, it is highly unlikely that the adverb *αίσχρῶς* was delivered deadpan, either here or elsewhere, as in 10.25,[44] where there is an accumulation of strong moral terms – *αίσχρόν* and *άνάξιον*. The expression of emotion can become authentic through *hypocrisis*, as Plutarch's *Demosthenes* 11.2–3 clearly indicates.[45]

4. PHYSICAL CONDITIONS AND SOCIOCULTURAL SIGNIFICANCE

This section raises two questions that have not been satisfactorily answered, despite having been addressed in some works of modern scholarship. The first is how the physical setting of the Pnyx affected the political workings of the Assembly. It has been argued by Johnstone (1996, 127) that speeches were passed from the front to the rear of the auditorium, and those Athenians who could not hear the speakers adequately because of the distance and noise, made their judgments based on "the speaker's name and reputation". Enos (1998, 331) opines that the speakers delivered

[44] Demosthenes 10.25: "By Zeus and all the other gods, it would be disgraceful [*αίσχρόν*] and unworthy [*άνάξιον*] of you and of the resources of your city and the record of your ancestors to abandon all the other Greeks to enslavement for the sake of your own ease, and I for one would rather die than be guilty of proposing such a policy."

[45] In *Demosthenes* 11.2–3, Plutarch says that "there is a story about Demosthenes, that he was approached by a man asking him to help him plead in court. When the man explained how he had been beaten by someone, Demosthenes said 'But you haven't at all suffered what you say you have suffered.' The man raised his voice and screamed 'Have I, Demosthenes, not at all suffered?!' and then Demosthenes said, 'Oh yes, now I do hear the voice of someone who has been wronged and suffered.' This shows how important for persuasion he considered the pitch (of voice) and delivery to be of those who speak."

their pieces to "rotating audiences". This topic is examined further, together with the second question: what sociocultural qualities of the Pnyx made the hill the center of political speech-making and, in fact, the cradle of Athenian democracy?

4.1. The Physical Setting of the Pnyx: Construction and Acoustics

Before going further into the two questions – especially the first one about the acoustic conditions in the auditorium – it is necessary to depict the setting. The Pnyx is a well-designed platform, theater-like in shape, which was carved into the rocky heights in the western part of the city of Athens. There were three phases of construction and architectural development. None of the three phases altered the main structure of the site: the Assembly area was unroofed and roughly semi-circular in form. Each of the three phases did, however, have its own unique features. During the first, around 500 BC, the auditorium followed the natural slope of the hillside, but this was thought not to have been completely practical, because the auditorium, approximately 40 meters deep and 60 meters wide, would have probably been exposed to wind.[46] The second phase of construction took place in 404–403 BC, when the auditorium was moved from the north to the southwest slope, in order for the seats to be protected from strong winds. Johnstone (1996, 116) argues that the acoustics improved on Pnyx II because of the reorientation of the auditorium and the speaker's platform, with northeast winds blowing from behind the *bēma*. The third and final structural phase probably occurred around 330 BC (see Rotroff, Camp 1996, 263–294), when the auditorium were enlarged considerably (to 60 m deep and almost 120 m wide) by the addition of stoas that were never fully constructed (Figures 1 and 3).[47] The landmark of the site, which is still visible on the hill, is the stone *bēma* (the platform or "the stone", ὸ λίθος, as it is known; cf.

[46] The speech of Andocides, *On His Return*, is perhaps the only transmitted piece of political oratory that was performed on Pnyx I (possibly delivered between 410 and 406 BC).

[47] If Pnyx III is to be dated around 330 BC, contrary to the argument that it was constructed around 340 BC, it is possible that none of the transmitted symbouleutic speeches of Demosthenes were actually delivered there. The speech dated most closely to 330 BC is the spurious *On the Treaty with Alexander* (speech 17), which, according to Hitchings (2017, 194) would have been delivered between late 334 and late 333 BC.

Aristophanes, *Acharnians* 683) for the speaker (Figure 4a-b-c; for the dating of the site on the slope of the Pnyx and detailed descriptions of the place see Kourouniotes, Thompson 1932, 90–217; Moysey 1981, 31–37).

The issue of the acoustics of the Pnyx and the practical, non-verbal arrangements in the *ecclēsia* has relatively recently attracted the interest of scholars. Johnstone, though with somewhat impromptu and methodologically faulty fieldwork, attempted to reconstruct the acoustics of the site, concluding rather dishearteningly that, even in ideal physical and meteorological circumstances, the speeches, passing from the rear of the auditorium to the front, would have been heard by three-quarters of the audience members only, requiring the remainder to base their decisions upon the reputation of the speakers rather than the essence of their argumentation. A strong voice would be a fundamental prerequisite for speakers to be able to deliver orations in the Assembly, which is why Demosthenes supposedly tried hard to overcome the vocal shortcomings which both he himself and the late textual tradition attribute to him.[48]

Johnstone notes that not even a strong voice would make a speech fully audible and comprehensible to the audience on the Pnyx. What Johnstone does not consider, however, is that environmental circumstances in today's Athens, especially the level of noise, are vastly different from those of the ancient city, and this difference almost certainly has a significant impact on audibility on the Pnyx (as indeed in every precinct of Athens). Therefore, any conclusions that can be drawn will always remain merely conjectural, even if by revisiting the political arena of the Pnyx, we use modern climatological, architectural, and topographical evaluations of the setting. This is what the Academy of Athens intends to do. It should also be underlined that the ancients were more performatively competent than we are, not least because of their education and high level of knowledge of performative matters, especially sound, as texts indicate (e.g., Aristophanes, *Clouds* 961–972).[49]

[48] Demosthenes, referring apparently to his vocal shortcomings, calls himself *Βάτταλος*, "lisper" or "stammerer" (18.180). Demetrius of Phalerum claims, as reported by Dionysius of Halicarnassus (*On the Style of Demosthenes* 53) and Plutarch (*Demosthenes* 11.1-3), that he was personally aware of Demosthenes' vocal shortcomings. The validity, factuality, and reliability of these reports are doubted; even if there is any truth in the tradition, it may have been derived from the credulous taking of Demosthenes' own comments at face value.

[49] Aristophanes, *Clouds* 961–972: "I will, therefore, describe the ancient system of education, how it was ordered, when I flourished in the advocacy of justice, and temperance was the fashion. In the first place it was incumbent that no one should hear the voice of a boy uttering a syllable; and next, that those from the same quarter of the town should march in good order through the streets to the school of the harp-master, naked, and in a body, even if it were to snow as thick as meal.

Therefore, even if you have the voice of Luciano Pavarotti, whom Johnstone thought of when delivering Demosthenes 4 (the first of the *Philippics*) with strained vocal cords (see Johnstone 1996, 131), this does not mean that one has the speaking skills of the ancients, nor the audience's listening skills.

But what do the transmitted texts say about the acoustics on the Pnyx? The answer to this question is relatively disheartening because ancient texts are largely silent on this topic. Given that texts and material evidence are the only ways we have to try to reconstruct an impression of what happened in the past, our knowledge and understanding of audibility in the amphitheater on the Pnyx will perpetually be fragmentary and uncertain. The texts, unfortunately, do not tell us anything about the acoustics on the Pnyx, and not much about the acoustics in theaters or other sites of public speaking, but there are some limited, and hitherto largely under-discussed, sources that are worthy of (re)examination. The correlation between the theatrical and the political space on the Pnyx is methodologically pertinent: if theatergoers at the Asklepion of Epidaurus, who could number as many as 14,000 (not to mention larger theaters such as the one in Megalopolis in Arcadia, with a capacity of 20,000 spectators), can listen to unamplified voices in the back row, about 60 meters from the *skēnē* and the broader scenic building (Figure 5), then it is possible that audience members in the Assembly crowd of 6,000 on the hill of Pnyx also could. Both the theater and the Assembly are – to use the expression from Hall (2002, 7) – "a palette of vocal techniques": voice was of paramount importance for the activity in both settings, and one is justified in arguing, as modern scholars do, that performers were trained as to vocally perform their roles as effectively as possible (see Pickard-Cambridge 1968, 167–171; Csapo, Slater 1995, 256–258 and 265–268; MacDowell 2000, 352; Hall 2002, 22–23; Ley 2006, 54; on voice in law court speaking see Serafim 2017, 28–32 and 114–136).[50]

The theoretical foundations of the systematic science of sound in Greek antiquity, especially concerning the interrelation between pitch and the length of the vibrating string, were laid by Pythagoras (6th century BC).

Then again, their master would teach them, not sitting cross-legged, to learn by rote a song, either 'pallada persepolin deinan' or 'teleporon ti boama' raising to a higher pitch the harmony which our fathers transmitted to us. But if any of them were to play the buffoon, or to turn any quavers, like these difficult turns the present artists make after the manner of Phrynis, he used to be thrashed, being beaten with many blows, as banishing the Muses."

[50] On the importance of voice for actors see Plato, *Republic* 568c3; Aristotle, *Rhetoric* 1403b26–33; 1413b14–28; Aristotle, *Problems* 11.22; Demetrius, *On Style* 193-5; Demosthenes 18.308–309; Diodorus Siculus 15.7, 16.42; Plutarch, *Life of Ten Orators* 848b.

Later, in the 4th century, Archytas described the production of sound as a phenomenon of having two objects strike each other, while also examining the conditions of sound propagation in a physically designated scenery (Guthrie 1962, 371). Nearly a century later, Aristoxenus, one of Aristotle's disciples, discussed the principles of auditory matters in the performative settings of the ancient *polis*. Burkert (1972) also refers to the theories of Plato and Aristotle (mainly in *Poetics* on music, a form of sound in the theater, and in *Problems*, presuming that this treatise can credibly be assigned to him) about sound propagation, with the former arguing that the movement of sound is a matter of pitch (higher pitch leads to faster propagation),[51] a topic that is also examined by Theophrastus of Eresus (see Hunt 1978). Matters pertaining to the propagation of sound waves were also examined by the Stoic philosopher Chrysippus and the Roman architect and engineer Marcus Vitruvius Pollio (born ca. 80 BC). Selected passages from his treatise *On Architecture* (which is dedicated to Augustus and was probably composed between 16 and 13 BC) are discussed extensively below. Perhaps the earliest examination of acoustics in ancient literature is the account of Herodotus, in Book 4 of the *Histories*, about the underground passageways that the Persians dug to get underneath the walls of the city Barce during their siege of it.[52]

Vitruvius' remark in 5.3.4, about theater architecture that allows sound to travel unimpeded, is useful in shedding light on how the height of the Pnyx and its onsite structures would have helped the propagation of sound as well:

> The number of passages must be regulated by the height of the theatre, and are not to be higher than their width, because if made higher, they will reflect and obstruct the voice in its passage upwards, so that it will not reach the upper seats above the passages, and the last syllables of words will escape.

[51] This idea about the pitch of the voice playing a role in determining the speed and the quality of the sound is rejected by Vitruvius: "Herein the ear does not perceive any difference of tone between the beginning and ending, by the voice rising higher or descending lower; neither that from a high pitch it becomes lower, nor the contrary" (5.4.2).

[52] Herodotus 4.200: "As for the tunnels, a blacksmith discovered them by the means of a bronze shield, and this is how he found them: carrying the shield around the inner side of the walls, he struck it against the ground of the city; all the other places which he struck returned a dull sound; but where there were tunnels, the bronze of the shield rang clear. Here the Barceans made a counter-tunnel and killed those Persians who were digging underground. Thus, the tunnels were discovered, and the assaults were repelled by the townsfolk."

> In short, the building should be so contrived, that a line drawn from the first to the last step should touch the front angle of the tops of all the seats; in which case the voice meets with no impediment.

In 5.3.7, Vitruvius also makes a comment that applies indirectly to the acoustics on the Pnyx, even if this is not the subject of his transmitted treatise on architecture:

> In the same manner the voice spreads in a circular direction. But, whereas the circles in water only spread horizontally, the voice, on the contrary, extends vertically as well as horizontally. Wherefore, as is the case with the motion of water, so with the voice, if no obstacle disturbs the first undulation, not only the second and following one, but all of them will, without reverberation, reach the ears of those at bottom and those at top.

The analogy between the acoustics of the theater, described by Vitruvius, and the acoustics of the Pnyx is clear: the site of the *ecclēsia* does not present any architectural hindrance to the easy diffusion of sound, and this, in combination with the height of the hill, would allow sound to reach the ears of the audience members at the top and the bottom. This conclusion may seem speculative, since there is no direct reference to the Pnyx in Vitruvius' treatise, but the similarities between theater architecture and the Pnyx make any assumption about the properties of sound in the latter more than reasonable. The Pnyx, according to its physical description, is not a dissonant place, i.e., one of those "in which the voice, rising first upwards, is obstructed by some hard bodies above" (5.8.1). Its openness and the minimal structure of the buildings allow for optimal propagation of sound.

The wide span of the auditorium (as seen in Figure 1, the auditorium space steadily grew from phase I to phase III) and the distance that separates the speaker and the pulpit on the Pnyx from the audience seating, are key factors that allow sound to travel better. As Chourmouziadou (2007, 80) argues, "the more the actor approached the audience, the smaller the part of the audience that received the direct sound, due to the propagation of sound at nearly grazing incidence". Another architectural feature of the site of the *ecclēsia* on the Pnyx appears to be relevant to the discussion about the propagation of sound: as seen in Figures 1, 2a and 2, the platform of the speaker is placed at a lower level than that of the auditorium, allowing its rear to function as a sound reflector, exactly like the rear of the raised stage in the theater (Camp 1996, 45 offers a different approach regarding

the level of the auditorium on Pnyx III, arguing that it was either level with or sloping downward away from the raised speaker's platform. This cannot be the case if one accepts the presentation of Pnyx III in Figure 1). This contributes to increased reverberation (see Wiles 1997). This suggestion is corroborated by Lucretius (1st century BC), who points out that "among solitary places the very rocks give back the counterparts of words each in due order, when we see our comrades wondering amid the dark hills, and with loud voice summon them scattered here and there. [...] So does hill to hill buffet the words and repeat the reverberation [...] no one can see beyond a wall although he can hear voices through it" (*On the Nature of Things* 4.522–721, translated by Sinker 1937; on reverberation not worsening sound or impeding intelligibility see Manzetti 2019, 434–443). Modern interdisciplinary acoustic experiments also suggest that ground-level or low theatrical platforms are more efficient than higher platforms, in terms of sound propagation (see Izenour 1977; Barkas 1994, 39–56), while also indicating that the gradual raising of the platform, mostly in Roman times, had a negative impact on the intelligibility of the theatrical performance (see Canac 1957; Athanasopoulos 1976; Barkas 1994, 39–56). The same principles can be applied to the sites of the *ecclēsia* on the Pnyx.

Beyond architectural features, the effectiveness of speech projection and the quality of sound propagation are also determined by other onsite measurements: the number of audience members (a maximum of 6,000, in the case of the Pnyx), their seating and clothing, and other aspects of the physical scenery, such as wind and heat. The Pnyx, as has been previously stated, was likely windy, therefore, the meetings of the Assembly would not have taken place during the winter.[53] But the "windy character" of the physical setting on the Pnyx, which can reasonably be assumed to have hindered the audience, preventing them from comfortably attending the Assembly due to low temperatures and humidity, is thought to have increased and facilitated the propagation of sound. Goularas (1995) argues that the open-air theater design where the wind blows toward the audience, in combination with a minimum temperature of 8°C, is superior, a conclusion that is not unopposed

[53] Cf. Thucydides 8.97, on the use of the Pnyx as the place of the meetings of the Assembly. The Pnyx was not the only place where the meetings of the Assembly were held; sources also indicate that the Theatre of Dionysus was also used, though not for environmental reasons, but rather for religious. Both Aeschines 2.61 and Demosthenes 21.8 mention that the Assembly was moved to the theatre after specific festivals: Aeschines speaks about the celebration of the City Dionysia (when it is reasonable for the meetings to be held nearer the precinct of Dionysus) and Demosthenes about the Pandia (festival of Zeus).

by other modern research studies (see Declercq, Dekeyser 2007, 2012; Johnstone 1996, 124, which presented the opinion that wind reduced intelligibility in the Assembly amphitheater).

The strengthening of acoustics is accomplished by a specific type of paraphernalia called *ἠχεῖα*, a bronze vessel that acts as a megaphone, on the principle that sound propagates by setting air in movement. The functioning of these vessels is known in archaeoacoustics as "the Vitruvian secret" (in 1.1.9):

> So, the vessels, called *ἠχεῖα* by the Greeks, which are placed in certain recesses under the seats of theatres, are fixed and arranged with a due regard to the laws of harmony and physics, their tones being fourths, fifths, and octaves; so that when the voice of the actor is in unison with the pitch of these instruments, its power is increased and mellowed by impinging thereon. He would, moreover, be at a loss in constructing hydraulic and other engines, if ignorant of music.

These vessels work, specifically, as a technical means of improving the clarity of the voice, not its strength. In Vitruvius' words (5.5.3):

> The voice which issues from the scene, expanding as from a centre, and striking against the cavity of each vase, will sound with increased clearness and harmony, from its unison with one or other of them.

In 5.3.8, Vitruvius also claims that the bronze loudspeakers were tuned to correspond with the voices of the actors ("since in bronze or horn wind instruments, by a regulation of the genus, their tones are rendered as clear as those of stringed instruments, so by the application of the laws of harmony, the ancients discovered a method of increasing the power of the voice in a theatre"). That the material of Vitruvius' vessels, bronze, is a good reflector and radiator of sound and was known to the Ancient Greeks, as indicated in Aristotle's *On the Soul* 2.8, where it is remarked that "not all bodies can by impact on one another produce sound; impact on wool makes no sound, while the impact on bronze or other body which is smooth and hollow does. Bronze gives out a sound when struck because it is smooth; bodies which are hollow owing to reflection repeat the original impact over and over again, the body originally set in movement being unable to escape from the concavity." Something similar about the capacity of bronze to produce strong sound is mentioned in Pollux, *Onomasticon* 4.70, in a description of the "watery aulos", a musical instrument consisting of bronze pipes that

are blown from below, with water compressing air upward. Pollux says, specifically, that "the bronze gives the aulos a bolder sound" (*Onomasticon* 4.70: *καὶ ὁ χαλκὸς ἔχει τὸ φθέγμα ἰταμώτερον*; cf. comments in 4.85–86, on the material of the salpinx, another musical instrument made of bronze and iron).

The existence of bronze sound vessels and their use are still uncertain and vastly controversial issues. Vitruvius refers, in *On Architecture* 5.5.8, to Roman General Lucius Mummius, who, upon returning to Rome from Corinth (perhaps in 146 BC), "brought [...] some of its bronze vases, and dedicated them as spoils at the temple of Luna." It is indeed argued that there were niches in theaters, beneath the *diazōma* (the corridor that separates the upper and lower tiers of the theater and facilitates the circulation of spectators), that held the bronze loudspeakers – this seems to be so in the case of the theater at Aizanoi, a Phrygian city in western Anatolia (1st century AD), despite scholarly dissent (see Dilke 1948, 137). "The 'bell' is inserted in the cavity and is supported by wedges of half a foot, which is the same height as the neck. The niche must thus be higher, about two or three feet (60–90 cm) what [sic] makes the internal volume larger than the volume of the neck" (see Valière *et al.* 2013, 72). An attempt has been made by scholars to reconstruct the placement of Vitruvius' bronze vessels based on his writings (Figure 6): they are evenly distributed in all *diazōmata* and rows (13 in each) in the theater (see Sevillano *et al.* 2008); it is perhaps this even distribution that makes the acoustics effective. Izenour (1977) has also described the existence of nine cavities behind the *diazōma* in the ruins of a Roman theater in Beit She'an, Israel (expressing doubts about the effectiveness of the use of bronze vessels). The fact, however, that similar technology has been used extensively throughout history to strengthen the acoustic potential of places of spectatorship is enough to indicate that the acoustic pots would have been effective in fulfilling the purpose they were designed for. Similar vessels dating from the 10th to the 16th centuries have been used all across Europe (Figure 7)[54] and in the Ottoman Empire, inside the walls of churches and mosques (on the use of acoustic pots in Irish churches see Fitzgerald 1855, 303–310; on the use of vessels in Danish churches from 1100–1300 AD see Bruel 2002; Valière *et al.* 2013, 70–81; on the use of acoustic pots in the Ottoman Empire see Atay, Gül 2021, 1–12).

There are two caveats to bear in mind when reading Vitruvius' intriguing treatise: first, we do not know whether this technology was used in 4th century BC classical Athens (it may not have been used until Vitruvius'

[54] Figure 7 presents an acoustic (or resonance) pot incorporated in the wall of the church at the Chartreuse du Val de Benediction, Villeneuve-lès-Avignon, France.

time, or only in other areas of the Roman Empire); and second, if it was used, whether it was used in the auditorium of the Assembly on the Pnyx, or only in the theater. Given that Vitruvius' treatise draws information from earlier treatises on construction, especially Aristoxenus (5.5.6; see Valière *et al.* 2013, 73), it should not be considered impossible that his description applies to Ancient Greek theaters of the 4th century. There is no reason why the vessels, if used in the Greek theaters, would not have also been used in the Athenian Assembly, unlike other paraphernalia, such as masks, which were strictly confined to the theatrical space, where it is argued that they had a voice-enhancing function (on the use of dramatic masks as a means of amplifying the voices of actors see Vovolis, Zamboulakis 2007, 1–7).[55] It is the placement of the pots on the site of the Pnyx that poses the most difficult question. They may have been placed beneath the floor, as in the Hazine-I Evrak Building in İstanbul (Figure 8); this possibility should be explored (by archaeologists).

Another intriguing remark by Vitruvius is that there was no need for sounding vessels in wooden auditoriums that were built in Rome, because the boarding itself was resonant.[56] Assuming that the reference in Aristophanes' *Acharnians* 23–26 is correct, the Pnyx would have had the same acoustic potential as Roman auditoriums because it had wooden seats in the pit, the main area of the auditorium. Stone seats were hewn out in the wall of the terrace, but the other benches would probably have been made of wood: "*οὐδ' οἱ πρυτάνεις ἥκουσιν, ἀλλ' ἀωρίαν/ ἥκοντες εἶτα δ' ὡστιοῦνται πῶς δοκεῖς/ ἐλθόντες ἀλλήλοισι περὶ πρώτου ξύλου,/ ἀθρόοι καταρρέοντες*" ("The Prytanes even do not come; they will be late, but when they come they will push and fight each other for a seat in the front row"). There is, then, considerable ancient evidence and steadily growing modern interdisciplinary knowledge which both point to the function of physical scenery and the construction of Greek theatrical spaces – and thus also on the Pnyx – as natural amplifiers of the voices of performers (whether actors

[55] On the acoustic capacity of musical instruments, such as the trumpet, see Julius Pollux, *Onomasticon* 4.88, where it is mentioned that the instrument could be heard at a distance of 10 km (or 50 stades).

[56] Vitruvius 5.5.7: "Someone may perchance urge, that many theatres are yearly built in Rome, without any regard to these matters. But let him not be herein mistaken, inasmuch as all public theatres which are constructed of wood, have many floors, which are necessarily conductors of sound. This circumstance may be illustrated, by consideration of the practice of those that sing to the harp, who when they wish to produce a loud effect, turn themselves to the doors of the scene, by the aid of which their voice is thrown out. But when theatres are constructed of solid materials, that is of rubble, squared stones, or marble, which are not conductors of sound, it is necessary to build them according to the rules in question."

or public speakers), which would compensate for the energy loss due to the open-air setting and the seasonal adversities this causes (see Barkas 2019, 337–353). Declercq, Dekeyser (2007) even argues that the "geometry of the theatre", i.e., the benches and the limestone *cavea* (audience area), would boost the sound while muffling the background audience noise. There is, therefore, no reason for classicists to assume that speeches in the Assembly were delivered before rotating audiences, or that the audience members based their decisions on the name and the authority of the speakers in front of them. Rumor could, arguably, be thought of as having divine status, at least according to Aeschines 1.127–130 (see Serafim 2021, 34–36, 73–74),[57] but it would be sheer speculation to argue that it was a key factor in political decision-making in Athens.

4.2. The Sociocultural Importance of the Pnyx

In answering the second question about the sociocultural reasons for choosing the Pnyx as the meeting place of the Assembly, scholars refer with puzzlement to Aeschines 1.82, where it has been argued that the poor reputation of the place by 346/5 BC (when the speech was delivered) is underlined (Harrison 1890, 107; Judeich 1931, 86; Kourouniotes, Thompson

[57] Aeschines 1.127–130: "But in the case of the life and conduct of men, a common report which is unerring does of itself spread abroad throughout the city; it causes the private deed to become matter of public knowledge, and many a time it even prophesies what is about to be. […] **You will find that both our city and our forefathers dedicated an altar to Common Report, as one of the greatest gods;** and you will find that Homer again and again in the *Iliad* says, of a thing that has not yet come to pass, 'Common Report came to the host'; and again you will find **Euripides declaring that this god** is able not only to make known the living, revealing their true characters, but the dead as well, when he says, 'Common Report shows forth the good man, even though he be in the bowels of the earth'; and Hesiod expressly represents her as a goddess, speaking in words that are very plain to those who are willing to understand, for he says, **'But Common Report dies never, the voice that tongues of many men do utter. She, too, then, is divine'.** You will find that all men whose lives have been decorous praise these verses of the poets. For all who are ambitious for honour from their fellows believe that it is from good report that fame will come to them. **But men whose lives are shameful pay no honour to this god**, for they believe that in her they have a deathless accuser. Call to mind, therefore, fellow citizens, what common report you have been accustomed to hear in the case of Timarchus. The instant the name is spoken you ask, do you not, 'What Timarchus do you mean? The prostitute?' Furthermore, if I had presented witnesses concerning any matter, you would believe me; **if then I present the god as my witness, will you refuse to believe?** But she is a witness against whom it would be impiety even to bring complaint of false testimony" (emphasis by the author).

1932, 186. Fisher (2001, 217) argues that "we can glean only that specific proposals concerned areas around the Pnyx itself: unbuilt-up, secluded areas, *erēmiai*, deserted house-sites, cisterns, all places of inactivity or seclusion." There are arguments for the opposite, in line with the concerns in Thompson, Scranton (1943, 361), as well as about the validity and the factuality of what Aeschines says. The passage in 1.82 is as follows:

> ἐπειδὴ δέ που προϊόντος τοῦ λόγου εἶπεν ὅτι τό γε εἰσήγημα τὸ Τιμάρχου ἀποδοκιμάζει ἡ βουλή, 'καὶ περὶ τῆς ἐρημίας ταύτης καὶ τοῦ τόπου τοῦ ἐν τῇ Πυκνὶ μὴ θαυμάσητε, ὦ ἄνδρες Ἀθηναῖοι, εἰ Τίμαρχος ἐμπειροτέρως ἔχει τῆς βουλῆς τῆς ἐξ Ἀρείου πάγου,' ἀνεθορυβήσατε ὑμεῖς ἐνταῦθα καὶ ἔφατε τὸν Αὐτόλυκον ἀληθῆ λέγειν: εἶναι γὰρ αὐτὸν ἔμπειρον.
>
> When, in the course of his speech, he [Autolykos] said that the Areopagos council was opposing Timarchos' motion and he added "on the subject of that deserted spot and the place on the Pnyx, you should not be surprised, Athenians, if Timarchos is more experienced than the Council of the Areopagos," at that moment you burst into uproar and said that Autolykos was telling the truth: you said that he was certainly experienced with those places (translation: Fisher 2001, 90).

It is not only that we cannot trust what Aeschines says about Timarchus, as Thompson and Scranton rightly remark, not least because used every opportunity to attack his adversary at the trial and undermine his public (speaking) credentials. Carey (2000, 52 n. 90) and Rydberg-Cox (2000, 426) are correct in suggesting that Aeschines makes, in 1.82, a clever innuendo about Timarchus engaging in prostitution, which could only be fully practiced in the secrecy of desolate places.[58] It has recently also been argued that the physiognomic details that are attributed to Timarchus, especially about his stature, are fake (see Serafim, forthcoming). Therefore, a speaker who would dare distort details about the body of his adversary, while he was present in

[58] I would like, however, to take issue with the expression of Carey, when he claims that Aeschines accuses Timarchus of "grubby sexual encounters." If this is a reference to prostitution, as it should be, it is not fully clear – and that is a problem. "Sexual encounters" may, arguably, be an insinuation of homosexual encounters, which were not, however, considered "grubby" at the time. Carey could have been clearer about the point he is making here. The point made by Fisher (2001, 220) is more coherent.

court, would not hesitate to accuse him of grubby actions, inasmuch as he would not credibly expect the audience members to fully remember actions from the past.

It is also the case that Aeschines never refers to the Pnyx as being desolate and, thus, ill-reputed. The text contains two prepositional phrases: the first is clear, *καὶ περὶ τῆς ἐρημίας ταύτης*; the second is unseen, but we can find it by adding the preposition *περί*, which is missing because it is, in context, syntactically and semantically self-explicable, *καὶ [περὶ] τοῦ τόπου τοῦ ἐν τῇ Πυκνί*. The conjunction καὶ indicates a distinction between the two prepositional phrases: "this deserted spot and the area of the Pnyx." So it is possible that "the deserted spot" may not refer to the Pnyx, the place where the *ecclēsia* took place, but to another, unidentified place, perhaps one that is adjacent to the meeting place of the Assembly, or to a specific spot on the hill – neither the Pnyx as a whole nor the central part of it.[59] This is all the more likely bearing in mind that the delivery of Aeschines 1 almost coincides with the start of the enlargement of the Pnyx, which may have improved accessibility. The unidentified spot to which Aeschines 1.82 points may or may not be the same place as that in Xenophon's *Ways and Means* 2.6; the ancient "complaint" about the housing policy of Athens, made in Xenophon's account, indicates that there were other deserted places in the broader territory of the *polis*.[60]

Pushing aside I stigma Aeschines attaches to the physical place of the Pnyx, the ancient texts are marked by a surprising paucity of information about why the hill was preferred as the meeting place of the Assembly. To combat this textual silence, the following section will explore the criteria of theater– and temple-building. There are two interrelated aspects of the cultural identity of the ancient *polis*, since many theaters were built around sanctuaries (e.g., the theater in Epidaurus, which is located on the west side of mount Kynortio, was erected as part of the general development of the sanctuary of Asklepios) to decode the rationale behind the choice of the places where activities important for democracy were carried out. It is not coincidental that "the layout and orientation of the Pnyx borrowed the

[59] This suggestion is evident in the translation of the text in Rydberg-Cox (2000, 426): "During his speech, Autolycus said that the council did not approve of the proposition and said, 'Do not be surprised if Timarchus has more knowledge than the Areopagus council **about this isolated spot on the Pnyx**'" (emphasis by the author).

[60] Xenophon, *Ways and Means* 2.6: "Then again, since there are many vacant sites for houses within the walls, if the state allowed approved applicants to erect houses on these and granted them the freehold of the land, I think that we should find a larger and better class of persons desiring to live at Athens."

theatrical innovations that took place under the tyrants, including the layout of the agora and the rise of the single actor, or *protagonist[ē]s*, facing and answering the chorus and audience, attributed to poets like Thespis in the sixth century" (see Fredal 2006, 123).

The Pnyx was not protected from the wind and other natural pestilential causes of health problems, as described in ancient literature. An invaluable source of information is Vitruvius' *On Architecture*, despite this being significantly late and thus not fully relevant to the reasoning behind choosing a specific natural scenery for constructing important sites in democratic Athens. In 1.6.3, Vitruvius refers to the topographical reasons for choosing a specific place to erect public edifices, which mostly have to do with the observation of natural effects (in addition to other sociocultural reasons, including religiously laden ones, such as soothsaying,[61] or even the gods themselves choosing the place to erect their temples, as, for example, in the *Homeric Hymn to Apollo* 244–304):[62]

> In a place sheltered from the winds, those who are in health preserve it, those who are ill soon convalesce, though in other, even healthy places, they would require different treatment, and this entirely on account of their shelter from the winds. The disorders difficult to cure in exposed situations are colds, gout, coughs, phthisis, pleurisy, spitting of blood, and those diseases which are treated by replenishment instead of exhaustion of the natural forces. Such disorders are cured with

[61] Vitruvius, *On Architecture* 1.4.9: "The precepts of the ancients, in this respect, should ever be observed. They always, after sacrifice, carefully inspected the livers of those animals fed on that spot whereon the city was to be built, or whereon a stative encampment was intended. If the livers were diseased and livid, they tried others, in order to ascertain whether accident or disease was the cause of the imperfection; but if the greater part of the experiments proved, by the sound and healthy appearance of the livers, that the water and food of the spot were wholesome, they selected it for the garrison. If the reverse, they inferred, as in the case of cattle, so in that of the human body, the water and food of such a place would become pestiferous; and they therefore abandoned it, in search of another, valuing health above all other considerations."

[62] In the *Homeric Hymn to Apollo* 244–304 there are details of the physical scenery that beguiled Apollo to choose it for the construction of his temple, as, for example, in 267–274 (Telphousa, the Boeotian Naiad-nymph of the Telphousian spring on Mount Tilphousios, talks to Apollo): "Lord, you are than I am, yours surely the strength that is greatest— do you in Krisa erect it, below a ravine of Parnassos. There will no beautiful chariots ever be dashing, or swift-hoofed horses be clattering loudly, surrounding your well-built altar; rather, to you great gifts will the glorious nations of mankind bring, as Iḗpaián, Hail Healer; delighting in mind you then will receive fine victims from all of the neighboring peoples."

> difficulty. First, because they are the effect of cold; secondly, because the strength of the patient being greatly diminished by the disorder, the air agitated by the action of the winds becomes poor and exhausts the body's moisture, tending to make it low and feeble; whereas, that air which from its soft and thick nature is not liable to great agitation, nourishes and refreshes its strength.

And again, in 5.3.1–2:

> When the forum is placed, a spot as healthy as possible is to be chosen for the theatre, for the exhibition of games on the festival days of the immortal gods, according to the instructions given in the first book respecting the healthy disposition of the walls of a city. For the spectators, with their wives and children, delighted with the entertainment, sit out the whole of the games, and the pores of their bodies being opened by the pleasure they enjoy, are easily affected by the air, which, if it blows from marshy or other noisome places, infuses its bad qualities into the system. These evils are avoided by the careful choice of a situation for the theatre, taking especial precaution that it be not exposed to the south; for when the sun fills the cavity of the theatre, the air confined in that compass being incapable of circulating, by its stoppage therein, is heated, and burns up, extracts, and diminishes the moisture of the body. On these accounts, those places where bad air abounds are to be avoided, and wholesome spots to be chosen.

At another point, 5.9.9, Vitruvius points out there are two reasons for the choice of the locations for public edifices: "they are conducive to two good purposes; to health in time of peace, and to preservation in time of war." The Pnyx may satisfy the second reason, providing protection to the Athenians in times of war because it sits above the city, but it certainly does not fulfil the first reason, to protect against natural causes of ill health. As mentioned above, on Pnyx I, when the edifices followed the natural slope, the challenge was that the pulpit and the seats were stricken by north winds. This problem has already been stated in Kourouniotes, Thompson (1932, 136), when arguing that "there must have been many days when it would have been utterly impossible to hold a public meeting on the place unless some protection [was] available against the whistling, piercing wind. On such days, however, the Theater of Dionysus would lie in perfect calm and comparative warmth as a result of the shelter afforded by the Acropolis to the north."

Therefore, there may be other reasons why the *ecclēsia* took place on the slope of the Pnyx, specifically three. The first is the hill's central location in Athens. Theatrical performances, which attracted the interest of vast Athenian and non-Athenian audiences, were held in the Theater of Dionysus, on the south slope of the Acropolis, and near two other key areas of the ancient *polis*: the agora, the center of political, economic, and other public activities, and the Pnyx. In *Acharnians* 1–42, Aristophanes commented on the behavior of the presiding officers in the Assembly, saying that they came to the meetings late because "they are gossiping in the marketplace, slipping hither and thither to avoid the vermilioned rope." All the important activities of democratic Athens took place in the broad political area, with Fredal noting that "the Pnyx is not located in the *physical center* of the city, but as the site for collective deliberation among the entire demos, it constituted the *political center*, signified by the fact that it 'centered' upon the *agora*" (see Fredal 2006, 121, emphasis by the author). In 1.7.1 Vitruvius corroborates the idea that sacred edifices, "if inland, should be in the centre of the town." Therefore, given that the Pnyx is close to the other important precincts, it is reasonable to presume that its centrality made it a good choice for the place where the Athenians took decisions about the city.

The second reason is the height of the hill and the views it offers. In 4.5.2 Vitruvius points out that "the temple is to be turned as much as possible, so that the greater part of the city may be seen from it" (cf. 1.7.1, "the temples of the gods, protectors of the city, also those of Jupiter, Juno, and Minerva, should be on some eminence which commands a view of the greater part of the city"). This appears to be the case with the Pnyx: the physical setting where the Assembly held its meetings should face the *polis*, functioning as a proper and (cognitively/emotionally) effective reminder to the decision-making Athenians of their sacred duty to cast their vote to the advantage of the city. The location of the *ecclēsia* on the Pnyx, therefore, acquires a symbolic dimension: the Athenians climbed the hill to see what they must protect by their vote – the city below. Their decision was not, therefore, driven by an abstract idea of their land, but by a very concrete one, which may have functioned as a source of inspiration for the speakers (see Wordsworth 1855, 55; Fredal 2006, 121–122), while also creating a sense of magnitude and solemnity that enhanced the allure of the place where important decisions about the city were taken (cf. Aristotle, *Poetics* 1451a).[63]

[63] Aristotle, *Poetics* 1451a: "As then creatures and other organic structures must have a certain magnitude and yet be easily taken in by the eye, so too with plots: they must have length but must be easily taken in by the memory."

The third architectural and topographical reason why the Pnyx was selected for Assembly meetings is suggested by Fredal, who argues that "[u]nlike the bema on a plain (the *agora*), which would raise the speaker above his audience, the Pnyx (period 1) placed the speaker below his audience, who looked down upon him. [...] [T]he whole audience was kept before him so that they could be seen easily at a glance" (Fredal 2006, 122–123, emphasis by the author). To add to Fredal's reasoning, the setting allows the audience members to appear before the speaker as a seamless decision-making body – and this enhances the sense of unity among them, reminding them pertinently that, despite their argumentative and rhetorical clashes, which underline the stark differences between political factions, they are united on the hill, as they should be, for the benefit of the *polis*. The Pnyx promotes somatic unity to harness its symbolic, civic meaning; after all, it is civic unity that guarantees that Athens will function properly and prosper unequivocally.

5. CONCLUSION

Despite its extensive length this study is but a modest step forward in the direction of researching and further understanding the topographical, rhetorical, and other cultural workings on the Pnyx. The aims of this study were threefold. The first was to prepare an annotated compendium of references in Attic oratory to two words that most often describe the place and the political workings there: *Πνύξ* and *ἐκκλησία*. The second aim was to offer an analysis of performance as it is incorporated into and indicated by the text of seven symbouleutic speeches of Demosthenes – three *Olynthiacs* and seven *Philippics*. Analysis of performance in the Assembly is compared with that in the law court, with some overarching conclusions being drawn about how much of a difference the etiquette of specific institutional settings truly makes in sustaining a lively presentation of the speech and in achieving persuasion. The third and final aim of this study was to explore aspects that have to do with topography: the physical setting, the construction of the Assembly and its acoustics, and the impact that topography may have had on determining the character of the political processes in the Assembly. Another aim has been to answer the question of why the hill was chosen as the meeting place for the Athenians when they sought to make decisions about crucial matters that regulated the internal functioning of the *polis* and its relationship with other *poleis*. The arguments that this paper puts forward have the potential to ignite further interdisciplinary work and help

scholars better and more adequately understand what happened in the hill whose name is synonymous with democracy and political deliberation in classical Athens.

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FIGURES

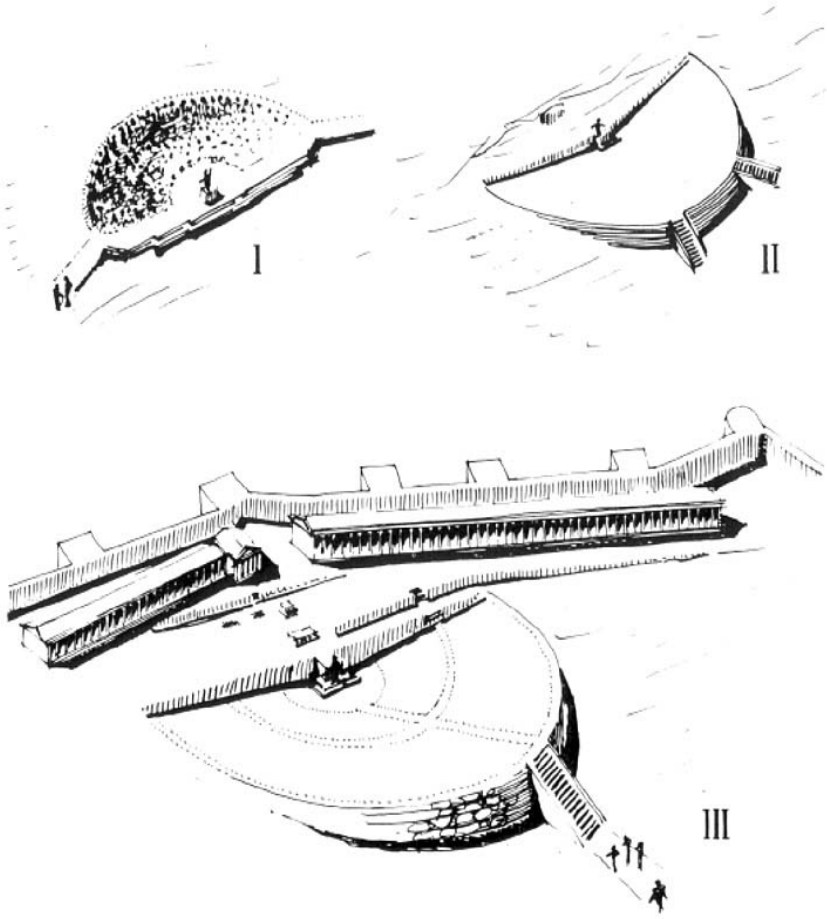
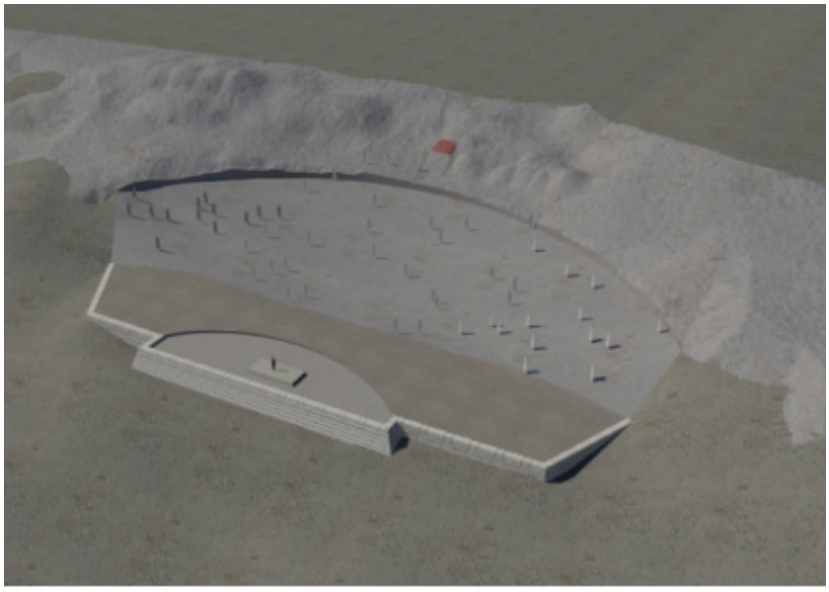
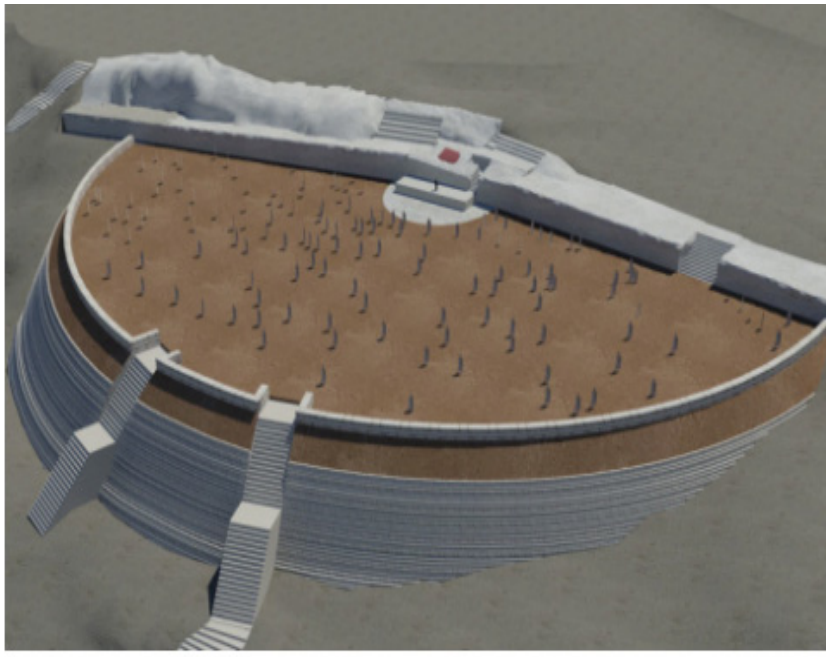


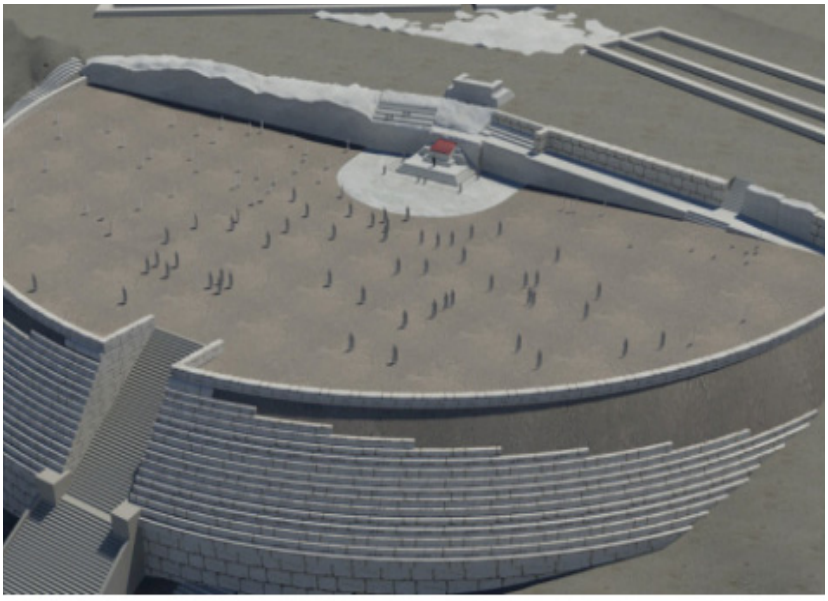
Figure 1. The three phases of the Pnyx. Drawing by John Travlos. *http://www.agathe.gr/democracy/the_ekklesia.html* (last visited: 20 February 2023).



(a) Pnyx I



(b) Pnyx II



(c) Pnyx III

Figure 2 (a-b-c). 3D models showing the evolution of the Pnyx assembly area and relative size of the three phases. Kim, Kyungyoon *et al*. 2015.

Figure 3. The Pnyx, about 500 BC. Model by C. Mammelis. Athens, Agora Museum. *http://www.agathe.gr/democracy/the_ekklesia.html* (last visited: 20 February 2023).

Figure 4a. The remnants of the *bēma*, the speaker's platform, on the Pnyx. Source: the author.

Figure 4b. The *diateichisma* – a new fortification wall behind the stoas, built in the 4th century BC. Source: the author.

Figure 4c. Remains of the retaining wall built during the third phase of the Pnyx's development. Source: the author.

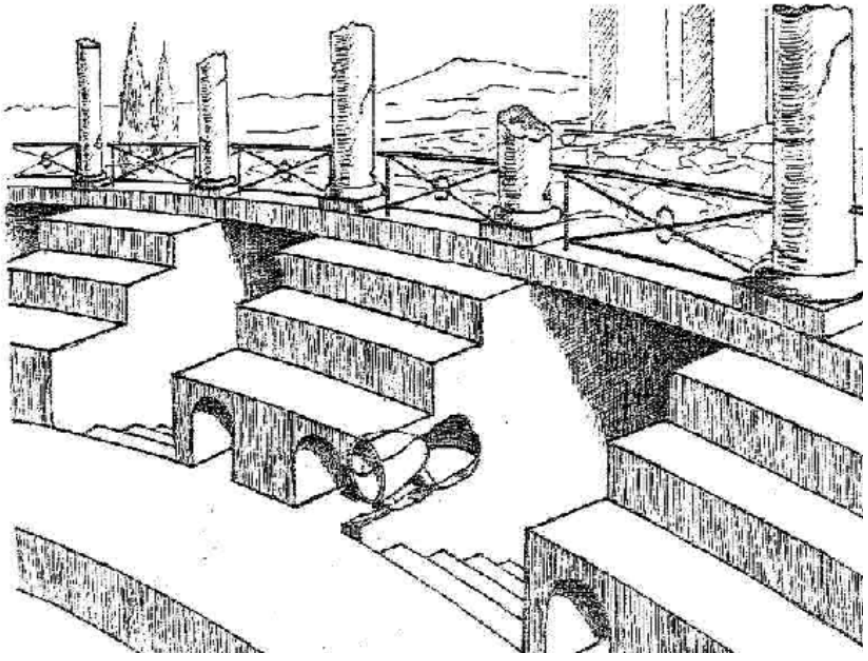


Figure 5. The reconstruction of Vitruvius' *ēcheia* by R. Floriot (after Panckoucke's 1847 publication of Vitruvius). Source: Valière *et al.* 2013, 70–81.

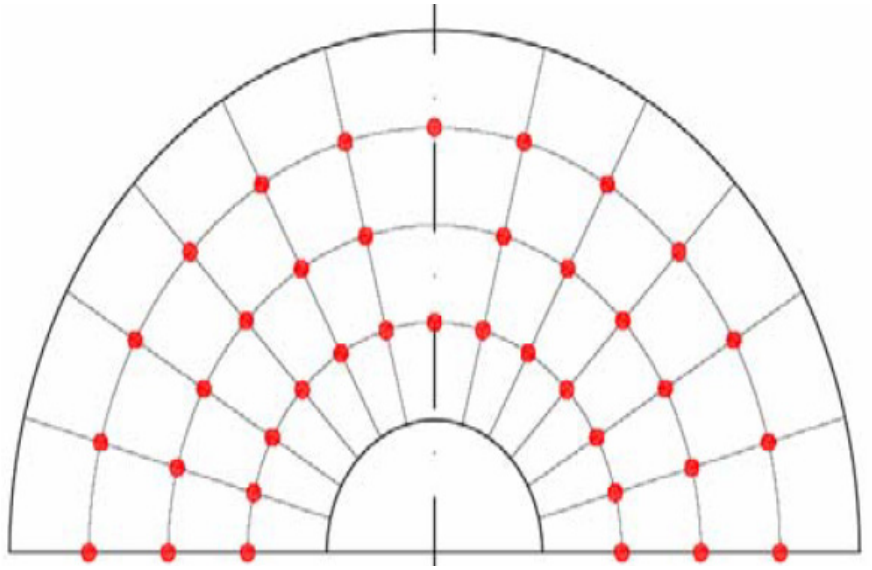


Figure 6. Reconstruction of Vitruvius' information about the distribution of bronze acoustic pots in an ancient theatre. Source: Sevillano *et al.* 2008.

Figure 7. Acoustic pot that is embedded in the wall of the church of the Chartreuse Notre-Dame-du-Val-de-Bénédiction, Villeneuve-lès-Avignon, France. *https://en.wikipedia.org/wiki/Acoustic_jar* (last visited: 20 February 2023).

Figure 8. Clay pots used in the flooring system of the Hazine-i Evrak Building in Constantinople. Source: Atay, Gül (2021, 1–12, on p. 8).

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*OPEN BANKING: BETWEEN COOPERATION AND COMPETITION***

The emergence of financial technology companies (fintechs) has spurred expectations that they will lead to large-scale disintermediation in finance and significantly disrupt the banking industry. Regulators in several jurisdictions have supported their market entry through the adoption of open banking policies, whose purpose is to facilitate third-party access to banking data, subject to customer consent. Data access has been seen as a competitive bottleneck in the banking industry, while customers hold the ultimate ownership over their data. This paper aims to critically assess proclaimed promises of open banking by analysing existing barriers to entry and market-based collaborations between banks and fintechs as identified in the literature. Since the expected effects can vary depending on the regulatory model embraced, the paper also outlines the economic trade-offs of different regulatory solutions. Consequently, the paper may help regulators who are considering introducing or designing open banking policies.

Key words: *Open banking*. – *Open finance*. – *Fintech*. – *Competition in banking*. – *Fintech regulation*.

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1. INTRODUCTION

The past decade has seen a rapid digital transformation of the banking industry. One of the driving forces has been the emergence of financial technology companies (fintechs), which introduced many incremental innovations in banking. Fintechs are praised for their flexibility and ability to leverage cutting-edge technology to offer affordable and customer-centric services. These companies raised great expectations, among industry members, academics, and the wider public, that they would bring about a revolution in banking (The Economist 2015), disintermediate the banking value chain (e.g. Macchiavello 2021), and 'disrupt' the traditional banking business model (e.g. Anand, Mantrala 2019; Cai 2018; Oshodin *et al.* 2017). Fintech activity rapidly spread across different fintech verticals. Recent literature captured their presence in 22 out of 36 banking service domains, while the biggest concentration is in the area of payments and transfer of funds (Hanafizadeh, Amin 2022).

Despite the rising threat of these potential competitors, banks have largely managed to shelter their rents and accommodate fintech entry. The reason is that fintechs often depend on banking infrastructure, licenses, customer bases, products, and data, compelling them to partner with incumbents (Enriques, Ringe 2020). As industry reports in different countries have shown insufficient levels of contestability and competition in the banking sector, regulators worldwide have been incentivised to adopt open banking policies. The idea of open banking is to mandate banks to allow third-party access to their customer data upon receiving customer consent. The main regulatory goal has been to reduce informational rents enjoyed by banks and to induce market entry. Open banking resides on the premise that data is a competitive bottleneck in the banking industry, while customers hold the ultimate ownership over their data and should be allowed to share it with third party providers that can generate new value for them.

Given that the adoption of open banking policies is relatively recent, the theoretical account of this phenomenon is still emerging. While the literature on open banking is fast growing (a notable contribution is *Open Banking*, edited by Linda Jeng (2022)), it appears that none of the existing studies examines open banking in the context of a broader set of factors facilitating the market entry of fintechs, either as competitors or partners of incumbents. Therefore, this paper aims to explore the potential effects of open banking policies in light of existing market-driven practices of competition and cooperation between banks and fintechs. To assess the promises of open banking, the paper also explores the differences in the regulatory approaches of several prominent jurisdictions: the European

Union (EU), the United Kingdom (UK), Australia, and India. The paper is among the first to discuss trade-offs of different regulatory design features and assess their expected impact on competition and cooperation in the market. In terms of methodology, this is a conceptual paper that draws upon the existing literature at the intersection of economics, finance, and law.[1] Its theoretical propositions are suitable for further empirical testing as time elapses and more data becomes available.

The paper aims to contribute to three strands of literature. An overarching framework for the paper is the literature looking into the relationship between regulation and competition in banking (e.g. Vives 2016). While the dominant paradigm is that regulation tends to soften and deregulation tends to strengthen competition (Degryse, Ongena 2008), open banking is specific as a pro-competitive regulatory intervention. The paper also aims to contribute to scholarship examining the determinants of fintech emergence and development. A growing number of papers is looking into successful fintech business models in different sectors, and factors driving fintech development at a country level (e.g. Haddad, Hornuf 2019). Recent literature has also opened up the question of why fintechs and banks tend to cooperate, either focusing on the bank (Faes *et al.* 2022) or fintech perspective (e.g. Bömer, Maxin 2018; Drasch, Schweizer, Urbach 2018; Gozman, Hedman, Sylvest 2018). Finally, the paper is connected to the literature examining the effects of regulations on fintech markets, which have predominantly focused on specific fintech verticals (e.g. Dushnitsky *et al.* 2016; Rau 2021). In contrast, open banking policies promise to have an impact across different fintech industries.

The structure of the paper is as follows. The next section explores the bank–fintech interaction landscape, trying to systemise different models of fintech entry. Section 3 discusses the foundations of open banking, outlining key concepts and regulatory objectives. Section 4 explores variations in open banking approaches in different jurisdictions, such as mandatory vs voluntary nature, the (un)existence of technical standards for data access, the scope of data to be shared, the regulatory perimeter regarding market participants, etc. Section 5 examines whether and to what extent open banking frameworks will likely drive competition and collaboration in banking, given the theoretical considerations on market-driven practices (Section 2) and different regulatory design features (Section 4). The last section concludes by elaborating on the potential developments of open banking and sets a research agenda.

[1] Additional insights come from personal work in the capacity of a tutor for the Cambridge Fintech and Regulatory Innovation programme (CFTRI).

2. BANK–FINTECH INTERACTION LANDSCAPE

To understand the 'disruptive' potential of fintechs and the implications of open banking policies for their expansion, it is helpful to better understand the existing modes of fintech market entry. Fintechs encompass a wide range of different innovations, which can roughly be divided into those that concern the delivery of (core) banking services and those that employ advancements in general-purpose technology (e.g. artificial intelligence (AI)), cloud computing, distributed ledger technology (DLT) to enhance existing banking products and processes (Bank for International Settlements 2018, 9). Examples of fintechs that fall within the latter category include fintechs that provide software for customer digital authentication and customer onboarding (e.g. Onfido), programmes that enable algorithmic credit-scoring (e.g. Aire), or programmes that facilitate regulatory compliance (also known as RegTech). These companies essentially provide inputs for the delivery of financial services. The banks' incentives to integrate their services are straightforward, i.e. banks can streamline processes, save on human resources expenditures, and provide cheaper and more reliable services.

Fintechs that deliver core banking services seldom do so independently and in direct competition with banks. Banks typically engage in a broad spectre of activities (Boot 2016, 436), thus performing a set of interrelated functions: maturity transformation and liquidity provision by accepting short-term deposits and extending medium and long-term loans, and payment and transaction services. In contrast, fintech services usually intend to target specific customer needs or even specific customer segments. Thus, fintech competition that involves market entry along all or most banking activities is rare. Nevertheless, two types of fintech business models compete directly with banks. The first type is so-called neo (digital, challenger) banks, which are essentially licensed entities that engage in banking activities exclusively via digital means, without any physical location and traditional branch networks. Depending on the jurisdiction, they hold a full blown banking licence or, as of recently, new types of lighter licenses aimed at facilitating market access.[2] Examples include Monzo Bank and Fidor in the UK, WeBank in China, N26 in Germany, etc. The second type of fintechs, whose products can be deemed substitutes for banking services, are companies whose business model is built on the premise of banking disintermediation. They offer technology platforms that stand as an alternative to 'balance-sheet intermediaries' and 'trusted third parties', and instead, provide matching

[2] For example, the Swiss regulator, FINMA, introduced a fintech licence to boost innovative financial companies (FINMA 2022).

services between lenders and borrowers, or two sides of a payment transaction (Bank for International Settlements 2018, 20). Examples include licensed crowdfunding platforms in the area of lending and capital raising, and cryptocurrencies in the area of payments. The ability of these fintechs to compete with banks is constrained by increased exposure to counterparty risk, among other factors.[3]

Among the fintechs that deliver banking services independently, there is an increasing number of companies that offer banking services to unbanked or underbanked parts of the population. These fintechs developed innovations 'where incumbent service providers were not present and in market segments where customer needs were not met' (Carletti *et al.* 2020, 7). Examples include mobile money payments in developing countries, such as M-Pesa in Kenya. In essence, these companies are not direct competitors to banks as the markets they operate in are not in the banks' sphere of interest.

An increasingly large number of fintech entries is enabled or facilitated by cooperation with a bank, which leads to the shared delivery of banking services. This phenomenon is often described as 'disaggregation of the banking value chain' or 'unbundling of banking services'. It involves the departure from the premise that 'the offering to the customer is exclusively created and distributed in-house by a bank' (Gozman, Hedman, Sylvest 2018, 7). Cooperation can take various forms, such as direct equity investments, joint ventures, alliances, incubation, etc. (Drasch, Schweizer, Urbach 2018, 10; Oshodin *et al.* 2017, 8–9).

The shared delivery of banking services by banks and fintechs is enabled by the use of application programming interfaces (APIs). This interface allows to synchronise and connect the database or services of a bank with different third-party applications or programs (Chakray 2022, 8). APIs in banking (or open banking in a broader sense) are 'about letting third parties build applications and services around the platforms of the financial institutions' (Gozman, Hedman, Sylvest 2018, 6). In other words, by decomposing the banking value chain, APIs enable service creation and distribution by third party providers.

Bank–fintech collaborations are driven by the banks' need for faster access to innovation. Their cumbersome legacy systems and bureaucratic and complex governance infrastructure make the internal innovation process sluggish. Fintech innovations can help banks enrich their service

[3] For a concise discussion on promises and expectations of cryptocurrencies, see Carletti *et al.* 2020, 8–11.

offer, or improve their distribution channels and customer experience. Partnerships with fintechs can also open new revenue streams for banks. The fintechs' incentives for cooperating with banks are diverse and directly relate to barriers to entry into the banking services market. The most important barriers are the lack of an established customer base, limited data on potential customers, lack of reputation and brand recognition, relatively high cost of capital, regulatory infrastructure,[4] and the need to integrate banking products into their services (Bömer, Maxin 2018, 11; Carletti *et al*. 2020, 7).

If one were to roughly decompose the banking value chain into service creation and distribution (customer interface), fintechs can perform both (Gozman, Hedman, Sylvest 2018, 6–8). Most often they serve as distributors of banking products, such as the case with mobile wallets (Google Pay, AliPay), marketplaces for banking services (e.g. platforms that match borrowers with bank lenders), or different kinds of information aggregators. The case of aggregators is interesting (especially in light of open banking, as will be discussed below), as they offer customers a single interface through which they can manage financial accounts held at various institutions (including the option of initiating payments).

In many instances, banks enable the provision of services created by third party providers, either through their distribution channels (e.g. offering 'robo-advisor' investments to their clients) or by lending their regulatory license. In the latter case, also called 'white-label bank' (Bömer, Maxin 2018, 17), a fintech can offer deposit-taking, lending, or payment services under its brand, while the bank providing the regulatory infrastructure remains in the background, often not visible to the fintechs' customers. The outsourcing arrangement is established on a contractual basis.[5]

Independently of the fintech's place in the value chain (service creation vs distribution), it is important to understand who can claim ownership over the customer base, which is tightly related to the question of which brand is visible to customers. In instances in which a bank has a relegated role (Bank for International Settlements 2018, 19–20), which is typically

[4] Regulatory infrastructure, in this context, is understood as a regulatory license complemented with necessary systems and procedures in place to ensure regulatory compliance.

[5] An example of this model is the German-based fintech Penta, which cooperated with Solarisbank. For detailed regulatory implications of this model, see Enriques, Ringe (2020).

the case with the 'white-label bank' model, but increasingly more so with information aggregators, bank–fintech cooperation can indirectly lead to more competition in the market as well.

Despite a proliferation of bank–fintech cooperation, banks' willingness to voluntarily integrate a third-party provider, i.e. the 'troublemaker' (Drasch, Schweizer, Urbach 2018), is often constrained for several reasons. Firstly, banks continue to bear all the regulatory compliance risk without being in full control over the fintech's operations. Simply put, bilateral contracts may not be effective enough in inducing fintechs to meet all the regulatory standards, while monitoring efforts by the bank may be limited and costly. Moreover, due to legacy systems, banks usually find it complex and costly to modernise their infrastructure and create APIs for third-party access. Finally, in collaborative models in which fintechs are customer-facing, banks may be afraid of ceding their customer base to their partners.

In summary, limited direct competition between fintechs and banks and factors hindering bank–fintech partnerships suggest that there is a need for more contestability in markets for banking services. Financial markets regulators with a competition mandate have sought to address this issue by adopting open banking policies. The following sections will explore the basic concepts of open banking, discuss major regulatory models, and assess their potential effects on competition and cooperation in the market.

3. THE FOUNDATIONS OF OPEN BANKING

Customer data has always been one of the key inputs in financial intermediation services. The very existence of banks is often explained by their ability to overcome or mitigate pronounced information asymmetries, which lead to trade frictions in direct interactions between lenders and borrowers (Damme 1994).[6] Namely, banks are considered superior in the screening of borrowers *ex ante*, and monitoring the contract execution *ex post*, thus reducing adverse selection and moral hazard. While banks have different ways of gathering relevant information about borrowers' creditworthiness, banks have traditionally relied on their lasting relationships with their customers – a concept also known as relationship

[6] In addition to trade frictions caused by asymmetric information, banks can mitigate trade frictions arising because lenders prefer to hold liquid assets, while borrowers prefer a longer maturity of their loan (a bank's function of maturity transformation). For an overview of microeconomic theories in banking, see Damme (1994).

banking or relationship lending (Elyasiani, Goldberg 2004). It is often held that long-lasting relationships with customers, together with the continuity of the organisation, determine a bank's value (Boot 2016, 433). Empirical studies also document that continuous relationships between banks and their clients are associated with lower interest rates, less strict collateral requirements, and a lower likelihood of credit rationing (Berlin, Mester 1999, 579). Moreover, banks' insights into customer transaction accounts, savings accounts, lending patterns, and repayment history over time give them a competitive advantage in cross-selling other banking products and services. The abundant data that customers produce as a by-product of their financial activities serves as a basis for offering, for instance, wealth-management services.

As in other segments of the economy, the importance of data in financial services is increasing. Data is often colloquially referred to as the 'new oil' (The Economist 2017). This is due to the technological progress, which reduces the costs of collecting, storing, and processing data (such as via machine learning, AI, and prediction algorithms), thus, enabling to extract a greater value from it (Acquisti, Taylor, Wagman 2016, 444; Allen, Gu, Jagtiani 2021, 2; Carrière-Swallow, Haksar 2022, 128). Being aware of this trend, regulators in several countries have adopted, or are considering adopting, open banking policies to facilitate the access and use of available banking data, thus promoting innovation and competition in the market. According to some studies, open banking policies are 'on the way to adoption' in more than 80 countries (Babina, Buchak, Gornall 2022, 19).

The concept of open data implies that customers are permissioned to share their data held at banks with third party providers. The access to data is provided under controlled standards, while individual customer data is usually retrieved in a standardised format, allowing for easy analysis and comparison. Open banking, mandated by regulation, resides on three interrelated premises. The first premise is that customers are the ultimate owners of their data, and they have the right to decide who will have access to it and for which purposes. Customers' explicit consent to share their data presupposes that the value of services they receive outweighs the disutility that comes with reduced privacy.[7] The idea is embedded in the term 'data portability', as part of a broader concept of 'active data rights'. The latter

[7] This assumption implies that the customer (data subject) has sufficient information and control over the consequences of collecting their data, such as when their data is collected and for what purposes, which is often not the case in the digital economy (see Acquisti, Taylor, Wagman 2016).

implies that individuals not only enjoy protection from their data misuse or theft, but can also take actions concerning information about themselves (Asrow 2022, 33–34).

The second premise is that financial institutions have the incentive to shield the customer data they gather from their competitors. From an efficiency point of view, banks' exclusive use of their customer data is suboptimal. The non-rival nature of the data, i.e. that the same information can be used by multiple economic agents, suggests that society would be better off if the data is shared among different agents that can derive value from its exploitation (Carrière-Swallow, Haksar 2022, 130–131).[8]

In connection to this, the third premise is that customer data can be a competitive bottleneck in the banking industry (e.g. Dell'Ariccia 2001; He, Huang, Zhou 2023). The essential idea is that established incumbents benefit from relationship banking, i.e. proprietary information gathered through continuous interactions with their customers allows them to better assess their creditworthiness. Based on this, they can acquire some market power over their customers to their competitors' disadvantage.[9]

Therefore, allowing customers to share their transactional data with third party providers of their choice should lower barriers to entry in the banking sector and increase competitive pressure on incumbents, thus leading to lower prices and greater innovation in the provision of banking services. Another argument that further supports open banking policies is that data is at the heart of fintech businesses (Wolberg-Stok 2022, 17). As technology companies that focus on specific customer needs, they can use individual granular data more efficiently than banks. In other words, they can better exploit customer heterogeneity, bringing change along three important dimensions (Babina, Buchak, Gornall 2022, 15). Firstly, fintechs can offer better customised products (for instance, financial advice or wealth management services). Secondly, using advanced tools of data analysis helps

[8] It is worth noting, however, that there is a difference between situations in which information on an individual customer is used for selling different banking products (e.g. consumer loans and mortgages) and situations in which such information is used for selling a unique banking product but different market players compete in offering the best terms to the customer. In the latter case, even though all competitors who have access to information can derive value from its exploitation, only the competitor that offers the best terms will ultimately conclude the transaction with the customer and actually benefit from it. Nevertheless, this will improve allocative efficiency.

[9] This has to be understood in the context of a wider 'data economy where the size of the data pool determines competitive strength' (Arner, Buckley, Zetzsche 2022, 150).

them to predict better customer willingness to pay for certain products or services, thus facilitating price discrimination. While price discrimination allows service providers to extract more consumer surplus (primarily from willing to pay customers), it also enables them to provide services to previously underserved customers with low willingness to pay. Moreover, fintechs often combine banking data with non-traditional data sources, providing more efficient tools for risk pricing and credit decisions (Babina, Buchak, Gornall 2022; Berg *et al.* 2020; Langenbucher, Corcoran 2021).[10] Better estimation of individual customer risk is essential for mitigating adverse selection, which is a result of a 'pooling equilibrium' – situation in which 'good' and 'bad' types of borrowers receive loans under similar conditions because they are non-differentiable.[11]

It is important to note that the optimism about open data policies resides on the idea that the amount of data produced within the banking sector will remain unchanged. Nevertheless, the fact that open banking regulations will turn customer data into a common good can alter the incentives of market participants involved in its production: customers and banks. Customers may reduce data production if they are unsure how their data is used (Babina, Buchak, Gornall 2022, 19) or if they are afraid of incurring costs as a result of it, for instance, if the data reveals that they are risky customers. An important interrelated question to understand is whether and when they will decide to 'opt in' to share their banking data with third party providers. Banks usually do not incur significant costs when collecting customer data that is a by-product of regular financial activities. However, all the costs borne to establish and maintain relationship banking may now be futile due to a lack of exclusivity over customer data, again potentially reducing the total amount of data available (Carrière-Swallow, Haksar 2022, 140–141).

[10] For instance, Upstart is a US-based lending platform that uses AI to predict creditworthiness based on alternative data, such as educational background and current employment, and provides consumer loans in cooperation with banks (Langenbucher, Corcoran 2021, 142–143). Berg *et al.* (2020) analyses the importance of simple and easily accessible digital footprint variables for predicting default rates. It analyses data typically available to a e-commerce website (device type, operating system (iOS vs Android), email address (with or without a personal name), etc.) to show that simple digital footprints variables are equal or superior in predicting default rates when compared to credit bureau scores. They also show significant complementarity between traditional and non-traditional risk assessment methods.

[11] While efficient risk pricing helps low-risk customers to obtain loans under more favourable terms, it can also lead to the exclusion of the riskiest customers, who would otherwise go unnoticed in a large pool of borrowers that are difficult to discriminate (Carrière-Swallow, Haksar 2022, 137).

Regarding more technical aspects, for open banking policies to be implemented, banks have to reconfigure their IT architecture to allow third party providers to access customer data via APIs (as explained in the previous section). Open banking presumes 'open' or 'public' APIs, implying that they are accessible by anyone (who satisfies pre-defined criteria set out by the API provider or the regulator) (Zachariadis, Ozcan 2017, 6–7). This stands in contrast to private APIs, used for voluntary cooperation arrangements between banks and fintechs, which are highly customised, non-visible to the public, and subject to specific contractual obligations between the two parties. It is debatable whether 'openness' also implies that access to APIs is loyalty-free (Cardinal, Thomas 2022, 93; Zachariadis, Ozcan 2017, 6).

However, a mere regulatory requirement for banks to create open APIs is insufficient for creating a reliable and secure system that will foster a large-scale exchange of customer data. The first set of necessary conditions entails the implementation of data rights, broadly speaking. This includes 'passive data rights' (e.g. standards regarding data protection, cybersecurity, appropriate use of data, etc., and 'active data rights' (e.g. the above-mentioned data portability, standards regarding customer consent, the right to delete or correct data, etc.) (Asrow 2022, 33–34).

Some aspects of data rights are embedded in the technical architectures and solutions of APIs. APIs are a set of protocols that govern communication, authentication, and data functionalities/payloads (Cardinal, Thomas 2022, 96–99). Communication standards define how two systems connect and exchange data in a secure manner. Authentication standards are there to ensure that approved third party providers gain access to customer data without using or possessing customer credentials (ID and password) for accessing their accounts, but instead relying on a substitute object. Data functionalities/payloads determine the type (scope) of data that third party providers are allowed access to. Access to data is sometimes limited to 'read only', or can include a 'write' function as well, meaning that third party providers can initiate transactions on behalf of customers. It is important to emphasise that APIs architecture and technical (security) standards are sometimes prescribed by the regulator, sometimes recommended by industry associations or other self-regulatory bodies, or merely governed by internationally-accepted best practices, leading to varying degrees of

uniformity (World Bank 2022, 17–18).[12] When designing their APIs, banks have the option to develop them in-house or get a 'ready-made' solution from API providers.[13]

In addition to data rights that follow from technical standards of APIs, all market participants involved in data handling and storage (banks, fintechs, data intermediaries) are usually subject to an additional set of rules that ensure the robustness of their systems. Such rules may be part of the open banking framework, but they can also stem from operational risk management requirements for licensing of financial intermediaries/third party providers, or general data protection regulations (e.g. the General Data Protection Regulation (GDPR)[14] in the EU). A related issue is how to delineate liability between banks and third party providers in instances of a system failure, i.e. data breaches, misuse, unauthorised login, unauthorised transactions, etc. While financial institutions have been *per se* liable for 'protecting their customers from financial loss as a result of fraud', open banking practises require modernisation of regulatory rules and specific guidance, since appropriate apportionment of liability is usually difficult to achieve through contractual arrangements between market participants (Boms, Taussig 2022, 59, 56–72).

In addition to creating a robust and secure data exchange system, including associated consumer protection issues that may arise, the second prerequisite of an effective open banking policy is achieving a certain level of interoperability of API standards across the industry. Interoperability implies the use of standardised data protocols and a customary interface that allows external systems and applications to simply 'plug in', without the need to understand the particularities of the APIs' provider's system

[12] It is interesting to note that, in terms of regulatory remit, implementation of an open banking framework (defining (technical) rules and their effective monitoring) is delegated to various authorities and entities in different jurisdictions. It can be a banking authority (e.g. in the EU, India, Singapore, Hong Kong), competition authority (e.g. in the UK, Australia), an entity created and/or financed by financial industry members, or a combination thereof. This has to do with the fact that not all banking supervisory authorities have a competition mandate, or the necessary technical expertise and capacity within the institution to set the standards and enforce them.

[13] A growing number of banks rely on API platforms whose role is to create an additional layer of interface between banks and third party providers, ensuring the necessary level of compliance (World Bank 2022, 18–19).

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

(Zachariadis, Ozcan 2017, 6). Interoperability also entails standardisation of data recording formats, ensuring that data stored by one market participant can readily be used by other market participants (incumbents and fintechs) (Carrière-Swallow, Haksar 2022, 141), avoiding the unnecessary costs of adapting to the customised protocols of individual banks. Thus, common API standards are important for the ability of third party providers to achieve economies of scale in regard to data collection, aggregation, and analysis.

While this section outlined some of the cornerstones of open banking policies, abstracting from design features of specific countries, the following section will offer a comparative overview of regulatory solutions in 'frontrunner' jurisdictions in terms of open banking (the EU, the UK, Australia, and India). Other than being among the earliest adopters, the selected jurisdictions exhibit some interesting differences that bear importance for the main research question – whether and to what extent open banking is likely to foster competition and cooperation in banking. The overview is meant to be a high-level synopsis of key characteristics, leaving a more detailed comparative analysis to (future) legal scholarship. The factual basis for the synopsis relies on the findings in the recent World Bank report on open banking policies (World Bank 2022) and is complemented by scholarly research.

4. OPEN BANKING REGULATORY MODELS

The trend of adopting open banking policies is relatively recent, yet jurisdictions exhibit significant differences regarding institutional details. The reasons for the significant disparities can be found in different regulatory remits and institutional objectives of the competent authorities, their administrative capacity and internal technical expertise, as well as market-driven factors, such as incumbents' readiness or level of resistance, the banking market structure, and the level of fintech penetration. Existing financial regulations (such as licenses for non-bank financial intermediaries) and the current data protection frameworks undoubtedly influence the regulatory architecture of open banking policies. Open banking regulatory models can be roughly divided into mandatory and voluntary. Within the mandatory regimes, one can also differentiate between regimes that also prescribe technical standards for APIs, and those embracing more flexibility in this regard. A complementary institutional trait is whether banks are allowed to charge royalty fees. Voluntary regimes, in contrast to mandatory ones, typically leave it up to the banks to decide on charging fees for access to their customer data (World Bank 2022, 19). Another important

differentiating design feature is the scope of data that is subject to data portability, as well as functions that third party providers are allowed to perform concerning this data ('read' and/or 'write' access). Finally, banking regimes differ regarding the rules on market participants, including both the supply (financial institutions) and the demand side (fintechs) of the data exchange process.

4.1. The EU

The EU was the first jurisdiction to create a mandatory open banking regime, with the implementation of the Second Payment Services Directive (PSD2) in 2015.[15] The Directive came into full effect on 14 September 2019. The requirement to allow third party providers to access consumer financial data was coupled with strong customer authentication measures (also known as multi-factor authentication). In addition, the implementation of open banking was facilitated by the adoption of a comprehensive data protection regime embedded in the GDPR, effective as of 2018.[16]

While the PSD2 did not introduce a technical framework for 'common and secure open standards of communication' between banks and third parties, this task was delegated to the European Banking Authority (EBA), which issued complementary second-level texts.[17] Yet, the EBA merely requires banks (account servicing payment service providers) to offer a 'dedicated interface', without specifying the technical standards of communication, to ensure technology and business model neutrality.[18] Instead, 'to ensure the interoperability of different technological communication solutions, the interface should use standards of communication which are developed by international or European standardisation organisations'.[19] In the meanwhile, the industry autonomously adhered to standards created by several market-

[15] Directive (EU) 2015/ 2366 of the European Parliament and of the Council of 25 November 2015, on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and Repealing Directive 2007/64/EC, 2015 O.J. (L 337) 35.

[16] On the implications of GDPR on Open Banking, see Arner, Buckley, Zetzsche (2022, 157–162).

[17] Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication.

[18] Commission Delegated Regulation (EU) 2018/389, Recital 20.

[19] Commission Delegated Regulation (EU) 2018/389, Recital 21.

led initiatives.[20] With regard to the scope of data, the European regulator was rather conservative, allowing access only to payment accounts. 'Data from a loan, mortgage, saving, investment, pension, and insurance accounts' falls outside the scope (Littlejohn, Boskovich, Prior 2022, 182). The PSD2 was created with the view of facilitating entry into the payment-related services market. For this reason, 'read' and 'write' access to data is allowed, so that fintechs holding an appropriate license can also initiate a transaction from an account held at another institution. Regarding market participants subject to open banking regulations, the European regulator does not differentiate between banks of different sizes, creating a level playing field across the industry.

One distinctive feature of the open banking regime in the EU is that it introduced a set of new licenses for market players, who can build their business model around open access to customer data. Namely, the PSD2 created licenses for 'payment initiation services providers' (PISPs), and 'account information services providers' (AISPs). PISPs are businesses that initiate the transfer of funds between the customer's account and the merchant's account, without the need to go through the online platform of the bank where the customer account is held. PISPs offer customers low-cost payment solutions for their online transactions, without the need for a card intermediary (Vezzoso 2018, 32). AISPs are businesses that offer customers a comprehensive overview of their financial situation by collecting and aggregating information from payment accounts held at different banks and displaying it in an informative and accessible manner. Based on this, customers can change their spending/saving patterns or provide consent for this data to be shared with fintechs that provide additional services, such as banking products price comparisons, personalised advice regarding banking products, etc. (Vezzoso 2018, 32).[21] Neither AISPs nor PISPs are authorised to hold customer accounts directly. The approach of the European regulator – to allow only licensed third parties to access customer data – also bears significance on potential liability. Namely, the PSD2 prescribes that authorised third parties must comply with specific risk management requirements and hold indemnity insurance (or an equivalent guarantee) against specified liabilities (World Bank 2022, 17).

[20] These include standards created by German-based STET Group, and Polish-based API (World Bank 2022, 17).

[21] The PSD2 also introduced a license for payment instrument issuer service providers (PIISPs), which is less important for the discussion on open banking.

4.2. The UK

Open banking was introduced in the UK following the adoption of the PSD2 in 2018, as the country was still a member of the EU at the time. The mandatory regime was set up by the Competition and Markets Authority. Open banking in the UK embraced most of the EU solutions, such as that it mandates customer-permissioned data sharing only with licensed third party providers (regulated by the Financial Conduct Authority, or an equivalent authority in the EU Member State).

However, the framework exhibits some notable differences from its predecessor. The UK regulator recognised early on the necessity of adopting industry-wide technical standards and delegated their creation to an independent body – the Open Banking Implementation Entity (OBIE), which would work closely with industry members. The nine largest banks in the UK (also known as the CMA9) were mandated to finance its activities. To ensure interoperability across the industry, the OBIE went even further to create Operational Guidelines and Customer Experience Guidelines (Littlejohn, Boskovich, Prior 2022, 184). Regarding the scope of customer data, as is the case in the EU, third party access in the UK is limited to 'demand deposit accounts' (personal current accounts and business current accounts). However, it goes beyond this to allow for retrieval of information on bank products and services (Littlejohn, Boskovich, Prior 2022, 187). Finally, an important difference from the PSD2 solution is that the open banking framework in the UK is mandatory only for the CMA9, recognising that the insufficient level of competition and innovation in the market needs to be balanced against compliance costs for smaller market players.

4.3. Australia

Similar to the UK, the open banking regime in Australia was set up by the Australian Competition and Consumer Commission in 2018, with phased implementation starting in July 2019. In Australia, like in the UK, technical standards were mandated by regulations and followed by additional customer experience guidelines. Concerning the scope of data, the Australian regulator embraced an all-encompassing solution where access to data involves credit and debit cards, mortgages, and banking products and services, in addition to deposit and current accounts. However, unlike in the EU and the UK, the regulatory framework does not allow payment initiation. The novelty of the Australian approach is reflected in its area of application. Namely, open banking is merely one segment of a wider open data initiative, where access

to customer data is also mandated in other sectors of the economy, such as energy and telecommunications. Nevertheless, in the banking sector, a phased approach was foreseen so that the open banking framework was mandatory only for major banks during the first period, whereas other banks could adapt with a one-year delay.

4.4. India

The approach of the Indian regulator (the Reserve Bank of India) differs from the approaches presented above, most notably regarding the voluntary nature of rules. However, to better grasp the uniqueness of the open banking policy in India, it is helpful to distinguish between the 'read' and 'write' access to data, i.e. payment initiation.

The principles of open banking were first introduced in India with regard to payment initiation services, through the adoption of several interrelated policies, known under an overarching term 'Indian Slack' (Carrière-Swallow, Haksar, Patnam 2022, 247–253). The first important policy enabling the introduction of open banking is the Aadhaar identification system. It is a system of digital IDs for all Indian citizens who sign up for it. It enables financial institutions to easily verify customer identity via APIs, thus facilitating digital onboarding and compliance with Know Your Customer (KYC) rules necessary to open an account. The second important policy was the creation of the Unified Payments Interface (UPI) in 2016 – an interoperable payment system also based on standardised API protocols, which enables retail payments and settlements between financial service providers. The UPI is maintained as a public digital infrastructure, and access to it is provided to all licensed intermediaries – banks and non-banks fintechs that hold a 'special payment bank licence' (Carrière-Swallow, Haksar, Patnam 2022, 250). This license was created with the view of enabling the provision of financial services on a smaller scale, thus facilitating fintech entry.

While payment initiation data access is fully operational on a voluntary basis, data sharing among regulated financial service providers is still underway. The proposed data-sharing solution is unique in several respects (Carrière-Swallow, Haksar, Patnam 2022, 251–253). While the participation of banks is voluntary, it is meant to be facilitated through a special type of regulated aggregators. Moreover, data sharing will be established on a reciprocal basis, so that fintech companies will equally be required to

share financial data on their customers. Concerning the scope of data, as in Australia, data sharing will gradually evolve from financial services data to insurance and health data.

5. OPEN BANKING – FALLING SHORT OF EXPECTATIONS BUT HOLDING NEW PROMISES?

The growing enthusiasm of regulators worldwide about open banking policies and their effects on contestability and competition in banking (despite notable differences in approaches) requires a better understanding of the mechanisms potentially leading to the desired effects. The analysis of different models of fintech market entry (Section 2) shows that direct competition between banks and fintechs is not common due to factors that are far more comprehensive than access to customer information. Clearly, open banking policies will bear little or no consequence on fintechs that do not offer substitutes for banking products or intend to expand into these markets. This primarily includes companies that provide technology-based inputs for banking services, and companies that focus on niche banking services, customer segments, and geographies, i.e. markets in which banks do not operate.

Secondly, a wide array of fintechs that could potentially act as competitors to banks concerning specific products are dependent on cooperation with a bank to enter the market. For instance, a lack of reputation and customer base has often led to the integration of fintech products into banks' offerings. Fintechs whose business model entails operating under the regulatory umbrella of a licensed bank could potentially benefit from access to customer data under open banking, but in most jurisdictions they would need to get a special license (e.g. AISP, PISP). Moreover, the incumbent bank in the background (which enables the fintech to offer banking services, such as deposit taking and lending) can always withdraw its license, while retaining the deposit accounts opened by the fintech company.[22]

One fintech business model that would arguably benefit the most from open banking policies is information aggregators and marketplaces for financial services. These platforms could offer a unique interface through

[22] Contracts between fintechs and banks, under the regulatory umbrella model, often include clauses that stipulate that the fintech holds ownership over the customer base. However, it is questionable whether such clauses are enforceable and how customers' deposit accounts would be taken over by a different partner bank (or the fintech if it subsequently obtains its own banking license).

which customers could integrate and manage all their accounts held at various institutions, especially with the payment initiation function that some jurisdictions have enabled through open banking. Bank for International Settlements (2018) described a potential scenario in which aggregators would lead banks to become 'commoditised service providers and cede the direct customer relationship' to the aggregator (the platform) (Bank for International Settlements 2018, 19). While aggregators will likely continue to be just another distribution channel for banking products, one can conjecture that they will intensify the competition among incumbent banks, primarily by increasing the transparency of various banking offerings and facilitating their comparison. For platforms acting as aggregators of financial services to become established market players, thus fostering competition among incumbents, they would have to build a customer base. For this reason, it has been argued that technology platforms from non-financial sectors also known as BigTechs (Amazon, Apple, Google, Facebook, Alibaba, Tencent), acting as aggregators and marketplaces for financial services, will leverage their existing reputation, the customer base, and complementary data to become an indispensable distribution channel for banking products (Carletti *et al.* 2020, 12). With strong network effects, under this scenario, there would be a highly competitive market for banking products, with a few technology platforms dominating the interface with customers.

Even though an open banking regime has limited potential to intensify competition between fintechs and banks, there is nevertheless one more channel through which it can intensify competition among incumbents (including licensed neo (challenger) banks). Namely, with banks being able to get access to each other's customer information, the competitive advantage of relationship banking will be reduced, allowing smaller banks to compete along other price and non-price dimensions.

As mentioned above, proponents of open banking have mainly focused on competition and innovation as the regulatory goals. An often-neglected aspect of open banking policies is their potential effect on bank–fintech collaboration. As explained in Section 2, banks may be reluctant to engage in partnerships with fintechs due to the costs of creating APIs and regulatory and reputational risks, among others. One may conjecture that open banking will lead to a greater number of collaborations between banks and fintechs, primarily because banks will need to upgrade their core infrastructure for open APIs, making it more modular and flexible for further integration of fintech products and services. In addition, banks will bear a smaller risk when partnering with third party providers when there are clear regulatory standards regarding data transfer and technical integration of their products and services. In the same vein, the risk of collaborations will be lower with

a clear regulatory stance on how liability is split in case of a data breach or misuse of consumer rights. Open banking regulations are more likely to drive collaborations when third party providers are required to hold their license (e.g. AISP, PISP) and are thus subject to direct supervision of the regulatory authority. Nevertheless, the danger of reputational spillovers may undermine collaboration incentives (Klus *et al.* 2019, 16).

Interestingly, open banking regulations may create a loop between competition and cooperation in banking. Let us assume that open banking regulations will intensify the competition among incumbents. In that case, they may indirectly lead to greater cooperation with fintechs, whose innovations can help banks keep their competitive edge, for instance, by making better use of customer data and offering more personalised services.

The institutional variations described in Section 4 are usually difficult to capture in large-scale cross-country empirical studies, but they are also likely to make an important difference in the effects of open banking. It is straightforward to argue that mandatory open banking policies will lead to greater competition than voluntary ones. Nevertheless, an ill-fitting top-down approach may be more difficult to implement and thus less effective than voluntary rules created by and widely accepted among industry members. It has been mentioned before that mandatory regimes are usually royalty-free, while voluntary regimes give banks more freedom to decide on fees. If banks decide to charge fees for their customer data, competitive constraints are likely to be lessened. Still, voluntary partnerships are likely to increase, as banks can potentially create new revenue streams.

One regulatory feature that is likely to have a decisive effect on the effectiveness of open banking is common API standards. When considering the foundations of open banking (Section 3), it has been discussed how important interoperable API standards are for the ability of third party providers to achieve economies of scale in regard to data collection, aggregation, and analysis. Therefore, one can argue that the EU approach of favouring technology neutrality over common standards will weaken the potential effects of open banking.

The regulatory perimeter of open banking creates trade-offs. If all market participants in the banking sector are subject to the same rules (such as in the EU, as opposed to the UK solution), a level-playing field will naturally intensify competition. Nevertheless, smaller banks may find the implementation of open API architecture disproportionately burdensome, forcing them to increase margins or cut expenses in other areas important for their ability to innovate and compete (e.g. R&D, advertising, etc.). In other words, competitive pressure from smaller incumbents may be reduced.

In connection to this, the regulatory perimeter regarding third party providers, i.e. beneficiaries of open banking, can have countervailing effects on the prevalence of bank–fintech collaborations. Namely, as explained above, banks' willingness to expand their collaborations beyond regulatory requirements will depend on their ability to minimise regulatory and reputational risks stemming from partnering with fintechs. This means that open banking frameworks that provide access to data only to licensed third party providers will induce greater confidence among banks. However, such rules can also reduce the diversity of fintech innovations, since many innovative fintech business models or products do not neatly fit one of the existing licenses.

6. CONCLUSIONS

The paper has outlined several theoretical proposals regarding the expected effects of open banking on competition and cooperation in the market, which can be subject to further empirical testing as more data becomes available over time. The baseline finding is that open banking will primarily increase competition between incumbents rather than between incumbents and fintechs. The reason is that fintechs are seldom direct competitors to banks for reasons that are far more paramount than data access. Some fintechs act as technology suppliers to banks, some focus on geographical and product markets in which banks do not operate or target customer segments underserved by banks, while a large portion of them depend on establishing a cooperation with a bank for market entry. However, the activity of fintechs will likely enable mechanisms through which competition between incumbents will materialise. Thanks to open banking, fintechs, in particular those that act as data aggregators, will foster the transparency of banking offerings. Moreover, data-sharing infrastructure created as a result of open banking implementation can facilitate more encompassing collaborations between banks and fintechs, thus increasing the banks' innovation potential.

The paper has also discussed the economic trade-offs of the different regulatory approaches embraced by the jurisdictions that were among the early adopters of open banking policies (the EU, the UK, Australia, and India). The most notable differences concern the following dimensions: the mandatory vs voluntary nature of rules, the ability to charge fees for data access, the (un)existence of common API standards, the scope of data being shared, the functions that third party providers are allowed to perform concerning these data, and the rules on market participants on the supply

and demand sides of the data exchange. The paper has examined of how such regulatory choices can affect competition and cooperation in banking, which can be of interest to regulators and policymakers in the process of drafting an open banking framework.

All the theoretical prepositions in this paper rely on the assumption that open banking will lead to successful data-sharing practices, which further depend on two interrelated questions that call for further research. The first question is whether the amount of customer data will change with the introduction of open banking policies. As briefly discussed in Section 3, open banking can potentially alter the incentives of both customers and banks to produce data. The second question is whether and to what extent customers will give their consent for data to be accessed by third party providers. Their willingness to share will inevitably be affected not only by their perception of the quality of data protection, but also by a number of cultural and institutional factors, which need to be better understood.

Future research agenda will also need to follow developments in open banking policies, which may take several directions. From a contestability point of view, the most effective direction would be to open up core banking infrastructure via APIs for third party providers to integrate (plug in) their products and services. This would essentially mean mandating banks to establish cooperation with fintechs to alleviate barriers to entry. An obvious obstacle to this is the regulatory treatment of such services. Putting fintechs under banks' regulatory umbrella, as has been the practice in some of the market-driven collaborations, is unacceptable for the obvious reason that banks cannot be held accountable for non-compliance of third party providers which they were unable to choose themselves. Even for services that would not necessarily fall within the regulatory remit, the question is on which economic grounds one could justify such a policy, such as the premise that customers own their data, which provides grounds for existing open banking regulations. Some similarities can be drawn to the essential facilities doctrine, as developed in competition policy and applied both in the case of physical infrastructure and some intangible assets (e.g. Graef 2019). Still, the latter is applicable under a very restrictive set of conditions, which would not hold in banking.

The second, more realistic direction of development of open banking is to continually expand the scope of (banking) data that third party providers can have access to with customer consent, as well as to increase the scope of services that can be provided based on this data. As discussed in Section 3, the approaches of individual jurisdictions already exhibit differences along these dimensions. Increasing the scope of (open) data and associated services

will likely depend on the growing trust that banks and their customers put in data security and data sharing standards, as well as consumer protection standards adhered to by third party providers.

Another direction of development already taking place in several jurisdictions is to expand open banking regulations to other financial industries beyond banking, e.g. insurance companies (also known as 'open finance'). The theoretical considerations developed in this paper likely bear implications for open finance frameworks as well, as fintechs in other financial markets face similar barriers.

The most controversial direction of change is to impose open data[23] standards on BigTechs who will likely benefit the most from existing open banking policies, while exclusively owning their pools of alternative data (e.g. purchasing patterns, search interests, behaviour on the internet). Their economic power coupled with network effects can help them expand quickly into markets for financial services. It is not a surprise that open data policies are most welcome among incumbents who are currently primarily cost-bearers of existing open banking regulations. There is no doubt that such developments would considerably contribute to creating an even playing field between BigTech and traditional intermediaries, and potentially significantly improve the allocation of resources with advanced screening available to all market players. In addition to privacy and ethical concerns that such a policy would raise, the public choice theory may come into play when trying to understand why such a regulatory change will be difficult to achieve in the near future.

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[23] Open data is a generic term encompassing open e-commerce, open social media, open (Google) search, open health data, open telcoms, and all other domains in which asymmetries in data access hinder new business avenues as well as creating additional value for consumers (Wolberg-Stok 2022, 27–29).

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PRAVO DETETA NA IDENTITET U KONTEKSTU PRAVILA O ANONIMNOSTI DONORA REPRODUKTIVNIH ĆELIJA

Značaj prava deteta na identitet, koje je izričito priznato članom 8 Konvencije Ujedinjenih nacija o pravima deteta, rezultirao je napuštanjem tradicionalnog principa anonimnosti donora reproduktivnog materijala u velikom broju evropskih država. Međutim, određena nacionalna zakonodavstva još uvek se priklanjaju tom konceptu zabrane otkrivanja identiteta donora, dok pojedina predviđaju mešoviti model s ciljem uravnoteženja suprotstavljenih interesa. Debata je polarizovana između prava na privatnost donora i roditelja i prava deteta da zna svoje biološko poreklo. U radu je razmotren uticaj pravila o anonimnosti na mogućnost ostvarivanja prava deteta na identitet. Analiza različitih rešenja država evropskog pravnog prostora i stavova organa nadležnih za kontrolu primene najznačajnijih međunarodnih ugovora dovela je do izdvajanja odgovarajućih smernica za odmeravanje interesa u konfliktu. Iako je idealno rešenje tog pitanja teško zamislivo, zadovoljavajući bi mogao biti režim koji pruža garancije interesima svih lica, s fokusom na zaštitu prava deteta kao najugroženije strane.

Ključne reči: *Pravo deteta na identitet. – Anonimnost donora. – Biomedicinski potpomognuta oplodnja. – Pravo na privatnost. – Pravo deteta da zna biološko poreklo.*

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1. UVODNE NAPOMENE

Značaj biološkog porekla deteta slikovito je opisao američki novinar i pisac Vilijam Hoding Karter (*William Hodding Carter*) rečima: „Postoje samo dva trajna zaveštanja koja možemo dati svojoj deci. Jedno su koreni, a drugo krila" (Hodding Carter 1953, 337). Ne treba da iznenađuje to što se koreni navode na prvom mestu, kao polazna osnova života svakog pojedinca, ali i utočište kome se uvek vraća. Ipak, u pojedinim situacijama, bilo da su one splet životnih okolnosti ili posledica državne regulative, dete može biti uskraćeno tog nasleđa. Slično drevnoj ustanovi usvojenja dece, pravni odraz tehnološkog napretka u oblasti asistirane reprodukcije može u određenim slučajevima rezultirati ograničenjem ili potpunim negiranjem prava deteta da zna svoje biološko poreklo. Takve situacije mogu da budu posledica začeća uz biomedicinsku pomoć doniranjem reproduktivnih ćelija ili embriona u heterolognoj artificijelnoj inseminaciji. Ako ih prati apsolutna anonimnost donora, detetu se uskraćuje mogućnost da spozna istinu o svojim biološkom korenima.

Medicinski potpomognuta reprodukcija podrazumeva niz tehnologija kojima se osobama koje ne mogu prirodnim putem da dobiju potomstvo pruža mogućnost da se ostvare u ulozi roditelja. Kao metod začeća, potpomognuta reprodukcija prevazilazi u izvesnom smislu ideje konvencionalne porodice.[1] Ono što je danas poznato kao začeće uz pomoć darovanih polnih ćelija, naročito semenih[2], praktikovano je najmanje nekoliko stotina godina. Kao prvi primer upotrebe ove medicinske procedure navodi se inseminacija žene pod anestezijom i bez njenog znanja još 1884. godine. Informacije o tom činu izvedenom u tajnosti sačuvao je njen muž, dok njihov sin nije bio upoznat sa okolnostimasvog začeća, sledstveno tome, ni sa identitetom donora (Yuko 2016). Iako je taj drastičan primer daleko od savremenih shvatanja

[1] Iako doniranje semenih ćelija efikasno zamenjuje reproduktivnu ulogu partnera žene koja je primalac, takav čin je u početnim fazama razvoja imao seksualnu konotaciju, te je povezivan sa bludom i preljubom. To je jedan od razloga što pojedine religije taj postupak smatraju apsolutno neprihvatljivim. Interesantan je primer područje Azije gde postoji oštra razlika u stavovima o doniranju reproduktivnih ćelija u islamskim državama i onima koje to nisu. Šerijatsko pravo izričito zabranjuje doniranje semenih ćelija. Sličan stav je iskazala i Rimokatolička crkva. Odluka italijanske Vlade da u martu 2004. godine zabrani sve oblike začeća koje uključuju donora i surogat materinstvo nesumnjivo duguje zasluge uticaju Katoličke crkve (Burr 2010, 802; Blyth 2006, 247).

[2] Doniranje jajnih ćelija nije tako uspešan ni jednostavan proces. Osim toga, troškovi začeća i akutni nedostatak donora dodatno komplikuju njegovu upotrebu (Clark 2012, 621 fn. 1).

o ljudskim pravima i pravilima postupka asistirane reprodukcije, budući da se on obavlja uz izričitu saglasnost korisnika, princip anonimnosti donora uspeo je da opstane duže od jednog veka (Blyth 2006, 246).

Istorijski posmatrano, osim identiteta donora, i sama činjenica začeća deteta uz upotrebu reproduktivnog materijala davaoca tradicionalno je bila obavijena velom tajne. Međutim, relativna lakoća sa kojom je sada moguće utvrditi identitet genetskih roditelja i politika otvorenog usvojenja značajno su uticale na razvoj ideje o pravu deteta da zna svoje poreklo, kao užem segmentu prava na identitet (Clark 2012, 621). Pomenute situacije u kojima može biti narušeno to pravo deteta toliko su različite da onemogućavaju holističko rešenje (Besson 2007, 138). Ipak, u oblasti asistirane reprodukcije sukob interesa deteta sa pravima drugih lica, interesima javne vlasti ili čak ostalim pravima koja mu se priznaju otežava procenu situacije. Konflikt je naročito izražen u odnosu na konkurentno pravo donora na anonimnost, ali i prava roditelja na poštovanje privatnog i porodičnog života (Kovaček Stanić 2022, 207). Sve to je doprinelo da se ideja o pravu deteta da zna istinu o svom biološkom poreklu pretvori u svojevrsnu „Pandorinu kutiju" (Besson 2007, 138).

Oštra diskusija koja se u poslednjih nekoliko godina vodila o sukobu prava i interesa u ovoj oblasti uspela je da okonča apsolutnu nadmoć pravila o anonimnosti. Na međunarodnom nivou, osim Evropske konvencije o ljudskim pravima (EKLJP)[3] usvojene od Saveta Evrope koja na posredan način garantuje zaštitu prava na identitet, to pravo se prvi put u članu 8. Konvencije o pravima deteta (KPD)[4] izričito priznaje i detetu kao titularu. Kao rezultat tih tendencija, u skladu sa principom otvorenosti i istinitosti, u pojedinim zakonodavstvima detetu se pruža mogućnost da, pod određenim uslovima, sazna identitet donora (Vlašković 2014, 241).

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe), 4 November 1950, ETS 5. Ondašnja državna zajednica ratifikovala je EKLJP 2003. godine (vid. *Službeni list SCG* – Međunarodni ugovori 9/2003, 5/2005 i 7/2005 – ispr. i *Službeni glasnik RS* – Međunarodni ugovori 12/2010 i 10/2015).

[4] Convention on the Rights of the Child (UN General Assembly), 20 November 1989, United Nations, Treaty Series, vol. 1577, 3. Interesantan je podatak da je to najbrže potpisan međunarodni ugovor o ljudskim pravima svih vremena (Frith 2007, 645), što je posledica desetogodišnjeg procesa usaglašavanja o tekstu Konvencije. Tadašnja SFRJ je ratifikovala Konvenciju već naredne godine. Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Službeni list SFRJ* – Međunarodni ugovori 15/90 i *Službeni list SRJ* – Međunarodni ugovori 4/96, 2/97.

Nasuprot tome, izvestan broj država još uvek se priklanja principu anonimnosti u asistiranoj reprodukciji. Disproporcija nacionalnih rešenja je iznenađujuća ako se uzme u obzir da su sve te države vezane istim obavezama u međunarodnim instrumentima. Razlike proizlaze iz sociooloških, kulturoloških i istorijskih shvatanja zbog kojih se pridaje veći značaj određenim interesima nego drugima (Besson 2007, 152). Dok jedni pravo deteta da zna svoje poreklo postavljaju na pijedestal, drugi sukob između tog prava i pravila o anonimnosti rešavaju u korist donora.

U radu će biti iznete određene smernice za odmeravanje interesa u sukobu. Osim različitih rešenja nacionalnih zakonodavstava i međunarodnih dokumenata o ljudskim pravima, praksa Evropskog suda za ljudska prava (ESLJP) pruža korisne principe i stavove koji mogu doprineti uspostavljanju balansa. Izbor između principa anonimnosti i tajnosti ili principa otvorenosti i istinitosti ne treba posmatrati isključivo sa aspekta prava deteta ili interesa donora već i uz uvažavanje položaja roditelja i porodice kreirane na taj način. On je neminovni pokazatelj značaja koji se pridaje porodičnom životu i sociološkom roditeljstvu, s jedne strane, odnosno biološkom poreklu, s druge strane.

2. UTICAJ PRAVILA ASISTIRANE REPRODUKCIJE NA OPSEG PRAVA DETETA NA IDENTITET

Identitet je izuzetno složeni pojam, pa je razumljivo to što gotovo nikada nije zakonski definisan. Majkl Friman (*Michael Freeman*) ističe da je pravo na identet „pravo koje sprečava obmanjivanje pojedinca u pogledu istine o svom poreklu“ (Freeman 1996, 291). Teorijsku osnovu formiranja identiteta postavio je psiholog Erik Erikson (*Erik Erikson*), podelivši ga na tri suštinska dela – biološki, koji se tiče saznanja genetskog porekla, psihološki, kao sinonim za oblikovanje sopstvene ličnosti, i kulturološki, koji podrazumeva usvajanje sistema vrednosti šire zajednice.[5]

[5] Ističući značaj identiteta, psiholozi su često upotrebljavali metaforu „ogledala“. Bez njega pojedinac ne može videti, a ni prepoznati sebe. Čovekov doživljaj sopstvene ličnosti zavisi od toga šta okolina, porodica ili šira društvena zajednica odražavaju – šta znaju, govore ili osećaju o njemu. Lica lišena saznanja o svojim precima, bilo zato što su usvojena ili začeta uz pomoć doniranog reproduktivnog materijala, izgubila su tu važnu komponentu samospoznaje. Drukčije rečeno, nepostojanje „ogledala“ ometa formiranje identiteta (Benward 2012, 166–167).

Genetski deo je statičan element identiteta (Tobin 2019, 293). Nedvosmisleno priznavanje tog prava i detetu kao titularu još je jedan značajan pokazatelj njegove slojevitosti. Drugim rečima, KPD, osim izričitog regulisanja prava deteta na identitet u članu 8, pojedine njegove segmente garantuje i u nekoliko drugih članova. Upravo je pravo deteta da sazna biološko poreklo značajan stepenik na putu ka formiranju ličnog identiteta. Ugrožavanje, čak i potpuno negiranje tog prava, može biti posledica uticaja različitih spoljnih faktora (Mladenović 2021, 450). Značajnu ulogu u određivanju opsega njegovog ostvarivanja imaju propisi kojima se reguliše postupak medicinski potpomognute oplodnje uz doniranje reproduktivnog materijala. Pravila o (ne)anonimnosti donora mogu uticati na razvoj deteta začetog tim postupkom. Ostvarivanje prava deteta u takvim situacijama zavisi od pristupa zakonodavne vlasti, ali i sopstvenih roditelja.

Potpuno ostvarivanje prava deteta na saznanje porekla, u kontekstu asistirane reprodukcije uz doniranje materijala, podrazumeva istovremenu realizaciju dva sasvim različita prava, koja se mogu posmatrati kao njegovi neophodni sastojci. Prvo je pravo deteta da zna okolnosti sopstvenog začeća, odnosno genetsko poreklo. Drugo je mogućnost da sazna identitet donora ili pojedine informacije o njegovoj ličnosti. Njihova uslovljenost je očigledna. Bez svesti o prirodi začeća ne može se ni pristupiti traženju informacija o donoru (Frith 2001, 476). Malo je verovatno da bi dete, ako mu roditelji ne saopšte istinu, uopšte postavilo pitanje genetske povezanosti sa njima. Začeće uz doniranje reproduktivnog materijala je i dalje dovoljno retka pojava da deca koja posumnjaju u biološku vezu sa jednim ili oba roditelja ne moraju nužno uzeti u obzir mogućnost tog načina dolaska na svet.

Uprkos tome, gotovo nijedna zemlja od onih koje su ukinule pravila o anonimnosti donora ne obezbeđuje mehanizam koji bi osigurao da dete začeto tim putem bude o tome informisano[6]. Odluka da se dete obavesti o prirodi njegovog začeća potpuno se prepušta roditeljima (Frith 2001, 477). Generalno, država daje prednost autonomiji roditelja na osnovu pretpostavke da se oni nalaze u najpogodnijem položaju da procene najbolji interes deteta. Iako bi zakonodavne promene mogle uticati na izmenu trenda prikrivanja istine od strane roditelja[7], njihova odluka je izuzetno složena

[6] Izuzetak je rešenje irskog Zakona o deci i porodičnim odnosima, kojim se, uz zabranu anonimnog doniranja, nameće obaveza državi da obavesti osobu koja je začeta tim postupkom u slučaju da ona sa navršenih 18 godina života zahteva izvod iz matične knjige rođenih (Mulligan 2022, 124).

[7] Roditelji mogu imati različite razloge zbog kojih oklevaju da detetu saopšte tu istinu. Njihov fokus se pomera od strahovanja za značaj sopstvene uloge roditelja do brige za očuvanje najboljeg interesa deteta. Mnogi od njih žele da zaštite svoj položaj, iz bojazni da bi dete moglo donora da doživi kao „pravog“ roditelja. Postoje

porodična stvar te veoma kompleksna za regulisanje zakonom. Štaviše, na području država članica Saveta Evrope takva intervencija bi se nesumnjivo mogla protumačiti kao kršenje člana 8 EKLJP, kojim se garantuje pravo na poštovanje privatnog i porodičnog života (Clark 2012, 623).

Rezultat te pravne situacije jasno je vidljiv u različitoj pravnoj prirodi dva pomenuta prava. Pravo na saznanje podataka o ličnosti donora, u slučajevima predviđanja njegove neanonimnosti, bilo bi garantovano samim zakonskim odredbama, dok bi pravo da sazna istinu o prirodi svog začeća predstavljalo moralno pravo deteta. Iako pojedini autori naglašavaju da obaveza leži i na strani države i na strani roditelja, kao što je već istaknuto, čak i zakonodavstva koja zabranjuju anonimnost donora istovremeno ne garantuju detetu saznanje o načinu njegovog začeća (Samardžić 2012, 171). Međutim, postojanje jednog takvog prava jasno podrazumeva konsekventno nametanje moralne dužnosti drugima (Frith 2001, 477). U pravnim sistemima koji su napustili pravila o anonimnosti ta obaveza pada na teret roditelja.[8] Moralna je upravo zbog nepostojanja pravnih sredstava kojima bi se kontrolisalo njeno poštovanje u praksi. Zakonsko pravo deteta je uslovljeno ispunjenjem moralne dužnosti roditelja.

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i stavovi da bi takva istina nesporno upućivala na neplodnost, najčešće muškog partnera, što se još uvek smatra visoko stigmatizovanim. Istraživanja su pokazala da potrebu za doniranjem reproduktivnih ćelija pojedini muškarci doživljavaju kao lični neuspeh. Upravo to je i razlog što su majke sklonije od očeva da saopšte takve informacije. Zbog činjenice da su nosile i rodile dete, odnosno da su gestacione majke, osećaju veću povezanost sa njime. Međutim, važno je razumeti da začeće koje uključuje donora reproduktivnih ćelija pruža mogućnost porodici kreiranoj na takav način da se uklopi u prividnu kulturološku normu i ispuni očekivanja genetske povezanosti, što je važan faktor uticaja na odluku mnogih parova da se opredele za taj postupak. Između ostalog, pojedini od njih čin doniranja doživljavaju kao ništa više od jednog altruističnog gesta ili usluge poput doniranja krvi ili nekog organa. Stoga, neotkrivanje tih podataka zapravo obezbeđuje parovima veću povezanost sa detetom. Ipak, pojavom sve većeg broja jednoroditeljskih porodica i odgajanja dece od istopolnih partnera, takve podatke je teško sakriti (Clark 2012, 641; Burr 2010, 804; Vlašković 2014, 240).

[8] Dobar primer možemo pronaći u zakonodavstvu Švedske, koja je pionir u napuštanju pravila o anonimnosti donora. Prema švedskom pravu, roditeljima se savetuje da bi „trebalo“ da saopšte detetu istinu o začeću uz pomoć doniranog reproduktivnog materijala (Frith 2001, 478). Slično rešenje se može pronaći i među normama domaćeg zakonodavstva koje se tiču usvojenja deteta. U jednoj od faza u postupku njegovog zasnivanja predviđena je i naročita dužnost službenog lica organa starateljstva da preporuči usvojiteljima da detetu saopšte istinu o biološkom poreklu, i to što je moguće pre (Ponjavić, Vlašković 2022, 234).

Premda pravila o neanonimnosti donora polažu značajne garancije pravu deteta na saznanje porekla, prepuštanje odluke koja uslovljava mogućnost njegovog ostvarivanja roditeljima nesumnjivo otkriva činjenicu da prevagu odnosi njihovo pravo na privatnost (Frith 2001, 479). Za mnoge roditelje čin nošenja deteta u utrobi, dojenje, odgajanje i podizanje deteta ima drastično veću važnost od čisto genetske veze. Ako bi im se obaveza obaveštenja nametala zakonom,[9] ona bi mogla predstavljati invaziju na njihovu privatnost. Umesto toga, iskrenost i postepeno prihvatanje takvog metoda koncepcije tokom vremena čini se kao najadekvatniji načini stvaranja osećaja obaveznosti otkrivanja istine u svesti roditelja (Clark 2012, 640).

Kada se ta prepreka uspešno prevaziđe saopštavanjem detetu informacije o okolnostima njegovog začeća, preostaje znatno komplikovanija moralna situacija. Složenost pitanja da li detetu omogućiti pristup podacima koje se tiču donora ili garantovati njegovu anonimnost posledica je očiglednog sukoba interesa. Mogu se izdvojiti tri osnovna interesa deteta da sazna svoje biološko poreklo, a to su medicinski, psihološki i interes krvne povezanosti (Samardžić 2018, 247).

Povod za najveća razmimoilaženja u stavovima teorije, ali i rešenjima nacionalnih zakonodavstava, jeste potreba deteta da sazna identifikacione podatke o ličnosti donora. Ono što većina uzima „zdravo za gotovo" postaje višestruko značajnije ukoliko bude uskraćeno. Anonimnost donora automatski kida sve veze između deteta i njegovih krvnih srodnika. Posledica toga je mogućnost pojave osećaja „genetske zbunjenosti" (*genealogical bewilderment*)[10] onih koji otkriju da nisu biološki povezani sa jednim ili

[9] U Velikoj Britaniji parlamentarna izmena Zakona o humanoj fertilizaciji i embriologiji pružila je povod za iznošenje predloga da se osobama začetim tim metodama osiguraju konkretnija prava. Na taj način bi država sebe potpuno udaljila od uloge „saučesnika" u uskraćivanju njihovog prava na saznanje istine o biološkom poreklu. U tom smislu, izložen je niz sugestija da se već prilikom registracije deteta u matičnu knjigu rođenih upiše podatak da je reč o detetu začetom uz donirani reproduktivni materijal. Iako taj amandman nije usvojen, predstavljao bi značajno sredstvo podsticanja roditelja da saopšte te podatke, budući da bi ih dete ionako saznalo uvidom u matičnu knjigu rođenih (Blyth, Frith 2009, 185). Međutim, nameće se pitanje koliko bi takvo zakonsko pravilo vodilo računa o ravnopravnosti dece, s obzirom na to da bi za pojedince moglo delovati kao svojevrsno „obeležavanje", te diskriminacija u odnosu na decu začetu prirodnim putem, ali i onu koja su nastala homolognom biomedicinski potpomognutom oplodnjom.

[10] Termin se odnosi na potencijalne probleme sa identitetom koje bi moglo da iskusi dete u hraniteljskoj, usvojiteljskoj porodici ili začeto putem postupka potpomognute reprodukcije poput surogacije ili doniranja gameta. Taj izraz je skovao psiholog Sants (*H. J. Sants*) još 1964. godine, ističući da je „genetska zbunjenost" dodatni stres koji pogađa usvojenu decu, za razliku od one koja odrastaju u biološkoj porodici (Clark 2012, 647–655). Takođe, u literaturi se ističe

oba roditelja. Međutim, postoje i oni koji osporavaju štetan uticaj „genetske zbunjenosti" na pojedinca. I zaista, nije svaka osoba začeta doniranim materijalom radoznala, a još manje zainteresovana za traženje tih podataka, budući da svako pridaje različit značaj genetskoj vezi. Međutim, problem sa pravilima o anonimnosti jeste to što ona na površan način poriču da biološko poreklo ikada može biti od velike važnosti ili da nepostojanje podataka o njemu može štetno delovati (Shanner 2012, 239). Drugim rečima, nije svako dete začeto na taj način oštećeno povredom njegovog prava na saznanje biološkog porekla, ali je svakako izloženo riziku od takvih posledica. Posebno je značajna uloge državne vlasti u zadržavanju tih podataka u tajnosti. Informacije o biološkom poreklu, u takvim okolnostima, tretiraju se kao nešto što država „daje", odnosno poseban resurs na koji dete začeto doniranjem gameta smatra da ima pravo, a što društvo ne mora da mu obezbedi. Međutim, njegovo pravo nije sadržano u pružanju informacija već u uklanjanju barijera za pristup tim informacijama, i to onih koje je država postavila oko postupka koji je prethodno sama omogućila (Ravitsky 2014, 36). Potpuno je razumljivo da dete u takvoj situaciji traži informacije kojima država raspolaže. Nemogućnost deteta da sazna svoje biološko poreklo usled životnih okolnosti ne može se izjednačiti sa slučajevima kada to pravo detetu uskraćuje država.[11]

Pravila o anonimnosti donora čine više od samog prekida srodničkih veza. Ona su plodno tle za zloupotrebu moći u kojoj odrasli postavljaju svoje interese ispred prava deteta, ali i svojih obaveza kao roditelja, i socioloških i bioloških (Shanner 2012, 240). Njihovo propisivanje s ciljem zaštite donora može se osporiti. Legitiman zahtev deteta za otkrivanje identiteta donora, koji bi bio jasno pravno ograničen, ne bi predstavljao stvarno kršenje njegovog prava na privatni život (Cordray 2012, 46). Sasvim je razumljivo i isticanje potrebe za zaštitu interesa roditelja od mešanja trećeg lica u

da deca koja osećaju gubitak identiteta zbog nepoznavanja jednog ili oba genetska roditelja sebe opisuju kao „genetsku siročad" (*genetic orphans*) (Somerville 2010, 41; Gilman, Nordqvist 2018, 319).

[11] Takvo gledište su kritikovali pojedini autori, koji smatraju da bi prihvatanje pravila o neanonimnosti donora moralo imati posledica i na decu koja nisu začeta na ovaj način. Oni ističu da je zauzimanje istog stava o tom pitanju nužan uslov zadovoljenja principa ravnopravnosti dece, te da je neophodno ili prihvatiti neograničeno pravo na saznanje porekla ili ga ograničiti usled uzimanja u obzir prava i interesa drugih lica. Jer, ako dete pretrpi štetu usled uskraćivanja saznanja o svom biološkom poreklu do te mere da bi država trebalo da propiše obavezni registar donora protiv njegove ili volje roditelja deteta, postavlja se pitanje zašto onda ne primeniti isti propis na prirodnu reprodukciju. Rešenje koje predlažu jeste uvođenje obaveznog DNK testiranja već pri samom rođenju dece začete prirodnim putem ili ustanovljenjem registra čak i prolaznih, kratkotrajnih veza zbog postojanja mogućnosti začeća (Samardžić 2018, 257; Cohen 2012, 443).

porodične odnose. Ipak, ukoliko se toliki značaj pridaje zaštiti privatnosti donora i roditelja, kao sporno se javlja pitanje srazmernih interesa deteta. Ako se drugim licima daje veća kontrola nad njegovim ličnim podacima, onda je i privatnost deteta efektivno narušena (Shanner 2012, 234). Takođe, opravdano je shvatanje da pravo deteta na identitet, ali i na zaštitu privatnog života, čak i kada bi se posmatrali udruženo, definitivno gube bitku sa osnovnim ljudskim pravom na život.

Suština se ogleda u tome da se ne može reći kako država nanosi štetu detetu ukoliko obezbeđuje rođenje deteta i život vredan življenja. Intencija zakonodavaca je razumljiva imajući u vidu da je opšteprihvaćen stav da je u najboljem interesu deteta da se rodi, a pravila o neanonimnosti donora mogu ograničiti te mogućnosti. Međutim, čak i prihvatanje takvog mišljenja ne garantuje zaštitu interesa deteta nakon njegovog dolaska na svet. Propise za koje se tvrdi da promovišu najbolji interes deteta ne treba opravdavati na osnovu ekstremnog argumenta da, u njihovom odsustvu, dete ne bi imalo život vredan življenja (Cahn 2009, 940). Ako pođemo od pretpostavke da ukidanje pravila o anonimnosti ne bi bilo u interesu izvesnog broja donora i roditelja, istovremeno možemo pretpostaviti da bi pojedini ipak uživali u saznanju da njihovo dete odrasta u sistemu koji mu obezbeđuje neometano formiranje identiteta.[12]

3. RAZLIČITI PRISTUPI DRŽAVA USKLAĐIVANJU PRAVA DETETA NA IDENTITET I PRAVA DONORA NA PRIVATNOST

Anonimnost donora reproduktivnih ćelija više nije princip koji uživa jednoglasnu podršku na evropskom pravnom području. Tendencije proširenja značaja prava deteta da zna svoje poreklo u oblasti medicinski potpomognute oplodnje postoje već nekoliko decenija. Međutim, poslednjih godina su izazvale drastične promene u rešenjima nacionalnih zakonodavstava.[13]

[12] Jedna od značajnijih uloga roditelja jeste stvaranje uslova da njihovo dete postigne ono što želi. Roditelji deteta začetog darovanim polnim ćelijama imaju dobar razlog da misle kako će njihovo dete želeti da zna identitet donora (Groll 2021).

[13] Faktički, iščezla je grupa država čiji zakoni su predviđali apsolutnu anonimnost donora koja isključuje pravo deteta da otkrije ne samo podatke vezane za njegov identitet, već i one neidentifikacione. U tom smislu, može se reći da je apsolutna anonimnost donora suštinski postala stvar prošlosti (*Šansa za roditeljstvo* 2019).

Prva u nizu zemalja koja se odrekla principa anonimnosti bila je Švedska još 1984. godine, predviđajući da dete ima pravo na pristup podacima o donoru koji se čuvaju u registru konkretne zdravstvene ustanove ukoliko je dovoljno zrelo.[14] Švedski primer je potom sledilo nekoliko država: Austrija (1992), Švajcarska (2001), Holandija (2004), Velika Britanija (2005), Finska (2007), Nemačka (2018) i Irska (2020) (Indekeu *et al.* 2021, 94; Kovaček Stanić 2021, 22). Pažnju privlači rešenje holandskog prava, koje uslovljava mogućnost pristupa informacijama o donoru prethodnim pismenim odobrenjem donora i uzrastom deteta od 16 godina života. Međutim, i bez ispunjenja prvog kriterijuma, podaci o donoru se ipak mogu pružiti nakon uzimanja u obzir interesa konkretnog deteta i donora (Vlašković 2014, 241).

Iste godine kada je Švedska usvojila princip neanonimnosti, u Velikoj Britaniji je suprotan koncept snažno promovisan u Varnokovom izveštaju (Blyth 2006, 249). Bilo je neophodno da prođe više od 20 godina kako bi englesko pravo dalo prednost pravu deteta da zna svoje poreklo. Prema aktuelnim zakonskim propisima, pravo uvida u podatke o identitetu iz registra Uprave za ljudsku embriologiju i oplodnju imaju osobe sa navršenih 18 godina života.[15]

Zanimljivo da je Francuska poslednja u nizu država koje su se pridružile toj grupi. Njen tradicionalni argument da treba poštovati privatni život, koji je, između ostalog, i temelj instituta anonimnog porođaja, činio je tu državu tipičnim primerom davanja prednosti interesima donora. Ne samo da je njegov identitet bio zaštićen zakonom već je i njegovo otkrivanje predstavljalo krivično delo. Kontroverzni zakon, koji je otvorio mogućnost pristupa medicinski potpotmognutoj oplodnji homoseksualnm partnerkama i ženama koje žive same, od septembra 2022. godine omogućava detetu da sa dostignutim godinama punoletstva ostvari pravo da sazna identitet donora.[16] Francuski zakonodavac se opredelio za jedno jedino rešenje, odnosno dozvolio je mogućnost isključivo neanonimnog doniranja (Giovannini 2022,

[14] Pretpostavlja se da je taj uslov ispunjen sa navršenih 18 godina života, dok se maloletnicima može odobriti pristup informacijama nakon prethodne procene Nacionalnog odbora za zdravstvo i dobrobit (*Socialstyrelsen*) (Preložnjak 2020, 1190; Lampic *et al*. 2022, 511).

[15] To rešenje se primenjuje od aprila 2005. godine, bez mogućnosti retroaktivnog dejstva. Prema tome, 2023. godine će prvi osamnestogodišnjak začet doniranim materijalom moći da ostvari uvid u te podatke pod okriljem engleskog prava (Clark 2012, 637; Emerson 2022, 431; Baylor 2021).

[16] Podaci se tiču porodične i profesionalne situacije, njihovog opšteg stanja i fizičkih karakteristika. Zakon se ne primenjuje retroaktivno, izuzev u slučaju da postoje poseban zahtev deteta i odobrenje donora. Zakonske norme garantuju pravo detetu da sazna identitet donora, ali ne i obrnuto (Fitzpatrick 2022).

11; *Le monde* 2022). Drastičnim izmenama zakona, ta država je iz jedne krajnosti otišla u suprotnu.[17] Osim toga što apsolutnu prednost daje pravima deteta, takav pristup istovremeno sprečava mogućnost sukoba sa pravom potencijalnog donora na privatnost budući da on jednostavno može odbiti da se nađe u toj ulozi (Tobin 2019, 266).

Drugu grupu čine države koje predviđaju pravo deteta da sazna određene informacije[18] o licu koje je doniralno oplodne ćelije, ali ne i njegov identitet. Za apsolutnu zabranu neograničene dostupnosti identifikacionih podataka o donoru, kao otelotvorenje principa anonimnosti, izuzimajući isključivo podatke od medicinskog značaja, opredelio se zakonodavac Republike Srbije (Draškić 2016, 148 fn. 344). Prema Zakonu o biomedicinski potpomognutoj oplodnji, dete začeto tim postupkom koje je sposobno za rasuđivanje ima pravo da iz medicinskih razloga traži od Uprave za biomedicinu podatke od medicinskog značaja koji se odnose na donora polnih ćelija i to kada navrši 15 godina života.[19] Gotovo identično rešenje predviđeno je u pravu Grčke.[20] Španski zakonodavac uspostavlja „relativnu anonimnost donora", odnosno i dete i njegovi roditelji imaju pravo da dobiju opšte informacije o donoru, a u situacijama postojanja rizika po život ili zdravlje dece" (Riaño-Galán, Martinez González, Gallego Riesta 2021, 337). Međutim, trenutno je aktuelna debata o ukidanju anonimnosti donora u Španiji, koja uspeh postupaka reproduktivnih tehnologija u velikoj meri duguje dostupnosti donora,

[17] Zakonodavna aktivnost je u prvom redu posledica pritiska međunarodnih organa. Naime, Francuska je trenutno jedina država koja je tužena strana u postupcima pred ESLJP po pitanju zaštite prava na saznanje porekla osoba začetih uz pomoć doniranog materijala. Iako još uvek nije doneta presuda u predmetima *Silllau v. France* i *Gauvin-Fournis v. France*, njihov prilično izvestan ishod podstakao je zakonodavne izmene (Preložnjak 2020, 1187; Mulligan 2022, 120).

[18] To mogu biti podaci koji se tiču obrazovanja, socijalnog statusa, zdravstvene istorije, interesovanja ili određenih fizičkih karakteristika donora. Na prvi pogled, takvo rešenje se čini kompromisnim i prihvatljivim, uspostavljajući adekvatan balans između interesa donora da ostane anoniman i potrebe deteta da sazna istinu o genetskom poreklu. Ipak, nedostatak iznetog pristupa se ogleda u psihološkom doživljaju deteta, koje je svesno da podaci o identitetu donora postoje, ali mu je ograničen pristup tim podacima (Draškić 2011, 97).

[19] Zakon o biomedicinski potpomognutoj oplodnji, *Službeni glasnik RS* 40/2017, 113/2017 – dr. zakon, čl. 57 st. 1.

[20] Medicinski podaci o donoru čuvaju se u potpunoj tajnosti u Banci za krioprezervaciju i registru koji vodi Nacionalna uprava za medicinski potpomognutu reprodukciju. Pristup tim informacijama je dozvoljen isključivo detetu iz razloga relevantnih za njegovo zdravlje (*Cryogonia* 2022).

budući da se osećaju zaštićenije jer njihov identitet neće biti otkriven.[21] Komitet za bioetiku je preporučio izmenu važećih propisa u korist prava deteta da zna svoje poreklo. Nakon mnogih godina potpunog nedostatka kontrole nad brojem dece rođene upotrebom ćelija istog donora,[22] čini se poželjnim da se uspostave odgovarajući registri kako bi se uravnotežila prava zainteresovanih strana (Giovannini 2022, 12). Režimi zaštite anonimnosti mogu se pronaći i u zakonodavstvima Poljske, Bugarske i Češke Republike (Mulligan 2022, 125 fn. 38).

Poslednji pristup je kombinacija rešenja prethodna dva. Danska je primer ovog hibridnog modela, konvencinalno poznatog kao sistem „dvostrukog izbora" (*'double track'*), u kome doniranje oplodnih ćelija može biti anonimno ili uz otkrivanje identiteta donora, po izboru učesnika postupka artificijalne inseminacije (Blyth 2006, 251). Pitanje anonimnosti je strukturirano kao recipročni „dvostruki izbor" jer obe strane, i donor i korisnici postupka artificijalne inseminacije, moraju postići saglasnost o istom pitanju – anonimno doniranje naspram mogućnosti otkrivanja identiteta (Pennings 1997, 2839). Model je izgrađen na shvatanju da jedno rešenje nije samo po sebi bolje od drugog i da bi stoga učesnicima postupka trebalo prepustiti odluku pod kojim uslovima žele da se ona obavi. Međutim, mogućnost ostvarivanja prava deteta da zna svoje biološko poreklo ograničena je izborom koji su napravili njihovi roditelji, pa ne nudi adekvatno rešenje sukoba interesa u svakom konketnom slučaju. Još jedna varijanta takvog pristupa javlja se u pravnim sistemima Islanda i Rusije, a u literaturi je poznata pod nazivom

[21] Upravo je bojazan od smanjenja broja donora jedan od ključnih argumenata protiv otkrivanja identiteta. Na taj način bi se znatno ograničilo pravo na slobodno roditeljstvo, odnosno potkopala mogućnost budućih roditelja da pristupe tehnikama asistirane reprodukcije. Ipak, dok je pravo deteta na saznanje porekla eksplicitno priznato kao ljudsko pravo na međunarodnom nivou, to isto se ne može reći za pravo na potpomognutu oplodnju u svrhu ostvarivanja pojedinca u ulozi roditelja. Čak i ako bi ukidanje anonimnosti zaista rezultiralo padom nivoa donacija, neodrživ je stav da bi to donelo više štete nego koristi. Uprkos tome što ne postoje jasni dokazi da bi do ovakvih posledica došlo, strah od takve mogućnosti je glavni razlog zbog kojeg pojedine države i dalje ustupaju prednost interesima onih koji žele da na takav način dobiju potomstvo (Tobin 2019, 267). U Velikoj Britaniji podaci o povećanju broja donora u istoj godini kada je anonimnost zabranjena ne podržavaju taj zaključak (Guichon, Mitchell, Giroux 2012, 215). Švedska je zabeležila isključivo promenu u starosnom profilu osoba koje su se javljavi kao donori. Osim toga, bilo je i stavova da je nestašica reproduktivnog materijala očigledan problem čak i u jurisdikcijama koje i dalje primenjuju režim anonimnosti (Burr 2010, 803).

[22] Fenomen „serijskih donora" je posledica nedostataka sistema za razmenu podataka između klinika koje vrše oplodnju unutar države, ali i prekograničnih doniranja. Na taj problem ukazala je Parlamentarna skupština Saveta Evrope u izveštaju Komiteta za socijalna pitanja, zdravlje i održivi razvoj, navodeći Belgiju kao primer (Sutter 2018, 3).

„sistem trostrukog koloseka“ (*‘triple track’*). Suština se svodi na nadogradnju prethodnog koncepta dodavanjem još jedne mogućnosti izbora, odnosno opredeljenje za donora koga budući roditelji poznaju, najčešće krvnog srodnika (Łukasiewicz, Viglianisi Ferraro 2021, 268).

4. TENDENCIJE U ODMERAVANJU SUPROTSTAVLJENIH PRAVA NA MEĐUNARODNOM NIVOU

Izloženi trend izmene zakonodavih rešenja u pravcu ograničavanja ili ukidanja anonimnosti inspirisan je tendencijama na međunarodnom nivou. KPD i EKLJP, podržani praksom ESLJP, prepoznaju značaj prava deteta da zna svoje poreklo. Dok široko deklarišu to pravo, istovremeno dopuštaju određena prilagođavanja sa ciljem uklapanja u kontekst nacionalnih političkih i društvenih okolnosti (Preložnjak 2020, 1182).

Članom 7 KPD priznaje se pravo detetu da zna identitet osoba sa kojima ima genetsku, gestacionu ili sociološku vezu.[23] Razlog tako širokog tumačenja pojma roditelja leži u činjenici da srž identitet deteta neminovno predstavlja njegovo pravo da zna svoje poreklo. Formulacija tog člana može dovesti do zaključka da to pravo ipak nije neograničeno već da je njegovo uživanje kvalifikovano okolnostima svakog konkretnog slučaja i potrebom uravnoteženja sa pravima i interesima drugih. Izraz „ako je to moguće“[24] (*as far as possible*) ukazuje na postojanje životnih okolnosti u kojima će biti praktično nemoguće utvrditi identitet roditelja deteta, čak i kada su uloženi istinski napori da se to učini. Istovremno, javljaju se i situacije u kojima takva mogućnost postoji, ali je ograničena državnom regulativom.[25] Iako se može smatrati da Komitet UN za prava deteta (Komitet) često tumači ta prava na apsolutan način, istina je da se u KPD pokazuje malo tolerancije prema

[23] Koncept roditeljstva je trodimenzionalan. On obuhvata segmente koji ne moraju da postoje istovremeno, a time ni da budu savršeno usklađeni. Sa aspekta tumačenja KPD možemo razlikovati gestacionog roditelja, u smislu žene koja nosi i rađa dete, a ne mora nužno biti genetski povezana sa njime, upravo imajući u vidu mogućnost doniranja jajnih ćelija ili embriona. Zatim genetski, odnosno biološki roditelj, čiji je reproduktivni materijal doveo do začeća, i sociološki, odnosno lice koje se faktički stara o detetu (Tobin 2019, 259; Kessler 2019, 318).

[24] Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Službeni list SFRJ* – Međunarodni ugovori 15/90 i *Službeni list SRJ* – Međunarodni ugovori 4/96, 2/97, čl. 7 st. 1.

[25] Upravo je ta formulacija rezultat prigovora koje su uložile delegacije bivše Demokratske Republike Nemačke, SSSR i SAD tokom izrade teksta Konvencije, izrazivši zabrinutost da bi neograničeno priznavanje prava detetu da zna biološko poreklo ugrozilo ustanovu „tajnog usvojenja“ koje su poznavali njihovi pravni

neotkrivanju identiteta roditelja. Naprotiv, polazište je da u slučajevima u kojima je moguće znati identitet dete ima pravo na informacije o tome. Primenjeno na konkretan slučaj, dete začeto postupkom potpomognute reprodukcije ima pravo da sazna identitet donora ukoliko država raspolaže tim podacima. U tom smislu, od država potpisnica se očekuje da kreiraju sistem za evidentiranje informacija o donoru kako bi se one mogle učiniti dostupnim detetu kada je to u njegovom najboljem interesu (Schmahl 2021, 141; Tobin 2019, 262). Štavište, ograničenje ostvarivanja prava u kontekstu potpomognute reprodukcije, ali ne i u pogledu postupka usvojenja, u suprotnosti je sa članom 2 KPD, kojim se zabranjuje svaki oblik diskriminacije (Piñero 2012, 265).

Kako fraza „ako je to moguće" postavlja visok prag u pogledu situacija u kojima postoji obaveza da se podaci o biološkom poreklu otkriju, i sam Komitet je dosledno zahtevao od država da olakšaju te mogućnosti.[26] Dodatnu potporu takvom tumačenju pruža član 8 KPD, kojim se garantuje pravo deteta na identitet. Uprkos svojoj naizgled inovativnoj prirodi, u tom članu se ne definiše pojam identiteta već se navode primeri njegovih elemenata, kao što su državljanstvo, ime i porodični odnosi.[27] Premda odredbe kojima se garantuju ta prava nisu napisane imajući u vidu doniranje reproduktivnog materijala

sistemi. Prema tome, ističe se stav da je takva fraza uvedena samo kako bi se sačuvala tajnost usvojenja i ni iz kakvog drugog razloga (Tobin 2019, 261; Piñero 2012, 264).

[26] Komitet je više puta iznosio stavove o primeni članova 7 i 8 KPD na potpomognutu reprodukciju. Svaki od njih je isticao važnost priznavanja prava detetu začetom uz donirani materijal na pristup informacijama o svom genetskom poreklu. U svojim Zaključnim zapažanjima upućenim Norveškoj još 1994. godine, on primećuje „moguću kontradiktornost između ove odredbe Konvencije i politike države članice u vezi sa veštačkom oplodnjom, odnosno čuvanjem identiteta donora semenih ćelija u tajnosti". Komentarišući situaciju u Švajcarskoj 2002. godine, Komitet naglašava da „zakon koji priznaje pravo na identitet, ali ga ne štiti nedvosmisleno u praksi predstavlja razlog za zabrinutost" te preporučuje da konkretna država „obezbedi, koliko je to moguće, poštovanje prava deteta da zna svoje roditelje" (Lyons, 2018, 4).

[27] Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Službeni list SFRJ* – Međunarodni ugovori 15/90 i *Službeni list SRJ* – Međunarodni ugovori 4/96, 2/97, čl. 8 st. 1. U toku izrade teksta KPD bilo je primedaba na to ponovno naglašavanje identeta deteta koje se činilo suvišnim s obzirom na član 7. Vodeći se istim razlozima kao prilikom formulisanja fraze „ako je to moguće", toj odredbi je dodat izraz „kako je priznato zakonom, bez nezakonitog mešanja" (*as recognised by law without unlawful interference*). I pored dodavanja fraze „kako je priznato zakonom" uz porodične odnose taj član se široko tumači u korist poznavanja i zakonskih i bioloških roditelja (Besson 2007, 143).

(Correia, Rego, Nunes 2021, 71)[28], pojedini autori smatraju da lista elemenata od suštinskog značaja za očuvanje identiteta uključuje i pravo na saznanje istine o biološkom poreklu (Piñero 2012, 258). Sličan je i stav Komiteta. U nizu svojih Zaključnih zapažanja on ističe da usvojena, kao i deca začeta putem potpomognute reprodukcije imaju pravo pristupa informacijama o svom poreklu, identitetu bioloških roditelja i o njihovoj medicinskoj istoriji, u odgovarajućem uzrastu i nivou razvoja. Mada se može učiniti da ide predaleko, pristup Komiteta o tom pitanju predstavlja odgovarajuće tumačenje KPD kojim se uvažavaju pitanja od suštinskog značaja za identitet deteta (Tobin 2019, 289–290). Shodno tome, KPD zahteva od država potpisnica da preduzmu sve zakonodavne, administrativne i druge mere sa ciljem zaštite dece od nezakonitog mešanja u ostvarivanje prava na identitet, tumačeći ga na dinamičan način, u svetlu aktuelnih uslova.

Međutim, u slučaju sukoba prava deteta na identitet i prava njegovih bioloških roditelja na privatnost, nijedan od pomenutih članova KPD ne pruža rešenje konflikta niti sadrže kriterijume za odmeravanje suprotstavljenih interesa. Takvo balansiranje se može pronaći u odlukama ESLJP. Premda se u EKLJP ne predviđa izričito pravo na identitet ili istinu o biološkom poreklu, praksa ESLJP to pravo izvodi iz člana 8 kojim se pruža zaštita privatnom i porodičnom životu. Osnovna karakteristika tog korpusa sudske prakse jeste to što pridaje centralni značaj podacima o biološkom poreklu sa ciljem uspostavljanja identiteta pojedinca i što minimalno toleriše mogućnost da država ograniči pristup tim informacijama.[29] Prepoznavanje identiteta kao segmenta privatnog života pojedinca datira još od slučaja

[28] Takvog stava bioje i Jap Duk (*Jaap Doek*), predsedavajući Komiteta za prava deteta od 2001. do 2007. godine. On je istakao da je član 8 prvobitno sastavljen imajući u vidu specifičnu situaciju, odnosno otmicu dece argentinskih političkih zatvorenika, a ne sa ciljem da se bavi zaštitom prava deteta začetog upotrebom polnih ćelija donora. Ipak, dodao je da se „u svetlu današnjeg razvoja i dinamičnog tumačenja KPD, može smatrati da on podrazumeva i pravo na istinu o svom biološkom poreklu“ (Piñero 2012, 258).

[29] Sa jednim uočljivim izuzetkom u slučaju *Odijevr protiv Francuske* (*Odièvre v. France*), Application no. 42326/98, ECtHR Judgment of 13 February 2003. Uprkos nekim površnim sličnostima, postoje razlike između anonimnosti donora i instituta anonimnog porođaja. Sa aspekta javnog interesa, država bi mogla legitimno predvideti anonimni porođaj kao sredstvo sprečavanja negativnijih posledica, poput prekida trudnoće ili čedomorstva, dok se anonimno doniranje polnih ćelija ne bi moglo okarakterisati kao „nužno zlo“. To nije način rešavanja krizne situacije već postupak koji iniciraju lica koja u njega ulaze dobrovoljno. Takođe, značajna razlika postoji i u pravnim posledicama otkrivanja identiteta majke kod anonimnog porođaja u odnosu na donora (Mulligan 2022, 142–143).

Gaskin (*Gaskin v. the United Kingdom*),[30] a zaokruženo je u predmetima *Mikulić* (*Mikulić v. Croatia*)[31] i *Jagi* (*Jäggi v. Switzerland*).[32] Iako predmet tih odluka nije regulisanje sukoba interesa donora i deteta začetog njegovim reproduktivnim materijalom, budući da ESLJP još uvek nije imao prilike da se o tome izjasni[33], njihov značaj nije zanemarljiv. Stav iskazan u tim odlukama zasnovan je na vitalnoj važnosti prava na identitet i gledištu da se pojedincu, ako ne nužno šteta, nanosi nepravda lišenjem tog prava. Imajući to u vidu, ESLJP priznaje pravo na pristup informacijama o svom genetskom poreklu kao ključnom aspektu identiteta, te zahteva njegovo rigorozno sprovođenje, sužavajući polje slobodne procene država članica u ovom pogledu (Mulligan 2022, 131). Sledstveno tome, pravila o apsolutnoj anonimnosti donora reproduktivnih ćelija predstavljaju kršenje člana 8 EKLJP.

Dok ESLJP još uvek nije zauzeo stav o pitanju anonimnosti donora, drugi organ Saveta Evrope, Parlamentarna skupština, izneo je vrlo detaljan predlog u svojoj Preporuci upućenoj Komitetu ministara 2019. godine.[34] On je zasnovan na nekoliko principa, od kojih je ključan onaj koji sugeriše zabranu anonimnosti donora u državama članicama *de lege ferenda*. Takav sistem bi podrazumevao da, izuzev kada se u ulozi donora pojavljuje srodnik ili bliski prijatelj, njegov identitet ne bi bio poznat roditeljima u trenutku začeća već bi pristup tim podacima bio omogućen detetu sa navršenih 16 ili 18 godina života. Idealno bi bilo da dete u takvim slučajevima bude obavešteno od države o okolnostima njegovog začeća i dostupnosti dodatnih

[30] *Gaskin v. the United Kingdom,* Application no. 10454/83, ECtHR, Judgment of 7 July 1989, para. 39.

[31] *Mikulić v. Croatia,* Application no. 53176/99, ECtHR, Judgment of 7 February 2002.

[32] *Jäggi v. Switzerland,* Application no. 58757/00, ECtHR, Judgment of 13 July 2006. U predmetu *Mikulić protiv Hrvatske*, ESLJP ponavlja da „pravo na poštovanje privatnog života podrazumeva da se svakome omogući da utvrdi detalje vezane za sopstveni identitet", te ističe da su informacije koje se na njega odnose važne zbog svojih „formativnih implikacija" (*Mikulić v. Croatia,* para. 54; Mulligan 2022, 129–130). S druge strane, u presudi *Jagi protiv Švajcarske* on ističe „da je pravo na identitet, koje obuhvata i pravo na istinu o biološkom poreklu, sastavni deo pojma privatnog života" te da je u takvim slučajevima „potrebna posebno rigorozna kontrola u proceni suprotstavljenih interesa" (*Jäggi v. Switzerland*, para. 37; Mulligan 2022, 129–130).

[33] Izuzimajući dva, već pomenuta, predmeta koja su u toku protiv Francuske (vid. fn. 46).

[34] Recommendation (Parliamentary Assembly, Council of Europe) No. 2156/2019: *Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*.

podataka.[35] To ukidanje anonimnosti ne bi proizvodilo pravne posledice na status roditelja, odnosno donor bi bio zaštićen od mogućnosti utvrđivanja njegovog ili njenog očinstva odnosno materinstva.[36]

Dalje, preporučuje se da države članice koje dozvoljavaju doniranje reproduktivnog materijala uspostave i vode adekvatne nacionalne registre donora i dece začete na taj način, kao i da se anonimnost ne ukida retroaktivno.[37] Iako je Parlamentarna skupština Preporuku okarakterisala kao usmerenu ka unapređenju prava svih zainteresovanih strana, fokusirajući se na prava deteta da zna biološko poreklo, Komitet ministara je dao donekle kompromisan odgovor. Ukazao je na to da, s obzirom na velike varijacije među zakonodavnim rešenjima država članica i osetljivost tog pitanja, bilo kakav predlog u tom smislu ne bi trebalo da bude pravno obavezujući. Prema stavu Komiteta ministara, neophodno je usvojiti neobavezujući instrument koji bi pružio pomoć državama u zaštiti prava osoba začetih iz doniranog reproduktivnog materijala, istovremeno osiguravajući ravnotežu sa pravima drugih lica uključenih u postupak začeća (Mulligan 2022, 127).

5. ZAKLJUČAK

Dok je nekada opseg prava deteta začetog postupkom biomedicinski potpomognute oplodnje direktno zavisio od pravila kojim državne vlasti štite interese donora, može se reći da se, u svetlu aktulenih okolnosti, odigrava suprotan proces. To što međunarodni organi promovišu značaj prava deteta na identitet ima povratni uticaj na regulisanje pravila o (ne) anonimnosti donora reproduktivnih ćelija u nacionalni zakonodavstvima. Mada još uvek postoje značajne razlike u režimima koje predviđa svaka konkretna država, jasan je pravac u kome se kreću izmene zakona u toj oblasti. Napuštanje apsolutne anonimnosti donora je razumno rešenje inspirisano potrebom da se postigne odgovarajući balans. Hibridni sistem „dvostrukog izbora“, koji je zamišljen kao svojevrsna zlatna sredina, usvojen u pojedinim državama, ne štiti prava deteta začetog uz donirani materijal znatno više od režima apsolutne anonimnosti. Može se očekivati da bi on pobrao najviše simpatija od ESLJP, inače poznatog protivnika apsolutnih pravila i opštih zabrana. Zakoni kojima se predviđaju izuzeci sa ciljem

[35] Recommendation No. 2156/2019, Art 7 (1).

[36] Recommendation No. 2156/2019, Art 7 (2).

[37] Osim iz medicinskih razloga ili kada se donor odrekao sopstvene anonimnosti. Recommendation No. 2156/2019, Art 7 (3), Art 7 (4).

postizanja ravnoteže suprotstavljenih prava u skladu su sa aktuelnom sudskom praksom tog organa. Međutim, dok režim „dvostrukog izbora“ može površno da izgleda kao atraktivan kompromis, suština je da država prepušta apsolutno odlučivanje o sudbini deteta roditeljima i donoru. Na taj način se ne sprečava mogućnost rođenja deteta koje će biti potpuno lišeno prava na formiranje identiteta već se stvara dodatna opasnost neravnopravnosti dece začete pod potpuno jednakim uslovima. Iz tih razloga, čini se da je sistem neanonimnosti i odloženog pristupa deteta informacijama o donoru najbolja alternativa u sukobu interesa različitih strana. Kao što je već istaknuto, u takvim okolnostima prosto odbijanje donora da se pojavi u toj ulozi sprečiće konflikt njihovih interesa. Osim toga, otkrivanje podataka o identitu lica koje je doniralo semene ćelije ni u jednoj od država koje su već usvojile takav sistem ne stvara mogućnost utvrđivanja njegovog statusa roditelja te ne proizvodi nikakve pravne posledice. Čak je i Preporuka Parlamentarne skupštine Saveta Evrope iz 2019. godine zasnovana na izloženom sistemu regulisanja postupka asistirane reprodukcije.

Takođe, interesi roditelja deteta zaštićeni su zabranom utvrđivanja očinstva, odnosno materinstva donora, budući da se time štite njihov status roditelja i porodični život od zadiranja „trećeg lica“. Njihovo pravo na privatnost teško može nadjačati pravo deteta da zna svoje biološko poreklo. Ukoliko je želja za detetom koje će biti genetski povezano barem sa jednim od roditelja dovoljno jaka da ih podstakne na začeće uz pomoć donora, onda je krajnje dvostruki standard zamisliti da želju za biološkom vezom neće jednako snažno osetiti dete začeto na taj način.

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THE RIGHT OF THE CHILD TO IDENTITY IN THE CONTEXT OF REPRODUCTIVE CELL DONOR ANONYMITY RULES

Summary

The right of the child to identity has been gaining importance in the efforts to revise legislation on donor anonymity in a large number of European countries. However, certain national legislations are still in favor of the concept of the identity disclosure prohibition, while some envision a mixed model, with the aim of balancing conflicting interests. The debate is centered on the donor and parent's right to privacy and the child's right to know their biological origins. An analysis of solutions from various European states, as well as the positions of the authorities overseeing the implementation of the most important treaties, has led to the development of guidelines when weighing interests in a conflict. Although an ideal solution is difficult to imagine, a system that protects the interests of all parties, focusing on the protection of the child's rights, could be satisfactory.

Key words: *Child's right to identity*. – *Donor anonymity*. – *Assisted reproduction*. – *Right to privacy*. – *Child's right to know one's origin.*

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FORMALNOPRAVNI ASPEKTI DEROGACIJE LJUDSKIH PRAVA ZBOG PANDEMIJE KOVIDA 19 U UPOREDNOJ USTAVNOSUDSKOJ PRAKSI

U radu se predstavljaju sličnosti i razlike u argumentaciji ustavnih sudova Republike Srbije, Republike Hrvatske, Bosne i Hercegovine i Mađarske prilikom odlučivanja o proceduralnim, odnosno formalnim aspektima derogacije ljudskih prava i drugih (restriktivnih) mera donetih povodom kovida 19, kao što su nadležnost organa i tela za donošenje restriktivnih mera, karakter, odnosno kvalitet akata kojima se te mere naređuju i kontrola od zakonodavne i/ili izvršne vlasti. Zajedničko im je da su, iako sudovi ni u jednoj odluci nisu zanemarili potrebu za restriktivnim merama zbog očuvanja javnog zdravlja, drugačije tretirali značaj formalnopravnih zahteva vladavine prava u uslovima pandemije. Cilj rada je da se analizom relevantnih ustavnosudskih odluka pronađu neki zajednički kriterijumi, merila i testovi za ocenu ustavnosti tih mera radi povećanja pravne sigurnosti u sličnim životnim situacijama u budućnosti.

Ključne reči: *Kovid 19. – Ustavni sud. – Vladavina prava. – Formalni aspekti*.

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1. UVOD

Nakon izbijanja pandemije kovida 19, izazvanog virusom SARS-CoV-2, prva reakcija skoro svih država sveta je bilo uvođenje ozbiljnih restriktivnih mera u raznim oblastima društvenog života koje su nesumnjivo pogodile i pojedina ljudska prava i slobode i način njihovog efektivnog ostvarivanja. Iako postoji mnogo sličnosti između država u pogledu vrsta mera koje su primenile (a delom primenjuju i dan-danas) za suzbijanje pandemije, nezavisno od njihovog političkog uređenja, pravnog sistema, stepena ekonomske razvijenosti (Lugonić, Arsenijević 2021), postavlja se pitanje da li su i nacionalni ustavni sudovi na sličan način pristupali rešavanju pravnih pitanja koja su se pojavila povodom ograničenja ljudskih prava i sloboda.

Prema rezultatima jednog globalnog istraživanja na uzorku od sto država, potvrđeno je da je u tim postupcima uloga (ustavnih) sudova (bila) višestruka: da „obezbede proceduralni integritet vanrednih režima" (Ginsburg, Versteeg 2020, 28), da uspostavljaju ravnotežu između restriktivnih mera i osnovnih ljudskih prava i sloboda i da od političkih aktera zahtevaju preduzimanje afirmativnih mera za borbu protiv kovida 19 radi ispunjenja njihovih ustavom predviđenih obaveza (Ginsburg, Versteeg 2020, 28).

U ovom radu proučavamo praksu ustavnih sudova Republike Srbije, Republike Hrvatske, Federacije Bosne i Hercegovine[1] i Mađarske povodom kovida 19; tačnije segment njihove ustavnosudske prakse koji se bavi spomenutim „proceduralnim integritetom" režima (bilo vanrednog, bilo „redovnog") i odnosi se na formalnopravna pitanja procesa odstupanja od ljudskih prava u borbi protiv pandemije. Zajedničko im je da su to ustavni sudovi mladih, „novih" demokratija, iako su se dve države već pridružile Evropskoj uniji (Mađarska i Hrvatska). Tri države (bivše članice nekadašnje SFRJ) imale su značajne zajedničke pravnoistorijske momente u toku svog pravnog razvoja, što takođe može (ali, s obzirom na veoma različit put demokratizacije nakon devedesetih, ne mora) da bude od uticaja na sličan ishod ustavnosudskih postupaka, odnosno logiku obrazloženja odluka u sličnim predmetima (Hendriks, Loughlin, Lidström 2011, 724–726).

Radi sužavanja obima predmeta istraživanja, istaknut je uporednopravni prikaz samo onih ustavnosudskih odluka spomenutih država koje su donete u postupcima za ocenu ustavnosti i zakonitosti propisa, kako je već rečeno, fokusirajući se prvenstveno na poštovanje načela (stroge) formalne ustavnosti i zakonitosti postupajućih ustavnih sudova. Taj metodološki pristup inače

[1] U radu se ne analizira posebno praksa Ustavnog suda Republike Srpske, ali se poziva na neke njegove odluke, gde je to relevantno.

odgovora i sve više zastupljenoj doktrini da se zakonodavne, normativne aktivnosti vršene mimo formalnopravnih pravila smatraju izuzetno teškom povredom ustava (Krčinski 2011, 84), dok procesne nedostatke u ustavnim žalbama treba blaže tretirati, „osećajem za meru", imajući u vidu osnovnu misiju ustavnih sudova da pružaju zaštitu povređenom ljudskom pravu (Manojlović Andrić 2013, 170–171).

Nakon nekoliko talasa virusa, na osnovu dosadašnjeg iskustva i na pravnom polju i na terenu, može se zaključiti da borba sveta protiv kovida 19 još nije gotova, a opravdano se može očekivati i pojava novih zdravstvenih i medicinskih izazova zbog promena u životnoj sredini. Zbog očekivanja društva da se osim najviše vrednosti čovečanstva, a to je zdrav život, istovremeno sačuvaju i najviše vrednosti samog pravnog razvoja, uključujući vladavinu prava u njenom punom kapacitetu, veliki je teret na ustavnim sudovima da pronađu odgovarajući balans između adekvatne zaštite tih vrednosti. Cilj rada je da se diferenciraju sličnosti i razlike u pojedinim argumentacijama ustavnih sudova u regionu koje su povodom kovida 19 izneli u postupcima za ocenu ustavnosti i zakonitosti propisa i da se na taj način prepoznaju sporna pitanja čije bi rešavanje doprinelo povećanju pravne sigurnosti u sličnim životnim situacijama u budućnosti.

U tu svrhu, u prvom poglavlju, radi uvođenja predmeta, daje se opšti prikaz odluka ustavnih sudova u regionu koje su se ticale kovida 19 („kovid odluke"), dok se u drugom poglavlju analiziraju pojedini aspekti formalnopravne dimenzije restriktivnih mera: pravni osnov derogacije, nadležnost organa i tela za donošenje restriktivnih mera, karakter akata kojima se te mere naređuju i (bilo preventivna, bilo naknadna) kontrola delatnosti tih organa i tela od zakonodavne vlasti, i to sve imajući u vidu različite pristupe ustavnih sudova skoro istovrsnim pitanjima.

2. „KOVID ODLUKE" U REGIONU

Umesto dublje analize svih elemenata relevantnih odluka, kao što su detaljna sadržina, vrste i ishod ustavnosudskih postupaka, rešavanje faktičkih pitanja nasuprot originalnoj funkciji ustavnih sudova za rešavanje pravnih pitanja, način definisanja javnog interesa, primena prakse Evropskog suda za ljudska prava i testa zakonitosti, nužnosti i srazmernosti, poruka izdvojenih mišljenja itd., u ovom poglavlju praksa ustavnih sudova u regionu prikazana je samo okvirno, pre svega izvođenjem generalnog zaključka o samom modelu odlučivanja u oblasti kovida 19; naravno, pod uslovom da se može pričati o nekakvom obrascu u postupanju suda, a ne samo o izolovanim odlukama, bez zajedničkih tačaka u argumentaciji. U tom pogledu, ustavni

sudovi Mađarske i Hrvatske su se pokazali prilično doslednim, a s obzirom na manji (mali) broj predmeta u Srbiji i Bosni i Hercegovini ne bi bilo metodološki ispravno izvesti bilo kakav zaključak.

Države su pristupile rešavanju *nepravnih* problema najrazličitijim normativnim oružjima, zbog čega se razlikuje karakter, odnosno „količina" propisa koji su se pojavili ili bi se mogli pojaviti pred ustavnim sudovima, što se ogleda i u broju ustavnosudskih predmeta u tom polju. Ustavni sud Srbije je raspravljao najmanji broj predmeta u oblasti kovida 19, a Ustavni sud Mađarske više desetina.

Inicijatori postupaka za ocenu ustavnosti i zakonitosti – nezavisno od toga kako se u pojedinim nacionalnim pravnim sistemima nazivaju (predlagatelj/predlagač, apelant, inicijator, podnosilac ustavne žalbe u izuzetnim slučajevima), rukovodili su se skoro istim, odnosno sličnim razlozima prilikom iniciranja normativne kontrole pred ustavnim sudovima u regionu; a to je bilo navodno kršenje njihovih osnovnih ličnih prava i sloboda (dostojanstvo, pravo na život, bezbednost lična sloboda, uključujući slobodu kretanja, pravo na privatnost, telesni i psihički integritet, zdrav razvoj dece, slobodu veroispovesti), političkih prava (sloboda izražavanja i primanja informacija, izborno pravo i pravo na lokalnu samoupravu, sloboda okupljanja) i ekonomskih, kulturnih, socijalnih prava (mirno uživanje imovine, prava u oblasti rada, pravo na obrazovanje, pristup zdravstvenoj zaštiti) u osporenim aktima. Prema navodima inicijatora, restriktivnim merama su diskriminisane, čak i stigmatizovane pojedine društvene grupe (stari ljudi, deca, zaposleni pojedinih profesija i preduzetnici u pojedinim privrednim oblastima, korisnici usluga socijalne zaštite, zatvorenici, osobe sa invaliditetom, migranti). Takođe se postavilo kao ustavnopravo relevantno pitanje da li je povređena dobrobit životinja u uslovima policijskog časa u Srbiji, odnosno da li je jedinicama lokalne samouprave u Mađarskoj uskraćeno pravo na samostalnu imovinu reorganizacijom budžetskih prihoda.[2]

Zajedničko obeležje praksi nacionalnih ustavnih sudova u istraživanju je da ni u jednoj odluci nisu zanemarili značaj restriktivnih mera za očuvanje opšteg interesa, odnosno ovlašćenje države da raznim sredstvima štiti zdravlje stanovništva u uslovima pandemije, čak i protivno ostvarivanju pojedinih ljudskih prava u punom kapacitetu. Između ostalog, razlikuju se u stepenu „tolerancije" sudova prema državi, odnosno u tome koliko daleko njeni (glavni) organi mogu ići u davanju prednosti supstancijalnom konceptu

[2] Inače je odgovor bio negativan u oba slučaja. Vid. odluku Ustavnog suda Srbije, IUo-45/2020, 28. 10. 2020, *Službeni glasnik RS* 126/2020, odnosno odluku Ustavnog suda Mađarske, 3234/2020 (VII. 1.), 1. 7. 2020.

vladavine prava nad njenim formalnom konceptu. Umesto istovremenog uvažavanja oba koncepta, kako je to prihvaćeno i u predloženoj definiciji Venecijske komisije (šire u European Commission for Democracy Through Law 2010), odnosno makar pokušaja balansiranja između formalnih (način donošenja, jasnoća i predvidljivost norme) i materijalnih zahteva (stvarni sadržaj, bit norme) vladavine prava (Banić 2015, 46–47), države su najčešće pod okriljem efikasnosti i efektivnosti zaobišle neke procesne korake u odlučivanju o derogaciji ljudskih prava. Pitanje je da li je to u ustavnopravnom smislu bio prihvatljiv način na koji su se države u regionu borile protiv kovida 19.

2.1. Srbija

U Srbiji je većina restriktivnih mera doneta izmenama i dopunama Uredbe Vlade o tzv. merama za vreme vanrednog stanja[3] koja više nije bila na snazi za vreme njene normativne kontrole.[4] Ustavni sud je retroaktivno utvrdio da pojedine odredbe koje su se odnosile na potencijalno dvostruko pravnosnažno odlučivanje u pogledu istog kažnjivog dela (prekršaj zbog povrede zabrane kretanja u određenom periodu, odnosno krivično delo nepostupanja po zdravstvenim propisima za vreme epidemije), nisu bile u saglasnosti sa Ustavom za vreme njihovog važenja, dok je ustavnost većine mera (npr. ograničenje slobode kretanja i slobode bavljenja profesijom, pravljenje razlike na osnovu starosti) potvrđena, takođe retroaktivno.[5] Inicijative za normativnim kontrolom drugih pravnih propisa u oblasti borbe protiv kovida 19 Ustavni sud Srbije je odbacio zbog nepostojanja pretpostavki za pokretanjem postupka, odnosno meritornim odlučivanjem.[6] Interesantna je činjenica da uredbe o merama za sprečavanje i suzbijanje zarazne bolesti kovid 19 kojima se takođe propisuju izvesne restrikcije, odnosno obaveze kako za građane, tako za poslovni sektor nakon ukidanja vanrednog stanja u Srbiji, nisu bile predmet normativne kontrole pred Ustavnim sudom Srbije.

[3] Uredba o merama za vreme vanrednog stanja, *Službeni glasnik RS* 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020 i 60/2020.

[4] Ostale uredbe Vlade donete uz supotpis predsednika države za vreme vanrednog stanja pretežno su se odnosile na tehnička i organizacijska pitanja, finansijsku podršku ili fiskalne mere.

[5] Ustavni sud Srbije, IUo-45/2020, 28. 10. 2020, *Službeni glasnik RS* 126/2020.

[6] Ustavni sud Srbije, IUo-63/2020, 20. 10. 2020, IUz-66/2020, 24. 12. 2020, IUo-62/2020, 30. 12. 2020, IUo-100/2020, 30. 12. 2020.

Naime, Vlada je, na osnovu neposrednog ovlašćenja iz Zakona o zaštiti stanovništva od zaraznih bolesti[7], donela tri istoimene uredbe i nekoliko desetina izmena kojima su, između ostalog, regulisani obaveza nošenja zaštitnih maski, organizovanje rada u poslovnim jedinicama različitih kategorija, na raznim manifestacijama, na javnom prevozu, način izvođenja nastave, okolnosti ulaska i povratka u zemlju, itd.[8] Iako važeća uredba ne sadrži ovlašćenje Vlade da posebnom odlukom izmeni opšti režim zaštite za pojedine jedinice lokalne samouprave, to je bilo predviđeno prvom i drugom verzijom uredbe, ako to nalažu posebne okolnosti.[9] Odredba jedne takve odluke, donete na osnovu ove autorizacije Vlade, kojom je bilo predviđeno duže radno vreme za ugostiteljske objekte i noćne klubove na teritoriji grada Beograda u odnosu na ostala mesta u Srbiji, jedino je osporena pred Ustavnim sudom zbog navodne diskriminacije na osnovu prebivališta i sedišta, što Ustavni sud nije prihvatio kao ustavnopravno relevantan razlog.[10]

2.2. Mađarska

Za razliku od Srbije gde se postupak za ocenu ustavnosti pokreće predlogom državnih organa, organa autonomnih pokrajina, jedinica lokalne samouprave i narodnih poslanika, odnosno prihvatanjem inicijative svakog drugog fizičkog ili pravnog lica,[11] u Mađarskoj se razlikuju postupci za ocenu ustavnosti opštih pravnih akata na osnovu inicijative za naknadnu normativnu kontrolu, odnosno ustavnih žalbi posebne vrste. Nakon stupanja na snagu novog Osnovnog zakona (Ustava) od 1. januara 2012. godine, naknadnu

[7] Zakon o zaštiti stanovništva od zaraznih bolesti, *Službeni glasnik RS* 15/2016, 68/2020 i 136/2020.

[8] Uredba o merama za sprečavanje i suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 66/2020, 93/2020, 94/2020, 100/2020, 109/2020, 111/2020, 120/2020, 122/2020, 126/2020, 138/2020, 141/2020, 144/2020 i 145/2020, Uredba o merama za sprečavanje i suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 151/2020, 152/2020, 153/2020, 156/2020, 158/2020, 1/2021, 17/2021, 19/2021, 22/2021, 29/2021, 34/2021, 48/2021, 54/2021, 59/2021, 60/2021, 64/2021, 69/2021, 86/2021, 95/2021, 99/2021, 101/2021, 105/2021, 108/2021, 117/2021, 125/2021, 7/2022 i 10/2022, Uredba o merama za sprečavanje i suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 33/2022, 48/2022, 53/2022 i 69/2022.

[9] Uredba o merama za sprečavanje i suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 66/2020… čl. 9a st. 2, Uredba o merama za sprečavanje i suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 151/2020… čl. 13 st. 2.

[10] Ustavni sud Srbije, IUo-100/2020, 30. 12. 2020.

[11] Zakon o Ustavnom sudu, *Službeni glasnik RS* 109/2007, 99/2011, 18/2013 – odluka US, 103/2015 i 40/2015, čl. 29 st. 1 tač. 1–2.

normativnu kontrolu propisa mogu da iniciraju samo Vlada, jedna četvrtina narodnih poslanika, ombudsman, predsednik Vrhovnog suda i republički javni tužilac, dok je pre 31. decembra 2011. godine bukvalno svako imao tu mogućnost.[12] Od više desetina predmeta pred Ustavnim sudom Mađarske koji se tiču kovida 19, samo četiri inicijative su podneli narodni poslanici (povodom ograničenja imovine jedinice lokalne samouprave oduzimanjem prava na porez na motorna vozila,[13] odstupanja od odredaba Zakonika o radu za vreme vanredne situacije[14] i izmenjenih pravila o preraspodeli radnog vremena[15], odnosno povodom toga što je Vlada proglasila teritoriju u lokalnoj svojini posebnom privrednom zonom[16]), a većina postupaka je inicirana po osnovu specifične ustavne žalbe fizičkih lica ili privatnih organizacija.

U Mađarskoj se razlikuje tri tipa ustavnih žalbi, od kojih se jedan odnosi na pravo podnosioca da ospori opšti pravni akt (ili njegove pojedine odredbe) ukoliko je povreda Ustavom zajamčenog prava nastupila zbog same primene tog akta, čak i bez prethodne sudske odluke, a podnosiocu ne stoji na raspolaganju drugo pravno sredstvo.[17] Imajući u vidu spomenutu strukturu inicijatora „kovid predmeta", i logično je da je najčešći razlog za neprihvatanje zahteva za pokretanje postupka bio nedostatak neposrednog, aktuelnog pravnog interesa podnosioca.

U postupku ocenjivanja ustavnosti uredbe o vakcinaciji zaposlenih u privatnom sektoru,[18] Ustavni sud je odbacio ustavne žalbe zbog nedostatka povezanosti podnosioca sa osporenom uredbom i njenim pravnim posledicama. Prema obrazloženju suda, osporena uredba se ne primenjuje *ex lege*, nego posredno, putem diskrecione ocene poslodavca koji slobodno odlučuje o tome da li će zahtevati vakcinaciju protiv kovida 19 za konkretno radno mesto ili neće. To jest, u tom slučaju zaposleni nezadovoljni odlukom poslodavca mogu da se obrate nadležnom sudu radi pravne zaštite u okviru običnog radnopravnog spora i, u krajnjem slučaju, Ustavnom sudu „redovnom" ustavnom žalbom.[19] Na osnovu ranije prakse Ustavnog suda već je utvrđeno da se ne može dokazati lična povezanost sa predmetom ako osporen propis

[12] Magyarország Alaptörvénye (2011. április 25), čl. 24 st. 2 tač. e.

[13] Ustavni sud Mađarske, 3234/2020 (VII 1), 1. 7. 2020.

[14] Ustavni sud Mađarske, 3326/2020 (VIII 5), 5. 8. 2020.

[15] Ustavni sud Mađarske, 3426/2021 (X 25), 25. 10. 2021.

[16] Ustavni sud Mađarske, 3388/2020 (X 22), 22. 10. 2020.

[17] 2011. évi CLI. Törvény az Alkotmánybíróságról, čl. 26 st. 2.

[18] A munkahelyek koronavírus elleni védelméről szóló 598/2021. (X 28) Korm. rendelet.

[19] Ustavni sud Mađarske, 3088/2022 (III 10), 10. 03. 2022, tač. 22–25.

još nije proizveo pravno dejstvo direktno u odnosu na podnosioca, odnosno ako sama povreda prava još nije nastupila, nije aktuelna.[20] No, nisu se svi u sudu saglasili sa odlukom većine. Na primer, sutkinja dr Agneš Cine (Czine Ágnes) izrazila je drugačiji stav u izdvojenom mišljenju, smatrajući da će navodna povreda prava uskoro nastupiti jer će stupanjem na snagu uredbe podnosioci biti izloženi riziku gubitka radnog mesta ako ne budu primili vakcinu u određenom roku. Prema njenom mišljenju, postoji bliska veza između adresata norme (zaposleni), pravne pozicije podnosioca i same osporene norme, što ukazuje na neposredan pravni interes podnosioca da se osporena uredba poništi.[21] Nažalost, ta argumentacija nije bila dovoljno ubedljiva da bi sud raspravljao o vakcinaciji protiv kovida 19 u meritumu.

Takođe, Ustavni sud Mađarske je obustavio postupke za ocenu ustavnosti specijalnih propisa koji su važili za vreme posebnog pravnog režima,[22] pretežno sa obrazloženjem da sprovođenje postupaka nije osnovano niti opravdano ako osporeni akt više nije na snazi, odnosno ne primenjuje se. S obzirom na dinamičnost normativnog rada, naročito na samom početku pandemije, podnesci su ulazili u fazu odlučivanja pred Ustavnim sudom neretko nakon ukidanja ili izmene osporenih akata. Iako Ustavni sud Mađarske može takođe retroaktivno da utvrdi (ne)saglasnost osporenog akta sa Osnovnim zakonom, ako postoji takva okolnost koja opravdava nastavak postupka,[23] ni u jednom slučaju nije se opredelio za produžetak. S jedne strane, taj pristup je svakako ekonomičan i smanjuje broj predmeta, to jest rasterećuje sud, ali, s druge strane, postoji bojazan da je sud propustio da odgovori na neka važna pravna pitanja koja mogu ponovo da se pojave u praksi. U manjem broju predmeta sud je odlučio u meritumu, ali odbijajući inicijative, odnosno ustavne žalbe bez izuzetka; to jest, nije utvrdio nesaglasnost osporenih odredaba sa Osnovnim zakonom Mađarske ni u jednoj odluci.

Sadržinski gledano, ustavnim žalbama su bili pobijani najrazličitiji propisi, pretežno uredbe Vlade, počevši od propisa o preduzetim merama za očuvanje stabilnosti nacionalne privrede, preko pravila o zaštitnim merama za vreme kovida 19, do akata o potvrđivanju zaštićenosti od virusa i obaveznoj vakcinaciji. Na službenom sajtu Ustavnog suda Mađarske

[20] Ustavni sud Mađarske 33/2017 (XII 6), 06. 12. 2017, tač. 33–35.

[21] Ustavni sud Mađarske, 3088/2022 (III 10), 10. 3. 2022, tač. 49.

[22] Za pojam posebnog pravnog režima u Mađarskoj videti poglavlje 3.1. ovog rada.

[23] 2011. évi CLI. Törvény az Alkotmánybíróságról, čl. 64, tač. e.

redovno se ažurira spisak rešenih predmeta povodom kovida 19, uključujući i postupke u toku.[24] U ovom radu se analiziraju samo one konačne odluke koje su relevantne sa aspekta ovog članka.

2.3. Hrvatska

Praksa prilično plodnog Ustavnog suda Hrvatske u ovoj oblasti obogaćena je i detaljnim izdvojenim mišljenjima manje-više istih sudija čija se argumentacija delom zasniva i na formalnopravnim razlozima, što će biti analizirano kasnije.

Kao što je već rečeno, Ustavni sud Hrvatske se pokazao doslednim u pogledu ishoda postupaka u „kovid predmetima„: ili je odbacio ili nije prihvatio predloge za pokretanje postupaka za ocenu ustavnosti i zakonitosti restriktivnih mera, ali je, za razliku od Mađarske, proglasio neustavnim napadnute akte u tri izuzetna slučaja. Sud je utvrdio (postupajući *ex officio*) da zabrana rada trgovinskih objekata nedeljom nije u saglasnosti sa Ustavom jer prilikom određivanja neradnog dana u toku nedelje Stožer civilne zaštite (ovlašćeni donosilac restriktivnih mera) nije postupio u skladu sa načelom srazmernosti.[25] Zatim nije našao razumno i objektivno opravdanje za tehnička ograničenja kojima je aktivno učešće poslanika na raspravi na sednicama Sabora, u uslovima pandemije bilo značajno ograničeno.[26] I na kraju, nije prihvatio obrazloženje Vlade Hrvatske da autonomija univerziteta obuhvata ovlašćenje rukovodstva visokoškolskih ustanova da odluči o izuzimanju studenata od primene Odluke o uvođenju posebne sigurnosne mere obaveznog testiranja na virus SARS-CoV-2 te posebne sigurnosne mere obaveznog predočenja dokaza o testiranju, cepljenju ili preboljenju zarazne bolesti kovid 19 radi ulaska u prostore javnopravnih tela.[27]

Ustavni sud je pokrenuo postupak po službenoj dužnosti jedino u prvom spomenutom slučaju (zabrana rada nedeljom), nakon prestanka važenja sporne odredbe, čija normativna kontrola inače nije bila inicirana od drugih lica niti je bila povod za masovno podnošenje ustavnih žalbi. Zato

[24] Ustavni sud Mađarske *https://alkotmanybirosag.hu/uploads/2022/05/inditvanyok_veszelyhelyzet_szignalt_2022_05_20.pdf*, poslednji pristup 26. septembar 2022.

[25] Ustavni sud Republike Hrvatske, U-II-2379/2020, 14. 9. 2020, *Narodne novine* 105/20.

[26] Ustavni sud Republike Hrvatske, U-I-4208/2020, 20. 10. 2020, *Narodne novine* 119/20.

[27] Ustavni sud Republike Hrvatske, U-II-7149/2021, 15. 2. 2022, *Narodne novine* 25/22.

se postavilo pitanje uzaludnog „trošenja energije“ suda za jedan takav slučaj koji nije prouzrokovao značajne štete u pravnom poretku, odnosno nije proizveo takve posledice koje je Ustavni sud morao da otkloni na ovaj retroaktivan način.[28] Postupanje Ustavnog suda je inače bilo povezano sa pitanjem ustavnosti rada nedeljom u redovnim okolnostima koje je bilo predmet više ustavnosudskih postupaka pre nekoliko godina, intenzivno praćenih od javnosti. Tada je sud utvrdio da „zakonsko propisivanje zabrane rada prodavnica nedeljom nametnulo prekomeran teret trgovcima na koje se ta zabrana odnosi, posebno u svetlu okolnosti da su tom zabranom pogođeni i oni trgovci koji u celosti poštuju prava svojih zaposlenika“.[29] Na kraju su sporne odredbe Zakona o trgovini bile ukinute zbog poremećaja ravnoteže između zaštite prava radnika u prodavnicama i zaštite slobode preduzetništva trgovaca. O osetljivošću ove teme svedoči i činjenica da je za „vreme kovida“ Ustavni sud inače odbacio većinu predloga za ocenu ustavnosti onih akata koji su međuvremeno stavljeni van snage ili značajno izmenjeni (iako bi po ustavnom zakonu imao ovlašćenje za ocenu ustavnosti propisa ako nije proteklo više od godinu dana od dana prestanka važenja do podnošenja zahteva, odnosno predloga za pokretanje postupka[30]). Prema jednom izdvojenom mišljenju sudije Gorana Selaneca, sutkinje Lovorke Kušan i sudije Andreja Abramovića, nisu inicijatori postupka krivi što je Ustavni sud toliko dugo čekao da donese odluku da je napadnut propis na kraju ukinut.[31] S druge strane, prema obrazloženju suda, retroaktivno postupanje može biti opravdano jedino u svetlu težine argumenata u inicijativama, postojanja javnog interesa i ocene pojedinačnih interesa inicijatora koji se pojave u većem broju.[32]

2.4. Bosna i Hercegovina

Praksa Ustavnog suda Bosne i Hercegovine ima na neki način najšarolikije ishode postupaka u vezi sa kovidom 19: potvrdio je da je obaveza nošenja zaštitnih maski legitimna naspram formalne nelegalnosti postupka donošenja

[28] Izdvojeno mišljenje sudije Miroslava Šumanovića, Ustavni sud Republike Hrvatske, U-II-2379/2020, 14. 9. 2020, *Narodne novine* 105/20.

[29] Ustavni sud Republike Hrvatske, U-I-642/2009, 19. 6. 2009, *Narodne novine* 76/09.

[30] Ustavni zakon o Ustavnom sudu Republike Hrvatske, *Narodne novine* 99/99, 29/02, 49/02 – prečišćen tekst, čl. 56 st. 1.

[31] Ustavni sud Republike Hrvatske U-II-1373/2020, 14. 9. 2020.

[32] Ustavni sud Republike Hrvatske, U-II-6267/2021, 12. 4. 2022.

relevantne mere,[33] izjavio je da nastavom na daljinu nije povređena sam bit prava na obrazovanje,[34] odbacio je kao nedopuštenu apelaciju u vezi sa obavezom nošenja lične zaštitne opreme i distanciranja zbog toga što je *ratio materiae* inkompatibilna sa Ustavom Bosne i Hercegovine[35] i odbacio je apelaciju zbog zabrane kretanja van mesta prebivališta jer su se pravne okolnosti promenile – predmetna naredba je u međuvremenu stavljena van snage.[36]

Ustavni sud Bosne i Hercegovine može da odluči da li je bilo koja odredba ustava ili zakona jednog entiteta u skladu sa Ustavom Bosne i Hercegovine, što obuhvata i normativnu kontrolu zakona same federacije (znači ne samo entiteta). Takve postupke može da inicira samo ograničen krug lica: članovi Predsedništva, predsedavajući ili njegov zamenik ili jedna četvrtina bilo kojeg veća Parlamentarne skupštine ili jedna četvrtina članova bilo kojeg zakonodavnog veća nekog entiteta.[37] Interesantno je da nijedan „kovid postupak" nije bio pokrenut po toj osnovi, nego od privatno pravnih lica podnošenjem tzv. apelacije.

Slično rešenju primenljivom u Mađarskoj, Ustavni sud Bosne i Hercegovine može izuzetno da razmatra apelaciju i kada nema prethodne (pojedinačne) odluke nadležnog suda, ukoliko apelacija ukazuje na ozbiljna kršenja prava koja štiti Ustav ili neki međunarodni akt koji se primenjuje u Bosni i Hercegovini.[38] Da bi takva apelacija bila dopustiva, apelant mora da navodi razloge zbog kojih se smatra žrtvom povrede prava. Neke apelacije su odbačene baš zbog nedostatka neposrednog pravnog interesa, dok su druge usvojene ali bez istovremenog ukidanja osporenog akta. Na primer, u jednoj odluci sud je potvrdio da je apelantova sloboda na kretanje bila povređena zbog nepostojanja proporcionalnosti između zaštite javnog zdravlja i naložene mere, ali, s obzirom na nesumnjiv javni interes da se

33 Ustavni sud Bosne i Hercegovine, AP-3683/20, 22. 12. 2020.

34 Ustavni sud Bosne i Hercegovine, AP-3667/20, 10. 12. 2020.

35 Ustavni sud je smatrao da osporene naredbe kojima se nalaže obavezno nošenje zaštitnih maski i održavanje socijalne distance na javnim površinama i zatvorenim javnim mestima nikako ne mogu dovesti u vezu sa onim odredbama Ustava Bosne i Hercegovine, odnosno Evropske konvencije za zaštitu ljudskih prava na koje se apelant pozivao; to jest, „iz činjeničnog stanja predmeta ne proizlazi da se apelant drži u ropskom ili potčinjenom položaju, niti da je lišen slobode, niti se obveza održavanja socijalne distance može smatrati ograničenjem slobode kretanja" (stav 14 odluke Ustavnog suda Bosne i Hercegovine, AP-1844/20, 2. 7. 2020).

36 Ustavni sud Bosne i Hercegovine, AP-1580/20, 20. 5. 2020.

37 Ustavni sud Bosne i Hercegovine, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini i *Službeni glasnik BiH* 25/2009 – Amandman I, VI, 3, a.

38 Pravila Ustavnog suda Bosne i Hercegovine, čl. 18 st. 2.

uvedu određena ograničenja, odnosno zbog mogućih negativnih posledica za celokupno društvo, Ustavni sud nije ukinuo predmetnu naredbu Federalnog štaba civilne zaštite.[39]

Za razliku od Federacije, u Republici Srpskoj svako može dati inicijativu za pokretanje postupka za ocenjivanje ustavnosti i zakonitosti, kao u Srbiji,[40] što je rezultiralo time da su pred Ustavnim sudom Republike Srpske napadnuti skoro svi propisi doneti povodom kovida 19: uredbe sa zakonskom snagom predsednika RS, zaključci Republičkog štaba za vanredne situacije i sama odluka o proglašenju vanrednog stanja.

3. FORMALNOPRAVNA DIMENZIJA RESTRIKTIVNIH MERA

U svojoj dugogodišnjoj praksi, Evropski sud za ljudska prava je izradio poseban test na osnovu kojeg se u svakom pojedinačnom slučaju utvrđuje da li je ograničenje ljudskog prava sprovedeno u skladu sa principima Evropske konvencije za zaštitu ljudskih prava. Iako se elementi tog testa mogu različito tumačiti (šire u Greer 2000, 23–26), ustavni sudovi se kontinuirano pozivaju na njih kada odlučuju o tome da li je postojala povreda ljudskih prava, a to su: 1) da li je mešanje države u vršenje konkretnog individualnog ljudskog prava bilo nužno u demokratskom društvu, 2) da li je mešanje, odnosno ograničenje bilo propisano zakonom i sprovedeno u skladu sa zakonom i 3) da li je mešanje bilo proporcionalno legitimnom cilju koji se želi postići. U vezi sa praksom ustavnih sudova u istraživanju, jednoglasno se može zaključiti da ni u jednom slučaju nije bilo sporno da su restriktivne mere bile nužne, odnosno da je cilj (tj. očuvanje javnog zdravlja) bio legitiman. Međutim, razlikuju se po tome da li bi se taj cilj mogao postići blažim merama (pitanje proporcionalnosti), odnosno da li su prilikom usvajanja mera bili ispoštovani zahtevi (formalne) legalnosti. U ovom radu se bavimo samo ovim drugim pitanjem.

Na početku izgradnje doktrine, kriterijum da svaka derogacija mora imati validan pravni osnov bio je fokusiran isključivo na obavezu organa državne vlasti da deluju u okviru zakona i drugih pravnih propisa (legalitet u smislu supremacije prava) (European Commission for Democracy Through Law 2010, 9). Vremenom su se razvili i neki drugi atributi u vezi sa kvalitetom akata, kao da ti propisi moraju biti dostupni, razumljivi i predvidljivi

[39] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 72–73.

[40] Zakon o Ustavnom sudu Republike Srpske, *Službeni glasnik Republike Srpske* 104/01 i 92/12, čl. 4. st. 1.

adresatima, odnosno predvidljivi i samim organima izvršne vlasti u smislu da znaju granice svojih ovlašćenja, to jest kako, kada i prema kojim subjektima mogu da izriču (restriktivne) mere (legalitet u smislu pravne sigurnosti) (Sloot 2020, 163).

Iako su ti zahtevi utvrđeni kao pretpostavke za ograničenje ljudskih prava u tzv. redovnim prilikama, smatra se da se moraju primeniti i u slučaju odstupanja od ljudskih prava u vanrednim okolnostima.[41] Takav je i stav Interameričke komisije za ljudska prava koja je u posebnoj rezoluciji izjavila da međunarodno pravo postavlja brojne kriterijume, kao što su legalitet, nužnost, srazmernost i pravovremenost, koje države moraju da poštuju čak i u ekstremnim slučajevima (Inter-American Commission on Human Rights 2020, 8).

3.1. Pravna kvalifikacija kovida 19 kao razloga za odstupanje od ljudskih prava i povezana pitanja

Države su suverene da odluče da li bi potencijalna opasnost za život i zdravlje ljudi opravdavala privremeno ili trajno odstupanje od uobičajenih modela delovanja u nacionalnom pravnom sistemu. Nezavisno od toga što kovid 19 nesumnjivo predstavlja stvarnu i neposrednu pretnju za pravo svih pojedinaca na zdravlje i život (šire u Lebret 2020), prema nekim mišljenjima njegove eventualne posledice ne zahtevaju uvođenje vanrednog režima.

Primeri Hrvatske, Mađarske i Srbije, a delimično i Republike Srpske, potvrđuju da jedan isti događaj može da se tretira veoma različito u pravnom smislu u raznim pravnim sistemima, i da su ustavni sudovi u praksi zauzeli prilično oprezan stav naspram teorijskog koncepta da bi kao čuvari ustava trebalo da prihvataju aktivistički pristup u oceni vanrednog stanja (Miljojković 2021, 140).

U kontekstu ovog istraživanja pravna kvalifikacija kovida 19, i u propisima, i od ustavnih sudova, relevantna je da bi se utvrdilo da li je izricanje restriktivnih mera imalo svoj validan pravni osnov u pojedinim pravnim sistemima; to jest, da li su organi vlasti delovali u skladu sa svojim ustavnim ovlašćenjima i imali pravi povod za uvođenje režima koji se bitno razlikovao od režima „u stanju normalnosti".

[41] Prema članu 15 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, vanredne okolnosti su ratno stanje ili druge javne opasnosti koje prete opstanku nacije, uključujući pretnju organizovanom životu zajednice i države (*Lawless v. Ireland* (no. 3), 1961, § 28).

3.1.1. Diskrecija zakonodavne vlasti u primeni ustavnih odredaba – slučaj Hrvatske

U ostvarivanju svoje zakonodavne vlasti, kada ograničava pojedina ljudska prava i slobode, Hrvatski sabor može da postupa na temelju dve ustavne osnove: član 16 i član 17 Ustava Republike Hrvatske.[42] Dok se u prvom slučaju ograničavaju ljudska prava u tzv. redovnim prilikama, na osnovu zakona donetih u standardnim zakonodavnim postupcima, u drugom slučaju Hrvatski sabor dvotrećinskom većinom odlučuje o ograničenju pojedinih prava „u doba ratnog stanja ili neposredne ugroženosti nezavisnosti i jedinstvenosti države, te velikih prirodnih nepogoda".

U konkretnom slučaju, umesto dvotrećinske, kvalifikovane većine predviđene za ograničenje prava za vreme vanrednog stanja, Hrvatski sabor je „običnim" zakonom – donetim običnom većinom, u hitnom postupku – utemeljio nadležnost organa izvršne vlasti (kriznog štaba) za ograničenje ljudskih prava zbog okolnosti koje su nastupile zbog kovida 19.

Imajući u vidu da se u Ustavu Republike Hrvatske epidemija ne spominje izričito među razlozima za uvođenje vanrednog stanja u državi, postavilo se kao sporno pitanje da li kovid 19 može da se kvalifikuje kao „velika prirodna nepogoda" koja može da opravda postupanje Sabora na osnovu člana 17 Ustava. Prema Ustavnom sudu, odgovor na to pitanje uopšte nije bitan jer niko nije ovlašćen da naloži Hrvatskom saboru kako da postupi u takvim situacijama. Drugim rečima, pitanje da li će se aktivirati član 17 (proglašenje vanrednog stanja zbog kovida 19) ili neće, u isključivoj je nadležnosti Hrvatskog sabora. Interpretacija Ustavnog suda nam ukazuje na pretpostavku ustavnosti svih zakona (odnosno mera donetih na osnovu tih zakona) koji su usvojeni na temelju člana 16, makar u pogledu postojanja validnog pravnog osnova: „[...] činjenica da osporeni zakoni (i mere) nisu doneseni na temelju članka 17 Ustava, po oceni Ustavnog suda, ne čini sama po sebi te zakone neustavnima".[43]

Radi otklanjanja svake nedoumice, Građanska inicijativa „Odlučujmo zajedno!" podnela je predlog za raspisivanje referenduma za dopunu relevantne ustavne odredbe rečima „epidemije, odnosno pandemije" jer se „jedino ustavnom dopunom članka 17 može zajamčiti da će ubuduće u stanju epidemije, odnosno pandemije, o ograničenju sloboda i prava Hrvatski sabor morati odlučivati najvišom kvalifikovanom većinom koju poznaje Ustav

[42] Ustav Republike Hrvatske, *Narodne novine* 56/90, 135/97, 113/00, 28/01, 76/10 i 5/14.

[43] Ustavni sud Republike Hrvatske, U-I-1372/2020, 14. 9. 2020.

Republike Hrvatske".[44] Iako je, formalnopravno gledano, referendumsko pitanje odgovaralo zahtevima ustavnosti, Ustavni sud Hrvatske je utvrdio da, posmatrajući ustav kao celinu, to nije u skladu sa Ustavom jer „ne udovoljava zahtevu razumne svrhovitosti i delotvornosti referenduma koje su po naravi stvari inherentne vladavini prava kao jednoj od najviših ustavnih vrednosti".[45] Sud je dao obrazloženje da svaka epidemija jeste i prirodna nepogoda, ali u konkretnom slučaju Hrvatski sabor nije našao da kovid 19 predstavlja takvu pretnju koja bi se mogla izjednačiti sa prirodnom katastrofom državnih razmera – i koja je „dovoljno jak razlog" za aktiviranje člana 17 Ustava.

Odluka većine je burno kritikovana, između ostalog, zbog ograničenja neposredne demokratije i suviše fleksibilne interpretacije nadležnosti Hrvatskog sabora u smislu članova 16 i 17, smatrajući da Ustavni sud na taj način želi da spreči da u slučaju uspešnog referenduma Sabor izgubio luksuz izbora između spomenutih ustavnih ovlašćenja, odnosno ustavnog osnova za derogaciju ljudskih prava.

3.1.2. Dopuna ustavnih odredaba zakonom – slučaj Mađarske

Problem u pogledu kvalifikacije kovida 19 kao elementarne nepogode pojavio se i u Mađarskoj, ali samo na nivou naučnih rasprava. Naime, Vlada Mađarske je proglasila (prvu) vanrednu situaciju Uredbom od 11. marta 2020. godine,[46] na osnovu neposrednog ovlašćenja iz Osnovnog zakona Mađarske koje glasi: „Vlada proglašava vanrednu situaciju u slučaju oružanog sukoba, ratne situacije ili humanitarne katastrofe u susednoj državi, kao i elementarne nepogode ili industrijskog udesa koji ugrožava bezbednost života i imovine, kao i radi sprečavanja njihove posledice."[47] Iako kovid 19 nesumnjivo ugrožava bezbednost života i imovine, prema vladajućem naučnom shvatanju, ne spada u pojmovni krug elementarnih nepogoda u mađarskom pozitivnom pravu (Szente 2020, 132). Ipak, to nije sprečilo Vladu Mađarske da proglasi vanrednu situaciju baš zbog epidemije izazvane humanim virusom, pa se postavlja pitanje ustavnosti dotične uredbe i svih drugih propisa koji su doneti na osnovu nepostojećeg ili spornog ustavno pravnog osnova. „Ukoliko ovi propisi materijalno pravno nisu u suprotnosti sa Osnovnim zakonom, to jest sadrže odredbe koje je Vlada ionako mogla da

[44] Obrazloženje zahteva Organizacijskog odbora, citira Ustavni sud Republike Hrvatske, U-VIIR-2180/2022, 16. 5. 2022, tač. 15.

[45] Ustavni sud Republike Hrvatske, U-VIIR-2180/2022, 16. 5. 2022.

[46] 40/2020. (III 11) Korm. rendelet a veszélyhelyzet kihirdetéséről.

[47] Magyarország Alaptörvény, čl. 53.

donese u skladu sa svojim normativnim ovlašćenjima, i tada su delimično formalnopravno manjkavi, jer se pozivaju na pogrešan pravni osnov“ (Szente 2020, 133).

Naime, Vlada Mađarske je proglasila vanrednu situaciju polazeći od zakonske definicije da epidemija izazvana životinjskim ili/i humanim virusima predstavlja *opasnost drugog porekla*, osim „klasičnih“ prirodnih opasnosti i opasnosti civilizacijskog porekla, povodom kojih, takođe, može da se proglasi vanredna situacija, odnosno da se uvede poseban pravni režim u zemlji.[48] Međutim, sporno je da li je sam zakon u skladu sa Ustavom. Ali u Mađarskoj niko nije pokrenuo ustavnosudski postupak za ocenu ustavnosti spornog zakona kojim je Parlament Mađarske bez neposrednog ovlašćenja iz Ustava proširio obim koncepta opasnosti na opisani način.

U posebnom pravnom režimu proširuju se ovlašćenja izvršne vlasti koja čak može privremeno da suspenduje primenu pojedinih zakonskih odredaba, odnosno da od njih privremeno odstupa (Országgyűlés Hivatala 2000). To rešenje je „inovacija Osnovnog zakona“ Mađarske koja nema svoj jasan ekvivalent u međunarodnom pravu, iako pojedini elementi mogu da se nađu u međunarodnoj literaturi (Till 2018, 4). Tako je Vlada Mađarske uspela da u skladu sa samim Ustavom propisuje mere u skoro svim granama prava koje su odstupile od redovnog pravnog režima (npr. u oblasti izvršenja krivičnih sankcija, prava azilanata, prava privrednih društava, urbanističkog planiranja, rudarstva, autorskih prava, stranih predstavništava, osnovnih ličnih i političkih prava) bez intervencije zakonodavne vlasti (Rácz 2021). To ne znači da su Parlamentu Mađarske oduzeta sva ovlašćenja za uvođenje posebnog pravnog režima jer je i dalje jedino ovlašćen da odluči o ratnom stanju, odnosno o vanrednom stanju zbog neposredne ratne opasnosti ili neposredne pretnje pravnom poretku u zemlji – osim ako je sprečen da donosi te odluke. U tom slučaju predsednik države preuzima tu odgovornost.[49]

Imajući u vidu da prilično široka ovlašćenja Vlade Mađarske za vreme vanrednih okolnosti predstavljaju ustavnu materiju, pitanje nadležnosti za uvođenje vanredne situacije *per se* nije se ni pojavilo pred Ustavnim sudom Mađarske, ali je i dalje diskutabilno postojanje validnog pravnog osnova u samom Ustavu s obzirom na spornu kvalifikaciju kovida 19 kao elementarne nepogode.

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[48] 2011. évi CXXVIII. Törvény a katasztrófavédelemről és a hozzá kapcsolódó egyes törvények módosításáról, čl. 44.

[49] Magyarország Alaptörvény, čl. 43 st. 1 tač. 3.

3.1.3. Sporna granica između vanrednog stanja i vanredne situacije – slučaj Srbije

U Srbiji je odluka o proglašenju vanrednog stanja doneta uz supotpis predsednika Narodne skupštine, Vlade i države na samom početku izbijanja pandemije,[50] što je osporeno pred Ustavnim sudom i zbog same procedure i zbog postojanja razloga za proglašenje vanrednog stanja. Prema inicijativama, uspešno upravljanje situacijom izazvanom kovidom 19 bilo bi moguće i u uslovima tzv. vanredne situacije. Za razliku od vanrednog stanja, koje se uvodi neposredno na osnovu Ustava „kada javna opasnost ugrožava opstanak države ili građana“[51], vanredna situacija je stanje koje nastaje „kada su rizici i pretnje ili nastale posledice po stanovništvo, životnu sredinu i materijalna i kulturna dobra takvog obima i intenziteta da njihov nastanak ili posledice nije moguće sprečiti ili otkloniti redovnim delovanjem nadležnih organa i službi“.[52] Prema oceni Ustavnog suda, skoro je nemoguće tačno definisati granicu između ovih pravnih instituta, ali je bio mišljenja da „pravni ‘kapacitet’ vanredne situacije ni približno ne garantuje takvu delotvornost reagovanja„[53] kao vanredno stanje.

Ustavni sud Srbije nije sebe smatrao nadležnim da oceni jesu li konkretne okolnosti slučaja opravdavale uvođenje vanrednog pravnog režima ili nisu, ali je isticao „da se ne može zaključiti da nije bio ispunjen ustavni osnov za proglašenje vanrednog stanja“. Na osnovu premise da dva negativna čine pozitivno dobili bismo konstataciju da je bio ispunjen ustavni osnov za proglašenje vanrednog stanja u Srbiji zbog kovida 19. Ali ako je tako, postavlja se pitanje zašto je sud zauzeo tako „taktičan“ stav.

Ne ulazeći u naučnu raspravu o odnosu pomenutih pravnih kategorija, sasvim je prihvatljiva životna realnost da se razlozi za uvođenje vanredne situacije intenziviraju i vremenom prerastu u vanredno stanje (vid. primer Republike Srpske). Iako to nije bio slučaj u Srbiji, i sam ustavnosudski postupak je pokazao da je „ostavljen suviše veliki normativni prostor koji bi se morao bolje popuniti, kako bi bio sprečen visok stepen voluntarizma prilikom procenjivanja“ (Avramović, Mlađan 2014, 779) da li je jedan događaj dovoljan razlog za jednu ili drugu vrstu postupanja. Da se podsetimo, za uvođenje vanredne situacije za čitavu državu nadležna je Vlada na osnovu

[50] Odluka o proglašenju vanrednog stanja, *Službeni glasnik RS* 29/20.

[51] Ustav Republike Srbije, *Službeni glasnik RS* 98/2006 i 115/2021, čl. 200 st. 1.

[52] Zakon o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama, *Službeni glasnik RS* 87/2018, čl. 2 st. 1 tač. 7.

[53] Ustavni sud Srbije, IUo-42/2020, 22. 5. 2020, *Službeni glasnik RS* 77/2020.

predloga Republičkog štaba za vanredne situacije,[54] a za proglašenje vanrednog stanja primarno je nadležna Narodna skupština. A kako je i Karl Šmit (Carl Schmitt) potencirao, onaj ko odlučuje o stanju nužde istinski je suveren.

Da li je Narodna skupština stvarno bila ograničena da se sastane i samostalno odluči o uvođenju vanrednog stanja, prema oceni Ustavnog suda, faktičko je, a ne pravno pitanje. „Imajući u vidu da Ustav, a ni drugi pravni akti nisu odredili koje su to situacije kad Narodna skupština nije u mogućnosti da se sastane, a naročito imajući u vidu i činjenicu da Ustavni sud ne može da ocenjuje organizacione mogućnosti Narodne skupštine da se sastane bez odlaganja u uslovima postojanja opasnosti po život i zdravlje ljudi."[55]

Ustavni sud Srbije, slično Ustavnom sudu Hrvatske, prihvatio je da je diskreciona odluka narodnih poslanika kako, odnosno po kojoj ustavnoj odredbi će postupiti. „Dakle, na delu je samomarginalizovanje Narodne skupštine i prepuštanje dominantne uloge izvršnoj vlasti. To je uostalom trajno obeležje srpskog parlamentarizma, pa se i nije moglo očekivati da će u periodu vanrednog stanja biti drugačije" (Simović 2020, 13). Takođe, zbog očigledno nepostojećih materijalnih uslova za proglašenje vanrednog stanja, a i zbog poštovanja oskudnih a postojećih proceduralnih koraka iz Ustava, „odluka o proglašenju vanrednog stanja može biti kritikovana sa stanovišta konstitucionalizma, ali ne i sa stanovišta ustavnosti, shvaćene u pozitivnopravnom smislu" (Simović 2020, 15). Taj stav je inače potvrđen odlukom Ustavnog suda Srbije, koji je odbacio predmet zbog nenadležnosti.

3.1.4. Epidemija kao poseban razlog za proglašenje vanrednog stanja – slučaj Republike Srpske

Ustav Bosne i Hercegovine ne sadrži odredbe o proglašenju vanrednog stanja na državnom nivou nego je proglašeno „samo" stanje nesreće uzrokovano pojavom virusa korona na osnovu Zakona o zaštiti i spašavanju ljudi i materijalnih dobara od prirodnih i drugih nesreća.[56] Za razliku od Federacije, u Republici Srpskoj (RS) uvedena je vanredna situacija dan pre proglašenja stanja nesreće na federalnom nivou, a nepune dve nedelje kasnije proglašeno je i vanredno stanje na nivou entiteta (Banjalučki centar

[54] Zakon o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama, čl. 39 st. 1 tač. 1.

[55] Ustavni sud Srbije, IUo-42/2020, 22. 5. 2020, *Službeni glasnik RS* 77/2020.

[56] Zakon o zaštiti i spašavanju ljudi i materijalnih dobara od prirodnih i drugih nesreća, *Službene novine FBiH* 39/03, 22/06 i 43/10.

za ljudska prava 2020, 8) „zbog epidemiološke situacije u Republici Srpskoj usled korona virusa 2019-nCoV".[57] Taj propis je inače bio napadnut pred Ustavnim sudom RS jer, prema navodima inicijatora, Ustav RS ne poznaje termin „epidemiološka situacija", s jedne strane, odnosno zbog toga što je, radi upravljanja potencijalnim pretnjama u zemlji, na snazi već bila vanredna situacija sa izvesnim restriktivnim merama, s druge strane. Ustavni sud RS nije se posebno bavio pitanjem prelaska iz vanredne situacije u vanredno stanje, kao što je učinio, na primer, Ustavni sud Srbije, odnosno zanemario je terminološku primedbu u vezi sa navodnom razlikom između izraza epidemija i epidemiološka situacija.

Narodna skupština RS proglašava vanredno stanje u slučaju ugrožavanja bezbednosti, usled elementarnih nepogoda (poplava, zemljotresa i požara), prirodnih katastrofa, *epidemija*, povreda ljudskih prava i sloboda i normalnog funkcionisanja ustavnih organa republike.[58] Znači, za razliku od ostalih država u regionu, nije bilo sporno da epidemija (koja je *expressis verbis* navedena u samom Ustavu) predstavlja drugačiju opasnost od elementarnih nepogoda i prirodnih katastrofa[59] nego se postavilo pitanje da je li nastala epidemiološka situacija stvarno ugrozila bezbednost, odnosno onemogućila normalno funkcionisanje zakonodavnog tela zbog povećanog zdravstvenog rizika. Prema oceni Ustavnog suda, i jedan i drugi uslov je bio ispunjen jer je kovid 19 izazvao visok stepen ugroženosti zdravlja i života građana, što samo po sebi predstavlja ugrožavanje bezbednosti.[60] Iako utvrđivanje stepena ugroženosti bezbednosti u zemlji zbog zabrinjavajuće epidemiološke situacije jeste faktičko pitanje, Ustavni sud RS nije odbacio predmet nego je analizom okolnosti slučaja odlučio u meritumu.

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[57] Odluka o proglašenju vanrednog stanja za teritoriju Republike Srpske, *Službeni glasnik Republike Srpske* 31/2020, tač. 1.

[58] Ustav Republike Srpske, *Službeni glasnik Republike Srpske* 21/1992 – prečišćen tekst, 28/1994 – amandmani XXVI–XLIII, 8/1996 – amandmani XLIV–LI, 13/1996 – Amandman LII, 15/1996 – ispr. 16/1996 – Amandman LIII, 21/1996 – amandmani LIV-LXV, 21/2002 – amandmani LXVI–XCII, 26/2002 – ispr. 30/2002 – ispr. 31/2002 – amandmani XCIII–XCVIII, 69/2002 – amandmani XCIX–CIII, 31/2003 – amandmani CIV i CV, 98/2003 – amandmani CVI–CXII, 115/2005 – Amandman CXIV, 117/2005 – amandmani CXV–CXXI i 48/2011 – Amandman CXXII i *Službeni glasnik BiH* 73/2019 – odluka US BiH, čl. 70 st. 3.

[59] Interesantna je činjenica da se u Federaciji BiH masovne pojave ljudskih, životinjskih i biljnih bolesti smatraju prirodnom nepogodom. Zakon o zaštiti i spašavanju ljudi i materijalnih dobara od prirodnih i drugih nesreća, čl. 3 tač. 1.

[60] Ustavni sud Republike Srpske, U-24/20, 29. 4. 2021.

Što se tiče Bosne i Hercegovine, uvođenje stanja nesreća se nije pojavilo kao ustavnopravno sporno pitanje pred Ustavnim sudom Bosne i Hercegovine, ali je sam sud „izuzetnom zabrinutošću" konstatovao „da je u ovoj naročitoj situaciji, u kojoj se zbog pandemije kovida 19 nalazi i Bosna i Hercegovina, izostala pravovremena reakcija nadležnog zakonodavca„[61]; umesto Parlamenta FBiH, Vlada FBiH je preduzela konkretne i blagovremene korake da bi se sprečilo nekontrolisano širenje bolesti.

3.1.5. Rezimiranje i zaključci

Sasvim je razumljivo i prihvatljivo da ustavni aranžmani predviđaju situacije koje mogu da utiču na opstanak države i njenih građana, kada država nije u stanju da reaguje dovoljno brzo. S druge strane, ne bi bilo racionalno očekivati da ustavne odredbe sadrže sve potencijalne opasnosti. Tako se desilo da se u ustavima zemalja koje su obuhvaćene istraživanjem epidemija ne spominje izričito kao razlog za uvođenje drugačijeg, vanrednog režima, osim Ustava RS. No, čak ni u slučaju RS nisu sve epidemije dovoljan uzrok za proglašenje vanrednog stanja, samo epidemije velikih razmera koje ugrožavaju bezbednost celokupne zemlje. Zato, kada se u pomenutim predmetima osporavala ustavnost samog pravnog osnova za odstupanje od „stanja normalnosti" (bilo da je reč o vanrednom stanju, vanrednoj situaciji ili proširenju ovlašćenja izvršne vlasti u redovnim okolnostima), ustavni sudovi su morali da daju odgovor ne samo na pravna nego i na faktička pitanja. Ustavni sud Srbije nije se smatrao nadležnim, dok je Ustavni sud RS odlučio u meritumu. Ustavni sud Hrvatske nije se upuštao u detalje jer sam zakonodavac treba da oceni po kom ustavnom osnovu će postupiti, imajući u vidu okolnosti konkretnog slučaja. Ustavni sud po pravilu ne može da preispituje tu odluku. Iako pred Ustavnim sudom Mađarske niko nije osporavao povod i pravni osnov za uvođenje posebnog pravnog režima, stručna javnost je izrazila svoju zabrinutost.

Sumirajući iskustva iz ustavnosudskih postupaka, može se zaključiti da su ustavi u regionu nepotpuni i/ili problematični u pogledu razloga za uvođenje vanrednog režima u kojima se može odstupiti od ljudskih prava; pa, ustavni sudovi su se našli u situaciji da se praznine mogu popuniti davanjem odgovora na neka faktička pitanja – što je svakako van njihove nadležnosti.

[61] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 54.

3.2. Nadležnost za donošenje restriktivnih mera i povezana pitanja

„Nadležnost državnog organa je po svojoj prirodi *par excellence* sistemsko pitanje. U najmanju ruku, nadležnost je uslov formalne valjanosti svakog pravnog akta“ (Slavnić 2013, 225). Zato je izuzetno važno, naročito u tako osetljivim okolnostima kao što su one koje su nastupile zbog kovida 19, da se unapred zna ko, kojim aktima i na osnovu čega može da derogira ljudska prava. U Hrvatskoj i Bosni i Hercegovini većinu restriktivnih mera je doneo direktno krizni štab, a u Mađarskoj i Srbiji vlada, u obliku uredbi (naravno sa izuzecima, vid. kasnije slučaj Srbije). U Srbiji je povremeno radno telo Vlade, Krizni štab za suzbijanje zarazne bolesti COVID-19, na čelu sa premijerkom, učestvovalo u donošenju restriktivnih mera samo posredno: na samom početku je bio zadužen za obaveštenje javnosti,[62] a kasnije se, razvojem situacije, njegova uloga proširila te je davao predloge, mišljenja i stručna obrazloženja.[63] Što se tiče Mađarske, profesionalnu potporu su pružala posebna odeljenja pojedinih ministarstava, naročito Ministarstva za ljudske resurse, ali konačnu reč u svakom slučaju je imala Vlada.

Iako organi izvršne vlasti i uprave podležu manjem broju ograničenja u vanrednim, odnosno neuobičajenim okolnostima, prepreka njihovom brzom delovanju je demokratija kao takva, koja zahteva konsenzus većine i postojanje raznih modela međusobne kontrole između organa vlasti. „Dakle, da bi se zaštitio opstanak demokratije kao takve, zakonodavna procedura je morala da stvori paradoks: smanjenjem demokratske kontrole kako bi se povećala efikasnost izvršne vlasti“ (Zwitter 2012, 100). U ovom poglavlju prvenstveno analiziramo kako su ustavni sudovi u regionu pristupali pitanjima osnovanosti nadležnosti i demokratske kontrole organa izvršne vlasti koji su umesto zakonodavca propisali restriktivne mere i neretko regulisali odstupanje od ljudskih prava povodom kovida 19 van ustavnih okvira.

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[62] Zaključak Vlade (05 broj 53-2928/2020), *Službeni glasnik RS* 48/2020.

[63] Odluka o obrazovanju Kriznog štaba za suzbijanje zarazne bolesti Covid-19, *Službeni glasnik RS* 132/2020.

3.2.1. Nepostojeća direktna parlamentarna kontrola – slučaj Hrvatske

Kao što je već u uvodnom delu istaknuto, u radu smo se koncentrisali „samo" na one ustavnosudske postupke koji su inicirani povodom potvrđivanja (ne)saglasnosti nekog propisa sa ustavom, odnosno zakonima. Šta se smatra *propisom*, osim zakona i klasičnih opštih pravnih akata čiju ustavnost i zakonitost može da ispituje ustavni sud, zavisi od ustavnog poretka konkretne države i tumačenja koje je usvojio sam ustavni sud. To pitanje se postavilo kao relevantno povodom normativne kontrole odluka kriznog štaba u Hrvatskoj (Stožer civilne zaštite), koje, kao „stručno, operativno i koordinativno telo za provođenje mera i aktivnosti civilne zaštite u velikim nesrećama i katastrofama" pod direktnim nadzorom Vlade Republike Hrvatske, može neposredno da naredi sigurnosne mere za sprečavanje širenja virusa, uz ministra zdravlja.[64] Imajući u vidu da je većina restriktivnih mera bila propisana odlukama Stožera civilne zaštite, prvobitni zadatak Ustavnog suda Hrvatske bio je da potvrdi (ili odbije) da li Stožer uopšte može biti ovlašćen (zahvaljujući izmeni zakona, a ne neposredno na osnovu ustava) da ograničava ljudska prava.

Analizirajući zakonodavni okvir, odgovor suda je bio pozitivan: odgovarajućim izmenama zakona Stožer je dobio ovlašćenje da normira pitanja iz nadležnosti Hrvatskog sabora, uključujući i ograničenje ljudskih prava, u skladu sa Ustavom. U svom izdvojenom mišljenju pojedine sudije Ustavnog suda smatrale su da takav stav, između ostalog, podržava delatnost jednog „paralelnog zakonodavca, na čelu s ministrom policije, koji se ne mora opterećivati ustavnim ograničenjima niti zakonodavnim procedurama".[65] Naime, Hrvatski sabor može jedino posredstvom Vlade da kontroliše njena tela, uključujući i Stožer, da traži posebne izveštaje o njihovom radu i u krajnjem slučaju nezadovoljstva da pokrene postupak glasanja o nepoverenju Vladi (Gardašević 2021, 115). S druge strane, većina sudija Ustavnog suda smatra da nedostatak direktne kontrole zakonodavne vlasti nad Stožerom nije problematičan dok se obezbeđuje ustavnosudska zaštita protiv odluka Stožera, odnosno eventualne zloupotrebe nadležnosti kriznog štaba.

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[64] Ustavni sud Republike Hrvatske, U-I-1372/2020, 14. 9. 2020.

[65] Izdvojeno mišljenje sudije Anreja Abramovića, Lovorke Kušan, Gorana Selaneca, Ustavni sud Republike Hrvatske, U-I-1372/2020, 14. 9. 2020.

Iako se njegove odluke smatraju interventnim merama koje u normalnim okolnostima nemaju karakter „drugih propisa" u smislu dopuštenog predmeta ocene ustavnosti i zakonitosti, prema Ustavnom sudu, one mogu biti predmet normativne kontrole ukoliko se njima nesporno ograničavaju neka ljudska prava, odnosno kada ugrožavaju samu bit tih prava.[66]

3.2.2. Neustavne mere u formalnopravnom smislu – slučaj Bosne i Hercegovine

Ustavni sud Bosne i Hercegovine je zauzeo drugačije stajalište od kolega u Hrvatskoj, iako je model donošenja restriktivnih mera u zemlji bio sličan. U Bosni i Hercegovini, kada je Vlada Federacije BiH proglasila stanje nesreće, Federalni štab civilne zaštite je dobio ovlašćenje „da u skladu s Federalnim planom i važećim zakonskim propisima preuzme sve aktivnosti oko koordinacije i rukovođenja akcijama zaštite i spašavanja ljudi na ugroženom području", uključujući i nalaganje brojnih mera donošenjem naredbi i drugih opštih akata.[67] Pred Ustavnim sudom Bosne i Hercegovine postavilo se kao sporno pitanje da li je zakonodavna vlast stvarno odobrila, dodelila izvršnoj vlasti, to jest Federalnom štabu, toliko široka ovlašćenja za upravljanje krizom zbog kovida 19 kojima su ozbiljno ograničena ljudska prava. Ustavni sud se pokazao kao izuzetno detaljan, a i kritički u analizi proceduralnih garancija vladavine prava. U prvom krugu, ispitivao je da li je pravni osnov (u konkretnom slučaju zakon) za delovanje Federalnog štaba ispunio sve uslove legaliteta u smislu pravne sigurnosti jer faktički svaka nepreciznost zakonskih odredaba može voditi proizvoljnosti u određivanju restriktivnih mera; zatim je analizirao da li je postojala kontrola tih mera, tačnije da li je zakonodavac kontrolisao donosioca tih mera. Čak i u uslovima poremećenog sistema podele vlasti, do kojeg je nesumnjivo došlo u skoro svim državama zbog kovida 19, „nadzor zakonodavne vlasti mora da postoji [...], neophodno [je] da postoji takav pravni okvir na osnovu kojeg izvršna vlast preduzima mere [...], koji suštinski uspostavlja ograničenja izvršnoj vlasti s ciljem da se onemogući zloupotrebljavanje svojih ovlašćenja".[68]

Prema Ustavnom sudu Bosne i Hercegovine, pasivnost Parlamenta Federacije BiH „da na jasan i blagovremen način u okviru svojih ovlašćenja uspostavi okvir delovanja izvršne vlasti"[69] u suprotnosti je sa ustavnim

[66] Ustavni sud Republike Hrvatske, U-I-1372/2020, 14. 9. 2020, tač. 33.1.

[67] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 55.

[68] Ustavni sud Bosne i Hercegovine, AP-3683/20, 22. 12. 2020, tač. 69.

[69] Ustavni sud Bosne i Hercegovine, AP-3683/20, 22. 12. 2020, tač. 72.

garancijama pojedinih ljudskih prava i, na primer, na osnovu tog obrazloženja proglasio je obavezu nošenja zaštitnih maski u državi neustavnom. Nadalje, sloboda kretanja za razne kategorije stanovništva bila je ograničena, odnosno pravo koje iz te slobode proizlazi bilo je prekršeno činjenicom da Federalni štab nije dobio jasne smernice od viših tela, odnosno da nije utvrđena njegova obaveza da restriktivne mere „redovno preispituje i produži samo ako je to 'neophodno u demokratskom društvu'".[70] Ustavni sud je usvojio taj stav nezavisno od opštepoznate ustavne obaveze svakog organa i organizacije da svoje aktivnosti uskladi sa ustavnim garancijama ljudskih prava i sloboda – što znači da moraju „voditi računa o tome da se njima ne narušavaju ljudska i ustavna prava u meri većoj nego što je to neophodno, a naročito da mere budu ograničenog trajanja, da se u razumnim vremenskim rokovima preispituju i prilagođavaju trenutnoj situaciji, te da ne stavljaju prekomeran teret na one na koje se odnose".[71]

S druge strane, Ustavni sud nije osporio sam značaj ograničenja, zaključivši da bi ukidanje osporenih i prvenstveno u formalnopravnom smislu neustavnih mera bilo neosnovano s obzirom na nesumnjiv javni interes za njihovo uvođenje, odnosno potencijalne negativne posledice koje bi mogle nastupati ukidanjem tih mera.[72]

3.2.3. Pitanje zloupotrebe zakonodavne vlasti – slučaj Mađarske

U Mađarskoj su originalno sve mere koje su usvojene od izvršne vlasti za vreme vanredne situacije neposredno na osnovu Osnovnog zakona bile ograničenog trajanja; važile bi najduže 15 dana, osim ako je Parlament posebno ovlastio Vladu na produženje tog roka.[73] Ali umesto pojedinačne autorizacije svake mere posebno, Parlament Mađarske je usvojio jedno specifično rešenje radi obezbeđivanja parlamentarne kontrole nad delovanjem Vlade i u specijalnom zakonu o zaštiti protiv kovida 19 omogućavao da sama Vlada odluči o produženju dejstva pojedinih mera i propisa do kraja vanredne situacije.[74] Iako se na prvi pogled čini da je izvršna vlast potpuno slobodna da radi bukvalno sve što hoće, Parlament Mađarske je zadržao pravo da bilo kad povuče tu autorizaciju, odnosno na osnovu samog zakona je i dalje ostao u obavezi na naknadnu potvrdu svake mere

[70] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 72.

[71] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 56.

[72] Ustavni sud Bosne i Hercegovine, AP-1217/20, 22. 4. 2020, tač. 73.

[73] Magyarország Alaptörvénye, čl. 53 st. 3.

[74] 2020. évi XII. Törvény a koronavírus elleni védekezésről, čl. 3.

Vlade. Takođe, prema Ustavnom sudu Mađarske, ni ustavotvorac nije dao neograničena ovlašćenja Vladi jer je „načelo neograničene ili nekontrolisane vlasti suprotno duhu Osnovnog zakona, čak i za vreme posebnog pravnog režima“.[75] Osim toga, činjenica da se funkcionisanje Ustavnog suda ne može suspendovati ni u vanrednim okolnostima takođe obezbeđuje mogućnost naknadne (normativne) kontrole.[76]

Stručna javnost se malo kritičnije ophodi prema ustanovi specijalnog pravnog režima, smatrajući da poštovanje ustavnih zahteva kao što su utvrđivanje realne opasnosti, jasno razlikovanje pravila „normalnog“ i specijalnog pravnog režima i privremeni karakter vanrednih mera načelno predstavlja odgovarajuće sredstvo protiv koncentracije vlasti, ali ne može da pruža nikakvu zaštitu od zloupotrebe normativne vlasti samog zakonodavca (Vörös 2020, 41). U sličnom kontekstu se može analizirati i slučaj Hrvatske.

3.2.4. Delegiranje ovlašćenja za derogaciju ljudskih prava – slučaj Srbije i Republike Srpske

U Srbiji „kad Narodna skupština nije u mogućnosti da se sastane, mere kojima se odstupa od ljudskih i manjinskih prava može propisati Vlada, uredbom, uz supotpis predsednika Republike“.[77] S obzirom na to da je i sama odluka o proglašenju vanrednog stanja bila doneta mimo Narodne skupštine, bilo je očekivano da neće učestvovati ni u donošenju restriktivnih mera (samo naknadno, njihovim potvrđivanjem). Ali da li u Srbiji postoji mogućnost da se ovlašćenje za derogaciju ljudskih prava delegira dalje? Drugim rečima, da li organ državne uprave (konkretno Ministarstvo unutrašnjih poslova, uz saglasnost ministra zdravlja) može da donese restriktivne mere umesto izvršne vlasti, na osnovu uredbe Vlade, i tako ograniči, čak i zabrani kretanje za vreme vanrednog stanja? Prema izdvojenom mišljenju sudije prof. dr Tamaša Korheca (Korhecz Tamás), imajući u vidu važeće ustavne odredbe u Srbiji, odgovor je negativan. Citirano ustavno ovlašćenje znači da, osim propisivanja ljudskih prava od kojih se može odstupiti, Vlada je u obavezi da odredi i mere kojima se odstupa od tih prava, a organe države uprave može jedino da ovlasti da konkretizuju te mere radi lakšeg i efikasnijeg sprovođenja. Prvobitna uredba Vlade je glasila da „Ministarstvo unutrašnjih poslova, u saglasnosti sa Ministarstvom zdravlja, može privremeno da ograniči ili zabrani kretanje

[75] Ustavni sud Mađarske, 15/2021. (V 13), 13. 5. 2021, tač. 33.

[76] Ustavni sud Mađarske, 23/2021 (VII 13), 13. 7. 2021, tač. 25.

[77] Ustav Republike Srbije, čl. 200 st. 6.

licima na javnim mestima“,[78] a naredbom su konkretizovani subjekti, vremenski okvir, mesta itd.[79] Naredba ministra je upravni propis kojim se ne mogu stvarati ili ukidati prava i obaveze čak ni za vreme vanrednog stanja, iako je tačno to učinjeno.

Ustavni sud, odnosno većina sudija, nije se posebno bavio pravnom sadržinom osporene naredbe, odnosno uredbe kojom je dato ovlašćenje za sprovođenja mera, nego se rukovodio praktičnim potrebama, a to je „što konkretizacija mera u takvim situacijama i po prirodi stvari pripada organu koji ih efikasno i efektivno može primeniti na terenu, u okvirima razvoja faktičke situacije koja se vremenski može veoma brzo menjati, a od čega će u velikoj meri zavisiti i intenzitet primene propisane mere“.[80] Nasuprot izdvojenom mišljenju, stav većine je bio „da osporena Naredba ministra unutrašnjih poslova suštinski predstavlja odgovarajući sprovedbeni akt, koji sam po sebi ne predstavlja vid izvornog i samostalnog odlučivanja samog ministra unutrašnjih poslova, već je na taj način samo realizovana i konkretizovana uredba Vlade“.[81] Ako je tako, postavlja se pitanje zašto je Vlada stavila van snage osporenu naredbu i smatrala potrebnim da implementira sve relevantne odredbe u svoju uredbu.[82]

Nakon ukidanja vanrednog stanja u skladu sa Ustavom, Narodna skupština je potvrdila Uredbu Vlade o merama za vreme vanrednog stanja zajedno sa svim drugim izmenama i dopunama,[83] uključujući prvobitnu verziju kojom je data autorizacija za regulisanje uslova za ograničenje i zabranu kretanja, odnosno izmenu kojom je osporena naredba stavljena van snage. Na taj način je zakonodavna vlast i u ovom slučaju, makar posredno, ostvarila naknadnu kontrolu restriktivnih mera, ali treba imati u vidu da osporena naredba nije po naslovu spomenuta.

Pred Ustavnim sudom Republike Srpske pojavila se slična dilema (samo sa drugačijim ishodom), to jest da li je Republički štab za vanredne situacije bio ovlašćen da ograniči kretanje u zaraženom i ugroženom području, imajući u vidu ustavnu odredbu da se „samo zakonom mogu uvesti ograničenja

[78] Uredba o merama za vreme vanrednog stanja, *Službeni glasnik RS* 21/2020, čl. 2.

[79] Naredba o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije, *Službeni glasnik RS* 34/20, 39/20, 40/20, 46/20 i 50/20.

[80] Ustavni sud Srbije, IUo-45/2020, 28. 10. 2020.

[81] *Ibid*.

[82] Uredba o izmenama i dopunama uredbe o merama za vreme vanrednog stanja, *Službeni glasnik RS* 53/2020.

[83] Zakon o potvrđivanju uredaba koje je Vlada uz supotpis Predsednika republike donela za vreme vanrednog stanja, *Službeni glasnik RS* 62/2020.

kretanja, ukoliko je to, između ostalog, neophodno radi zaštite bezbednosti i zdravlja ljudi".[84] Prema shvatanju Ustavnog suda, „osporeni zaključci nisu doneseni s ciljem izvršavanja zakona, već je njima izvršeno neposredno uređivanje odnosa... koji predstavljaju zakonsku materiju".[85] Zato je sud utvrdio da predmetni zaključci nisu bili u skladu sa Ustavom za vreme njihovog važenja. Nažalost, nakon utvrđivanja tih razloga neustavnosti, odnosno nezakonitosti, sud se nije upustio u raspravu o drugim navodima inicijatora, kao što je objavljivanje zaključaka Republičkog štaba u Službenom glasniku Republike Srpske, i na taj način je propustio da se pozabavi još jednim segmentom pravne sigurnosti, a to je obaveza obaveštenja građana o njihovim obavezama, naročito u vanrednim prilikama.

3.2.5. Rezimiranje i zaključci

Nezavisno od ishoda postupaka, odnosno načina odlučivanja ustavnih sudova o pravnoj kvalifikaciji kovida 19 kao razloga za uvođenje posebnih režima, može se zaključiti da su se zemlje (a i nacionalni ustavni sudovi) u regionu manje-više saglasile da je to relativno velika opasnost koja opravdava različito postupanje u odnosu na uobičajeno – čak i kad nije uvedeno vanredno stanje u konkretnoj zemlji. Takođe, slični aspekti su uzeti u obzir skoro u svakoj državi prilikom uspostavljanja vanredne upravljačke strukture za rukovanje konstantno promenljivom situacijom zbog kovida 19. Kako obrazloženje predloga relevantne odredbe Osnovnog zakona Mađarske glasi, „nakon proglašenja posebnog pravnog režima, potrebno je obezbediti brzo, operativno i odgovorno odlučivanje kako u političkom, tako u pravnom smislu, na koje se Vlada pokazuje jedino sposobnim u pravnom poretku Mađarske".[86] Taj pristup je u skladu sa koncepcijom Karla Šmita i Đorđa Agambena (Giorgio Agamben) koji tvrde da je najverovatnije „izvršna vlast najbolji i možda jedini institucionalni akter koji može da upravlja hitnim situacijama bezbednosnog karaktera" (Diaz Crego, Kotanidis 2020, 4). Ostale države u istraživanju došle su do sličnog zaključka.

S druge strane, ne smemo zaboraviti da „ustavna uređenja koja definišu politički poredak države za vreme normalnosti važe i za vreme vanrednog stanja. ... norme vanrednog stanja se i dalje rukovode principima demokratije i vladavine prava" (Zwitter 2012, 101). Zato je izuzetno važno da postupajući

[84] Ustavni sud Republike Srpske, U-40/20, 29. 4. 2021.

[85] *Ibid.*

[86] Az Alaptörvényhez és annak módosításaihoz indokolások, Indokolások tára, *Magyar Közlöny* 2020/161.

organi imaju ovlašćenje za derogaciju ljudskih prava neposredno na osnovu ustava i da se analiza restriktivnih mera koju vrše ustavni sudovi dovede „u vezu sa mehanizmima zaštite kojima se uspostavlja kontrola nad takvim delovanjem organa izvršne vlasti“[87], osim ispitivanja zakonitosti, srazmernosti, nužnosti, odnosno legitimnosti svakog mešanja izvršne vlasti u vršenje ljudskih prava. Taj koncept odgovara tzv. Medisonovom pristupu prema vanrednom stanju, koji kaže da se sistem kočnica i ravnoteže mora sačuvati čak i u ekstremnim okolnostima, odnosno da se akti izvršne vlasti uvek moraju podvrgnuti sudskoj proveri i kontroli zakonodavca (Diaz, Kotanidis 2020, 5). Taj model „ne zahteva od sudova da poništavaju akte vanredne upravljačke strukture ili da se angažuju sudskom aktivizmom, već da postavljaju ustavne standarde prema kojima će se ti akti ocenjivati“ (Miljojković 2021, 142). Ustavni sud Hrvatske, na primer, nije uspeo da ispuni standarde tog modela (Miljojković 2021, 142) i pratio je više zastupljenu, iako kontroverznu teoriju Karla Šmita o tome da su vanredna ovlašćenja suverena neograničena i nevezana jer jedino on može delovati izvan pravne normalnosti (Diaz, Kotanidis 2020, 4). Takav pritup se može primetiti i u Mađarskoj i Srbiji, dok su se Ustavni sud BiH i Ustavni sud RS kritičnije ophodili prema zakonodavnim rešenjima u vezi sa borbom protiv kovida 19.

Generalno gledano, ustavni sudovi u regionu nisu previše insistirali na striktnoj ispunjenosti proceduralnih zahteva vladavine prava u smislu pravne sigurnosti – da li je nadležnost organa koji je stekao ovlašćenje za donošenje restriktivnih mera uspostavljena tačno na ustavom predviđen način, da li postoji direktna parlamentarna kontrola delovanja tih organa i da li su zakonodavac i/ili vlada prekršili granice svojih ovlašćenja iz ustava prilikom regulisanja pojedinih elemenata vanredne upravljačke strukture – nego su više naglasili važnost materijalne strane vladavine prava (njenu širu sadržajnu perspektivu).

4. KONKLUZIJA

Prilikom osporavanja akata donetih „za vreme kovida“ ili zbog kovida 19 inicijatori normativne kontrole rukovodili su se najrazličitijim razlozima: nepostojanje pravnog osnova za derogaciju ljudskih prava i donošenje restriktivnih mera, pozivanje na pogrešan pravni osnov prilikom odstupanja od ljudskih prava, odnosno regulisanja vanrednih upravljačkih struktura, što je povezano i sa spornom kvalifikacijom pandemije, to jest epidemije

[87] Ustavni sud Bosne i Hercegovine, AP-3683/20, 22. 12. 2020, tač. 69.

kao povoda za uvođenje vanrednog stanja, nenadležnost za donošenje restriktivnih mera, nedostatak kontrole tih mera od zakonodavne vlasti, defekti u samom kvalitetu akata, kao što su nerazumljivost, neobjavljivanje itd.; kao da inicijatori „koji sagledavaju situaciju isključivo sa formalnog stanovišta" zapravo ne uviđaju da se država nalazi u koliko teškoj situaciji kada se suočava sa širenjem do sada nepoznate zarazne bolesti.[88]

Preveliko insistiranje na formi može isprazniti suštinu same pravne norme[89] i promovisati vladavinu razuma i dominaciju racionalnosti nad pozitivnim pravom i pravnim mišljenjem, a to je suviše širok i nejasan cilj da bi mu se težilo (Chiassoni 2021, 787). S druge strane, prema formalnom shvatanju vladavine prava, pravila po kojima se oblikuje državno delovanje, naročito podela vlasti, uključujući i „instrumentalna ograničenja ponašanja državne vlasti" (Lauc 2015, 51), podjednako su bitna. Iako je „evolucija ustavne prakse dovela do znatne tolerancije sitnih grešaka" u načinu donošenja propisa (Mijanović 1963, 217) totalnim odbacivanjem proceduralne perspektive vladavine prava kao „manje bitne", ignorišu se viševekovne tekovine samog pravnog razvoja. To samo potvrđuje potrebu da se pronađe odgovarajuća ravnoteža između forme i sadržine, što je u suštini osnovni zadatak ustavnih sudova u čuvanju i održavanju ustavnog poretka.

Analizom relevantnih ustavnosudskih predmeta, nezavisno od različitih normativnih rešenja primenljivih u regionu, potvrđeno je da su se, u nedostatku odgovarajućih, jasnih ustavnih i/ili zakonskih definicija i regulativa u svakoj državi koja je obuhvaćena istraživanjem, ustavni sudovi kao institucionalne garancije vladavine prava našli u teškoj situaciji. S jedne strane, morali su da paze da bez iskorišćavanja širokog polja ocene „sami ne donose arbitrarne odluke, da ne stvaraju samo svoja vrednosna merila, da ne odlučuju aktivistički ili da ne traže formalne razloge u cilju da izbegnu donošenje meritorne odluke" (Korpič, Horvat 2018, 84). S druge strane, od njih se očekivalo da nađu makar načelna rešenja za najurgentnija pitanja koja su se postavila povodom kovida 19 da bi se izbegli budući ustavnosudski sporovi zbog eventualne pojave novih bolesti.

Ustavni sudovi u regionu generalno su birali liniju manjeg otpora i umesto da sačuvaju osnove sistema kočnica i balansa za vreme jedne ekstremne situacije kakva je bila pandemija kovida 19, prihvatili su samomargionalizovanje parlamenta i skoro neograničeno proširenje ovlašćenja izvršne vlasti u širem smislu (počevši od vlade preko organa državne uprave do povremenih

[88] *Ibid.*

[89] Izdvojeno saglasno mišljenje Jovana Ćirića, sudije Ustavnog suda Srbije, Ustavni sud Srbije, IUo-45/2020, 28. 10. 2020, *Službeni glasnik RS* 126/2020.

radnih tela, na primer, kriznih štabova) prilikom odlučivanja o restriktivnim merama. Čitajući obrazloženja ustavnosudskih odluka možemo zaključiti da su sudovi pretežno dali prednost materijalnim aspektima vladavine prava, to jest vladavini standarda umesto *pravila*, sistemskom zaključivanju umesto doslovnog značenja, argumentaciji umesto neposredne primene pravila i mukotrpnim tumačenjima umesto *ex ante* jasnoće (Waldron 2011, 21). Takođe, iskristalizovali su se neki ne manje važni formalni zahtevi kao što su jasan povod za odstupanje od „normalnog" pravnog režima, ustavna regulativa nadležnosti vanredne upravljačke strukture, zadržavanje neposredne kontrole zakonodavne vlasti nad delovanjem vanrednih struktura izvršne vlasti. Regulisanjem tih pitanja izbegli bi se potencijalni ustavnosudski sporovi ili bi se bar olakšalo rad sudija prilikom odlučivanja u budućnosti.

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FORMAL ASPECTS OF DEROGATION OF HUMAN RIGHTS DUE TO THE PANDEMIC OF COVID 19 IN COMPARATIVE PRACTICE OF CONSTITUTIONAL COURTS

Summary

The paper presents the similarities and differences in the argumentation of the constitutional courts of the Republic of Serbia, the Republic of Croatia, Bosnia and Herzegovina, and Hungary when deciding on procedural/formal aspects of human rights derogation and other (restrictive) measures adopted due to COVID-19, such as the competence of bodies ordering restrictive measures, character/quality of their acts, control by the legislature and/or the executive. The commonality is that, despite the courts not neglecting the need for restrictive measures and the general interest in preserving public health, they treated the importance of formal requirements of the rule of law differently in pandemic conditions. The aim of this paper is to identify relevant common criteria and tests for assessing the constitutionality of these measures, in order to increase legal certainty in similar situations in the future, caused by new epidemics.

Key words: *COVID-19*. – *Constitutional court*. – *Rule of law*. – *Formal requirements*.

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SLUŽBENOST UPOTREBE (USUS) U RIMSKOM I SRPSKOM PRAVU

Pravo upotrebe je lična službenost, koja titulara prava ovlašćuje da stvar koristi u granicama svojih potreba. Shodno klasifikaciji nastaloj u rimskom pravu, ubraja se u servitutes personarum, zajedno sa pravom plodouživanja, besplatnog stanovanja i korišćenja rada tuđeg roba ili životinje. Uobličen u postklasičnom rimskom pravu, uz neznatne izmene, institut je preuzelo srpsko srednjovekovno, a sredinom XIX veka i moderno pravo donošenjem Građanskog zakonika za Knjaževstvo Srpsko. Servitut poznaje i pozitivno pravo Republike Srbije. Uprkos tome, dileme koje se tiču obima vršenja prava – da li uzuar stiče pravo na plodove i da li je vlastan pravo ustupiti drugom, zadavale su glavobolje i rimskim jurisprudentima i današnjim pravnicima. Na to da ukažemo na problematiku instituta i ponudimo pragmatična rešenja, naveo nas je Odgovor Privrednog apelacionog suda na pitanje nižestepenih sudova o pomenutim kontroverzama.

U radu su primenjeni jezičko, sistemsko i istorijsko tumačenje i istorijski metod.

Ključne reči: *Rimsko pravo. – Građanski zakonik Austrije (ABGB). – Građanski zakonik za Knjaževstvo Srpsko (SGZ). – Lične službenosti. – Pravo upotrebe (usus)*.

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1. UVOD

Upotreba (*usus*) je stvarno pravo korišćenja tuđe stvari, čiji titular (*usuarius*) može upotrebljavati stvar u granicama svojih potreba (*Pravna enciklopedija 2* 1985, 1773; Mousourakis 2012, 170). Prema Marcijanovoj klasifikaciji službenosti (D.8.1.1;[1] potencijalne nedoslednosti Stanojlović 2021, 22–23), spada u *servitutes personarum*, koje su se u rimskom pravu konstituisale legatom, poklonom (*donatio*), u postupku *in iure cessio* (*G. Inst.* 2.30; vidi Katančević 2017, 39–43) ili putem *deductio servitutis* (*G. Inst.* 2.33). Pored prava upotrebe (*usus*), u lične službenosti su u justinijanovom pravu ubrojani plodouživanje (*ususfructus*), pravo stanovanja (*habitatio*) i pravo korišćenja rada tuđeg roba ili životinje (*operae servorum vel animalium*). Vreme njihovog nastanka se ne može sa sigurnošću odrediti, a među romanistima vlada uvreženo mišljenje po kome su pravo upotrebe i pravo plodouživanja nastali u periodu pozne republike (Du Plessis 2020, 169). Uobličen u postklasičnom rimskom pravu, koncept *servitutes personarum*, uz neznatne izmene, preuzeli su brojni pravni sistemi, nastali na ruševinama rimske imperije, te tako i srpsko srednjovekovno i moderno pravo.

2. *USUS* U SRPSKOM PRAVU

Lične službenosti su dospele u srpsko srednjovekovno pravo posredstvom vizantijskih pravnih[2] i kanonskih izvora (Novaković 1986, 250–257; Solovjev 1928, 58–68). Uticaj vizantijsko-rimskog prava u nemanjićkoj Srbiji

[1] *Marcianus libro tertio regularum: Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum*. *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 2. jul 2022.

[2] Justinijanov *Corpus Iuris Civilis* bio je važeći izvor prava u Vizantiji do dolaska na presto Lava Isavrijanca (685–741), osnivača Isavrijanske ili Sirijske dinastije. Ipak, on je nastavio da bude posredan izvor prava u kasnijim svetovnim i crkvenim zbornicima. U domenu svetovnog prava sledili su mu: Ekloga (*ἑκλογή*) iz 739. godine i tri nezvanična priručnika prava – Vojni zakonik (*Nomos Stratiotikos*), Pomorski (Rodski) zakonik (*Nomos* (*Rhodion*) *Nautikos*) i Zemljoradnički zakonik (*Lex Rustica* ili *Nomos Georgikos*); Prohiron (*Prokcheiros nomos*) iz 879. godine; Epanagoga (*ἐπαναγωγή*) iz 886. godine i Vasilike (*Vasilike*) iz 892. godine. Posle Vasilika nije izdat nijedan novi zakonik već samo niz sažetih izvoda koji počinju *Epitome Legum* ili *Ecloga Legum* iz 920. godine, a završavaju se Heksabiblionom ili „Šestoknjižjem" (*Hexabiblos*) iz 1345. godine. Najznačajnije kompilacije crkvenog prava bile su: Sintagma (*Syntagma*) ili Fotijev Nomokanon iz 883. godine; Valsamonov *Exegesis canonum* iz 1175. godine i Sintagma (*Syntagma canonum*) Matije Vlastara iz 1335. godine (Ransiman 2020, 62–64).

širio se putem Zakonopravila Svetog Save,[3] ali i tzv. Justinijanovog zakona[4] i skraćene Sintagme Matije Vlastara, koji su uobičajeno pratili Dušanov zakonik (Solovjev 1928, 49–50, 53–58). Ti zbornici sadrže pravila koja se tiču *servitutes praediorum urbanorum*,[5] dok *servitutes praediorum rusticorum*[6] i lične službenosti[7] – pravo upotrebe i pravo plodouživanja, pominju vlastelinske i vladarske povelje. Sa ličnim službenostima susrećemo se uglavnom u darovnim poveljama manastirima i crkvama – u Svetoarhanđelovskoj povelji iz 1348. godine vlastelin Nikola Utoličić i njegova majka prilažu manastiru sv. Arhanđela baštinsko selo Ljubočevo, pod uslovom da ga „drže" dok su živi kao svaku baštinu (Solovjev 1928, 115 fn. 5), a kralj Stefan Dušan poklanja manastiru Hilandar crkvu Nikole Mračkog sa njenim zemljama i ujedno ustanovljava pravo „užitka" starcu Ioanu (Taranovski 1996, 635). Postoje i dva sačuvana pravna spomenika u kojima se pravo nije konstituisalo ugovorom o poklonu. Kralj Milutin je vlastelinki Radoslavi, Melšinoj ženi, poklonio manastir Svetog Georgija i selo Ulitišta, a taj dar su potvrdili kraljevi Stefan Dečanski i Dušan. Međutim, kralj Dušan je, u postupku svojevrsne eksproprijacije (ili revokacije poklona), odlučio da Radoslavino imanje pokloni Hilandaru, a vlastelinki ostavi pravo plodouživanja (Taranovski 1996, 634). Osim toga, ugovorom o kupoprodaji

[3] Zakonopravilo Svetog Save, Nomokanon ili Krmčija iz 1219. godine, u najvećoj meri je prevod Fotijevog Nomokanona, kome su pridodate norme iz Justinijanovih Novela (*Novellae*), Novele Aleksija Komnina, Zbornik Jovana Sholastika (*Collectio tripartita*), Mojsijev zakon i Prohiron – u srednjovekovnoj Srbiji poznat i kao „Zakon gradski". Prohiron u XXXVIII glavi, koja nosi naziv *Περὶ καινοτομιῶν* (*De novis operibus*), govori o različitim vrstama službenosti, a pravila su pomešana sa policijskim propisima o zidanju novih zgrada. Od 64 odredbe, koliko ih sadrži XXXVIII glava Prohirona, Matija Vlastar je u svoju Sintagmu uvrstio samo 18 i načinio kratku glavu K-3 pod istim naslovom – *Περὶ καινοτομιῶν*. Redaktori skraćene Sintagme su glavu o službenostima zadržali u celini bez ikakvih izmena (Solovjev 1926, 127–129; Stojanović 2014, 27; Stanković, Vladetić 2018, 390; Šarkić 2013, 1007).

[4] Tzv. Justinijanov zakon predstavlja srpsku kompilaciju pravnih pravila preuzetih iz Prohirona, Ekloge i Zemljoradničkog zakona (Stanković, Vladetić 2018, 390).

[5] Jedna zgrada ne može drugoj zaklanjati vidik na more – *servitus prospectus* (SS. K-2 § 4, ex Proch. 38.5); zabranjeno je puštati dim iz odžaka na susednu zgradu (SS. K-2 § 12, ex Proch. 38.18); zabranjeno je bacanje smeća oko susednog zida – *servitus sterquilini* (SS. K-2 § 14, ex Proc. 38.22); zabranjeno je zatvoriti susedov prozor zidanjem novog objekta (SS. K-2 § 2, ex Proch. 38.4) (Solovjev 1928, 128 fn. 4, 6–8).

[6] Prizrenska tapija (XIV vek) pominje *servitus itineris ac viae*, a Skopska povelja (1300) *aquaeductus* (Solovjev 1928, 128–129; Taranovski 1996, 638).

[7] Prvi tragovi ličnih službenosti pominju se u povelji kralja Milutina manastiru Banjska, izdatoj između 1313. i 1318. godine, i tiču se prava udovičkog užitka. U Dušanovom zakoniku pominju se lične službenosti na dva mesta: u slučaju pronije i u slučaju prava uživanja ženinog miraza (Lazić 2000, 34).

od 19. januara 1438. godine, kojim Radoslava Mirković prodaje svoju kuću u Trepči manastiru Svetog Pavla, predviđeno je pravo doživotnog korišćenja jedne sobe za Radoslavu i njenu sestru (Šarkić 2013, 1010).

Drugi, značajniji talas romanizacije prava zapljusnuo je Srbiju donošenjem *Građanskog zakonika za Knjaževstvo Srpsko* 25. marta 1844. godine (SGZ). Zakonik zadržava osnovnu podelu na stvarne (§ 332) i lične (§ 333) službenosti, uz mogućnost odstupanja od te oštre podele (§ 339) (Knežić Popović 1996, 75–76). Sledeći austrijski uzor, tvorac SGZ Jovan Hadžić propisao je pravila kojima se uređuju pravo plodouživanja (§§ 374–383), upotrebe (§§ 372, 373) i besplatnog stanovanja (§§ 384, 385). Živković piše da je pravo upotrebe uređeno kao deminutiv plodouživanja, a da se u SGZ obim ovlašćenja ograničava potrebama imaoca koje postoje u trenutku nastanka prava. Dodaje da koristi koje ne pripadaju imaocu prava upotrebe pripadaju vlasniku stvari te da u pogledu prenosivosti upotrebe, iako se čini da ona nije isključena odredbama SGZ, postoji načelan stav da je pravo neprenosivo i da je ustupanje vršenja prava bilo zabranjeno (Živković 2014, 181–194).

Sve do stupanja na snagu Zakona o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije[8], SGZ je bio važeća kodifikacija građanskog prava u Srbiji. Materija stvarnog prava nije bila zakonski uređena u posleratnom periodu od 1946. do 1980. godine, kada je donet savezni Zakon o osnovama svojinskopravnih odnosa.[9] Iako se na prvi pogled može činiti da je materija stvarnog prava konačno normirana, u oblasti ličnih službenosti situacija se samo zakomplikovala. Naime, u članu 60[10] ZOSPO

[8] Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije – Zakon o nevažnosti pravnih propisa, *Sl. list FNRJ* 86 od 25. oktobra 1946, 105 od 27. decembra 1946, 96 od 12. novembra 1947 – obavezno tumačenje. Zakonu je prethodila Odluka AVNOJ-a br. 132 od 3. februara 1945. (Živković 2014, 182 fn. 2).

[9] Zakon o osnovama svojinskopravnih odnosa – ZOSPO, *Sl. list SFRJ* 6/80 i 36/90, *Sl. list SRJ* 29/96 i *Sl. glasnik RS* 115/2005 – dr. zakon.

[10] Čl. 60 ZOSPO: „Pravo plodouživanja, pravo upotrebe, pravo stanovanja, kao i pravo stvarnog tereta uređuju se zakonom." Iako je ZOSPO stupio na snagu 1. septembra 1980. godine, do dana objavljivanja ovog članka nije donet poseban zakon koji bi uredio materiju ličnih službenosti. Pokušaj uređenja ličnih službenosti u Republici Srbiji učinjen je Nacrtom zakonika o svojini i drugim stvarnim pravima iz 2012. godine, kojim je predviđeno i uređeno pravo upotrebe (Deo VI, Glava Đ, čl. 391); zakonik nikada nije stupio na snagu. Pozitivan iskorak učinjen je Nacrtom građanskog zakonika Republike Srbije od 29. maja 2015. godine. Glava III Drugog odeljka, Drugog dela III Knjige nosi naslov „Lična službenost upotrebe" i u čl. 2007–2013. sadrži norme kojima se uređuje to pravo. Ostaje da se vidi da li će predloženi Nacrt biti usvojen kao važeća kodifikacija građanskog prava Republike Srbije.

nabrojane su lične službenosti, ali je propušteno da budu bliže uređene i to je ostavljeno zakonodavstvima republika i pokrajina SFRJ. Nepostojanje pravnih normi kojima bi se ta materija uredila na jedinstven i celovit način stvara svojevrstan pravni vakuum praćen lutanjem sudske prakse i nedoumicama oko toga koje norme treba primeniti.

Tako su se u novembru 2019. godine pred Odeljenjem za privredne sporove i Odeljenjem za privredne prestupe Privrednog apelacionog suda u Beogradu našla pitanja: „*Koja ovlašćenja ima titular lične službenosti 'prava upotrebe'? Da li 'pravo upotrebe' podrazumeva pravo titulara da samo neposredno iskorišćava predmet lične službenosti, odnosno da li pravo upotrebe sadrži ovlašćenje titulara da predmet lične službenosti izda u zakup drugom licu bez obaveštenja / saglasnosti vlasnika predmeta lične službenosti?*" (Privredni apelacioni sud, Odgovori na pitanja 20. 11. 2019, *Paragraf Lex*). Odgovor[11] koji je na njih dat na sednicama oba odeljenja bio je motiv da se u radu ukaže na dileme koje naša sudska praksa ima, a koje su identične ili slične onima koje su imali i rimski jurisprudenti. To su: 1) koja su tačno ovlašćenja imaoca prava upotrebe; 2) da li uzuar ima isključivo pravo korišćenja stvari, bez pribiranja plodova (*uti potest, frui non potest*); 3) da li se vršenje prava upotrebe može ustupiti drugom licu? Osim njih pažnju privlači i pitanje da li je Hadžić u § 372 potpuno transplantirao § 505 *Allgemeines bürgerliches Gesetzbuch* (ABGB) ili SGZ sadrži izvesne razlike u odnosu na svoj uzor?

https://ius.bg.ac.rs/wp-content/uploads/2020/10/NACRT-ZAKONIKA-O-SVOJINI.pdf, poslednji pristup 2. jul 2022; *https://www.mpravde.gov.rs/files/NACRT.pdf*, poslednji pristup 2. jul 2022.

[11] Većina autora polazi od toga da je stvaranje prava normativna delatnost, odnosno da je stvaranje prava jedino moguće donošenjem opštih pravnih akata. Za razliku od zemalja sistema *common law*, kod nas se sudska praksa ne smatra izvorom prava, to jest odluke Vrhovnog kasacionog i Ustavnog suda nemaju karakter precedenta. Osim sudskih odluka, sudovi na posebnim opštim sednicama (svih odeljenja istog suda) ili zajedničkim sednicama (dva ili više sudova) mogu zauzimati načelne stavove i pravna mišljenja. U tom slučaju, mišljenje Vrhovnog kasacionog suda ili Privrednog apelacionog suda javlja se (*de facto*) kao opšti akt tog suda. Treba napomenuti da je uloga sudova značajnija kada se određenom presudom ili mišljenjem popunjava pravna praznina. Iako se takva odluka (mišljenje) ne može smatrati precedentom u našem pravnom sistemu, njen značaj je veliki i na nju će se u velikoj meri ugledati niži sudovi kada rešavaju konkretan spor (Lilić 2000, 77–88).

3. OVLAŠĆENJA IMAOCA PRAVA UPOTREBE

3.1. Pravo na plodove – rimski koncept

Čitajući tekstove rimskih pravnika, stiče se opšti utisak da je pravo upotrebe lična službenost koja titulara prava ovlašćuje da stvar koristi bez ubiranja plodova (Watson 1968, 219). Takav načelan stav iznosi Gaj u komentaru pretorovog edikta, ali i Ulpijan stotinak godina kasnije:

> D.7.8.1.1. *Gaius libro septimo ad edictum provinciale: Constituitur etiam nudus usus, id est sine fructu: qui et ipse isdem modis constitui solet, quibus et usus fructus*.[12] [Može se ustanoviti golo pravo upotrebe, bez prava na plodove: ono se uglavnom ustanovljava na isti način kao i plodouživanje.]
>
> D.7.8.2. pr. *Ulpianus libro 17 ad Sabinum: Cui usus relictus est, uti potest, frui non potest.*[13] [Kome je ostavljeno pravo korišćenja (neke stvari), može da koristi, ali ne i da pribira plodove (od te stvari).][14]

Data definicija ne daje mnogo informacija. Imati pravo korišćenja stvari, bez prava ubiranja plodova previše je štura odrednica koja stvara dileme, prevashodno šta znači *upotrebljavati* stvar i šta se podrazumeva pod zabranom ubiranja plodova. Dilema, koja živi i danas, mučila je klasične rimske pravnike te tako prvi pokušaj određenja obima prava (D.7.8.10.4)[15] pronalazimo kod Avgustovog savremenika Labeona. On razmatra situaciju u

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[12] *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

[13] *Ibid*.

[14] Prevod Polojac, Katančević 2015, 89.

[15] *Ulpianus libro 17 ad Sabinum: Si usus fundi sit relictus, minus utique esse quam fructum longeque nemo dubitat. Sed quid in ea causa sit, videndum. Et Labeo ait habitare eum in fundo posse dominumque prohibiturum illo venire: sed colonum non prohibiturum nec familiam, scilicet eam, quae agri colendi causa illic sit: ceterum si urbanam familiam illo mittat, qua ratione ipse prohibetur, et familiam prohibendam eiusdem rationis est. Idem Labeo ait et cella vinaria et olearia eum solum usurum, dominum vero invito eo non usurum.* [Ako je ostavljeno pravo korišćenja imanja, nema sumnje da je to daleko od prava plodouživanja. Ali hajde da vidimo u čemu se pravo sastoji. Labeon navodi da uzuar ima pravo da živi na imanju i da vlasniku može zabraniti pristup: ali ne i kolonu ili (vlasnikovim) robovima, tj. robovima koji obrađuju zemlju: s druge strane, ako (vlasnik) pošalje kućne robove na imanje, takvim robovima može biti zabranjen pristup kao i vlasniku. Labeon navodi i da uzuar ima isključivo pravo korišćenje prostorija za skladištenje vina i ulja i da ih vlasnik ne sme koristiti bez njegove dozvole.]. *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

kojoj je dato pravo korišćenja seoskog imanja i u prvi plan ističe dve osobine prava: 1) da se ne može poistovetiti sa plodouživanjem jer je obim prava uži te 2) normira dejstvo lične službenosti *erga omnes*. Ono se ogleda i u svom pozitivnom aspektu, da ima isključivo pravo korišćenja skladišta za vino i ulje, i u negativnom, da vlasniku imanja može zabraniti pristup. Pomenuta distinkcija, da nije reč o plodouživanju, značajna je za predmet ovog rada, ali je i dalje nedovoljna da se pouzdano može reći šta tačno prilikom vršenja prava uzuar sme, a šta ne.

Naredni pokušaj bližeg određenja obima prava (D.7.8.12.1)[16] navodi Ulpijan koji u delu *Libri ad Sabinum* pominje mišljenja Sabina, Kasija, Nerve, Labeona, Prokula i Juvencija. U tekstu se razmatra situacija u kojoj lice ima pravo upotrebe seoskog imanja i kuće te jurisprudenti navode u čemu se sastoji njegovo pravo. Uzuar može stanovati u kući (*habitatio*), ali i prelaziti preko imanja peške ili kolima (*iter et via*). Može upotrebljavati drva za ogrev, voće, povrće, cveće, vodu, slamu i suvo granje, ali i druge proizvode *sed ad*

[16] *Ulpianus libro 17 ad Sabinum: Praeter habitationem quam habet, cui usus datus est deambulandi quoque et gestandi ius habebit. Sabinus et Cassius et lignis ad usum cottidianum et horto et pomis et holeribus et floribus et aqua usurum, non usque ad compendium, sed ad usum, scilicet non usque ad abusum: idem Nerva, et adicit stramentis et sarmentis etiam usurum, sed neque foliis neque oleo neque frumento neque frugibus usurum. Sed Sabinus et Cassius et Labeo et Proculus hoc amplius etiam ex his quae in fundo nascuntur, quod ad victum sibi suisque sufficiat sumpturum et ex his quae Nerva negavit: iuventius etiam cum convivis et hospitibus posse uti: quae sententia mihi vera videtur: aliquo enim largius cum usuario agendum est pro dignitate eius, cui relictus est usus. Sed utetur his, ut puto, dumtaxat in villa: pomis autem et oleribus et floribus et lignis videndum, utrum eodem loco utatur dumtaxat an etiam in oppidum ei deferri possint: sed melius est accipere et in oppidum deferenda, neque enim grave onus est horum, si abundent in fundo.* [Osim što ima pravo da stanuje, lice kome je dodeljeno pravo korišćenja (seoskog imanja i kuće), ima pravo da prolazi peške i kolima. Sabin i Kasije nam kažu da može koristiti drva za ogrev, za svoje svakodnevne potrebe, i da može imati pravo upotrebe na bašti i uzimati voće, povrće, cveće i vodu; međutim, on to može činiti, ne da bi ostvarivao profit, već samo u skladu sa svojim pravom korišćenja, to jest, ne u punom obimu. Nerva zauzima isti stav, dodajući da može koristiti slamu i suvo granje, ali ne i lišće (latice), maslinovo ulje, žitarice ili plodove drugih biljaka. Međutim, Sabin, Kasije, Labeon i Prokul smatraju da pored toga, može uzeti od onoga što je proizvedeno na imanju onoliko koliko je potrebno za izdržavanje sebe i svoje porodice, uključujući i proizvode za koje Nerva kaže da ne sme uzeti; Juvencije čak kaže da može koristiti te proizvode kada ima goste ili priređuje zabavu. Smatram da je ovo ispravan stav jer, na neki način, prema uzuaru treba postupati velikodušnije, u skladu sa poštovanjem prema osobi kojoj je ostavljeno pravo korišćenja. Međutim, moje mišljenje je da on može pomenute proizvode koristiti samo na imanju. Što se tiče voća, povrća, cveća i ogrevnog drveta, vredi razmisliti da li ih može upotrebljavati samo na imanju ili ih može doneti i u grad; mislim da je bolje dozvoliti mu, jer to nije veliki namet, ako ih imanje daje u izobilju.]. *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

usum, scilicet non usque ad abusum. Nerva se tome delimično protivi i smatra da titular nema pravo na lišće (latice), maslinovo ulje, žitarice ili plodove drugih biljaka, verovatno uzimajući u obzir njihovu ekonomsku vrednost. Šta zapravo žele da kažu ti pravnici? Analizirajući taj tekst, ali pre svega stavljajući ga u kontekst drugih pravila iz titulusa D.7.8. *De usu et habitatione*, može se zaključiti da je akcenat i dalje na *upotrebi*, a ne na plodovima. Kao što i sam Ulpijan kaže, potvrđujući stavove starijih kolega, uzuar nema pravo na plodove (D.7.8.2. pr), dok pobrojana dobra koja se proizvode na imanju može konzumirati u lične svrhe, samo radi ostvarivanja potpune *upotrebe* seoskog poseda (Kaser 1984, 151). Dobiti na korišćenje seosko gazdinstvo, bez mogućnosti privređivanja i pribiranja plodova sa njega, bilo bi apsurdno i ne bi vodilo ostvarivanju cilja zbog koga je pravo ustanovljeno. Tu nije reč o ovlašćenju imaoca prava službenosti da slobodno raspolaže (Buckland 1921, 272; Ourliac, De Malafosse 1961, 396) plodovima (*ius fruendi*) već o normiranju prava upotrebe – određivanju njegovih granica, koje nadilazi puko, faktičko korišćenje stvari. Upotreba tog ekonomskog dobra, datog određenom licu na korišćenje, može se ostvariti jedino tako što će uzuar moći da stanuje u kući, da dolazi na imanje – peške ili kolima, da proizvodi hranu, da zahvata vodu i da koristi drva za ogrev i kuvanje, kako bi se prehranio i preživeo (Girard 1918, 377; Buckland 1921, 272; Du Plessis 2020, 169). *Ius fruendi*, kao stvarnopravno ovlašćenje, podrazumeva ubiranje *fructus naturales et fructus civiles* i njihovo slobodno raspolaganje, te kod službenosti upotrebe možemo govoriti jedino o „krnjem“ ovlašćenju uzuara da koristi prirodne plodove koje stvar daje radi zadovoljenja ličnih potreba, to jest ostvarenja punog obima stečenog prava – upotrebe konkretne stvari. Takvo objašnjenje se sreće u Pomponijevoj parafrazi jedne Hadrijanove konstitucije:[17]

[17] Potvrdu takvog stava pronalazimo i u drugim tekstovima. D.7.8.12. U*lpianus libro 17 ad Sabinum: 2. Sed si pecoris ei usus relictus est, puta gregis ovilis, ad stercorandum usurum dumtaxat Labeo ait, sed neque lana neque agnis neque lacte usurum: haec enim magis in fructu esse. Hoc amplius etiam modico lacte usurum puto: neque enim tam stricte interpretandae sunt voluntates defunctorum.* [2. Ako je ostavljeno pravo korišćenja stoke, na primer, stada ovaca, Labeon smatra da ih može koristiti samo za potrebe đubrenja i da ne sme uzimati vunu, jagnjad ili mleko, jer su to plodovi. Smatram da može uzimati umerenu količinu mleka; jer volje mrtvih ne treba tumačiti tako strogo (kao što Labeon čini).] *3. Sed si boum armenti usus relinquatur, omnem usum habebit et ad arandum et ad cetera, ad quae boves apti sunt.* [3. Ako je ostavljeno pravo korišćenja stada goveda, uzuar će imati pravo da ih koristi u celosti, kako za oranje tako i za sve druge poslove za koje je stoka pogodna.]; D.7.8.15. pr. *Paulus libro tertio ad Sabinum: Fundi usu legato licebit usuario et ex penu quod in annum dumtaxat sufficiat capere, licet mediocris praedii eo modo fructus consumantur: quia et domo et servo ita uteretur, ut nihil alii fructuum nomine superesset.* [Ako je zaveštano pravo korišćenja imanja, uzuar može uzimati useve onoliko koliko je potrebno za podmirenje njegovih potreba u toku

D.7.8.22. pr. *Pomponius libro quinto ad Quintum Mucium: Divus Hadrianus, cum quibusdam usus silvae legatus esset, statuit fructum quoque eis legatum videri, quia nisi liceret legatariis caedere silvam et vendere, quemadmodum usufructuariis licet, nihil habituri essent ex eo legato.*[18] [Božanski Hadrijan, u slučaju u kome je zaveštano pravo korišćenja šume, smatrao je da treba dozvoliti i ubiranje plodova, jer, ako se legatarima ne bi dozvolilo da seku i prodaju drva, baš kao što je to dozvoljeno plodouživaocima, oni ne bi imali nikakvu korist od legata.]

3.2. Pravo na plodove – koncept SGZ

Dok se u ABGB službenost upotrebe uređuje u pet članova (§§ 504–508), u SGZ se to čini u dva:

§ 372 *Ko ima prava jednu stvar upotrebiti, onaj može prema svome stanju bez prizrenja na svoje ostalo imanje istom stvari koristiti se po potrebi, koja se uzima od onog vremena, kad je pravo rečeno počelo. No samu stvar takvi ne može izmeniti, niti na drugoga preneti.*[19]

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naredne godine, ali ne više od toga, iako bi se na taj način iscrpeli svi plodovi sa imanja prosečne veličine, i to po istom principu koji mu omogućava da koristi kuću ili robe na način da ništa od plodova ne ostane drugima.]; D.7.8.14.1. *Ulpianus libro 17 ad Sabinum: Usus fructus an fructus legetur, nihil interest, nam fructui et usus inest, usui fructus deest: et fructus quidem sine usu esse non potest, usus sine fructu potest*... [Bez obzira na to da li je zaveštano plodouživanje ili pravo na plodove, pravo na plodove uključuje pravo korišćenja, ali pravo korišćenja ne uključuje pravo na plodove, i dok ne može postojati pravo na plodove bez prava korišćenja, može postojati pravo korišćenja bez prava na plodove...]. *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022. U Justinijanovom pravu I.2.5.1–4. preuzeta su viđenja klasičnih pravnika uz isticanje jasne razlike da uzuar može koristiti prirodne plodove za ličnu upotrebu, a plodouživalac sve plodove koje stvar daje. *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

[18] *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

[19] *https://www.overa.rs/gradanski-zakonik-kraljevine-srbije-1844-god-sa-kasnijim-izmenama.html*, poslednji pristup 2. jul 2022.

> § 373 *U ostalom sva druga korist prinadleži gospodaru stvari, koji je dužan sve terete sa stvari skopčane nositi, i istu u dobrom stanju održavati. Samo u koliko bi korist ova manja bila nego teret, mora onaj, koji pravo na upotrebljenje ima, dodati, ili od upotrebljenja prestati.*[20]

Za temu koja se obrađuje u ovom članku značajno je navesti §§ 505 i 506 austrijskog uzora:

> § 505 *Wer also das Gebrauchsrecht einer Sache hat, der darf, ohne Rücksicht auf sein übriges Vermögen, den seinem Stande, seinem Gewerbe, und seinem Hauswesen angemessenen Nutzen davon ziehen.*[21] [Ko dakle ima pravo upotrebe tuđe stvari, taj sme, bez obzira na svoju ostalu imovinu, vući od nje koristi, koja se odmerava prema njegovom staležu, zanimanju i domaćoj potrebi.] (Aranđelović 1922, 138)
>
> § 506 *Das Bedürfniß ist nach dem Zeitpuncte der Bewilligung des Gebrauches zu bestimmen. Nachfolgende Veränderungen in dem Stande oder Gewerbe des Berechtigten geben keinen Anspruch auf einen ausgedehnteren Gebrauch*.[22] [Potreba se određuje po vremenu odobrenja upotrebe. Docnije promene u staležu ili zanimanju upotrebioca ne daju nikakva prava na prostraniju upotrebu.] (Aranđelović 1922, 138)

Prilikom pisanja članova o službenosti prava upotrebe, Hadžić je sublimirao §§ 504–507 ABGB u jedan član SGZ (§ 372), njemu svojstvenom tehnikom, kojom se obilato koristio i zbog koje je oštro kritikovan (Gams 1996, 17). Srpski zakonodavac koristi konstrukciju „*koristiti se* (stvari) *po potrebi*", a austrijski „*Nutzen davon ziehen*" („*vući od nje* [stvari] *koristi*"). Čini se da je Hadžić bliži rimskom poimanju službenosti prava upotrebe nego što je to ABGB. Sintagmom „*koristiti se* (stvari) *po potrebi*", srpski zakonodavac, ugledajući se na rimske pravnike, ograničava pravo upotrebe na korišćenje stvari i uslovno ubiranje prirodnih, ali ne i civilnih plodova,

[20] *Ibid.*

[21] *https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622*, poslednji pristup 2. jul 2022.

[22] *https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622*, poslednji pristup 2. jul 2022.

isključivo radi zadovoljenja ličnih i porodičnih potreba.[23] Držimo da izraz „*koristiti se*" i eventualne *koristi* koje stvar daje nikako ne mogu obuhvatiti otuđenje dela prirodnih plodova, odnosno da je institut definisan po ugledu na shvatanja klasičnih jurisprudenata. S druge strane, „*vući... koristi... prema... staležu, zanimanju i domaćoj potrebi*" (*den seinem Stande, seinem Gewerbe, und seinem Hauswesen angemessenen Nutzen davon ziehen*) obuhvatilo bi ubiranje i prirodnih i civilnih plodova koje stvar daje. Prema svemu sudeći, u tom pogledu nema ograničenja daljeg raspolaganja prirodnim plodovima. Dakle, austrijski zakonodavac jasnije i preciznije propisuje da uzuar, osim prava upotrebe, ima pravo ubiranja svih plodova, koje se ne ograničava na ličnu upotrebu, i pravo njihovog daljeg pravnog i faktičkog raspolaganja.

Uporednim i istorijskim tumačenjem § 372 SGZ, srpski pravnici su toj normi dali karakter kakav ima njen austrijski uzor.[24] Hipoteza da je rešenje u SGZ nastalo po ugledu na rimsko klasično, a ne austrijsko pravo, može se osporavati tvrdnjom da je posredi nespretnost u prevođenju teksta sa nemačkog, u šta malo verujemo, imajući u vidu da je reč o advokatu koji je pravničko znanje sticao u Habzburškoj monarhiji.

3.3. Prenosivost prava upotrebe – kreacionizam ili nepoznavanje prava?

Rigidna rimska koncepcija prema kojoj uzuar nema pravo na ubiranje plodova nije izdržala test vremena te već u rimskom pravu, a i danas, imalac prava upotrebe, osim prava korišćenja stvari, ima ovlašćenje da ubira određenu količinu plodova. Drugo značajno sporno pitanje je da li uzuar može svoje pravo dobročino ili teretno preneti na drugo lice. Kao i u prvom slučaju, jurisprudenti su decidni:

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[23] Upotrebilac ima pravo na plodove u granicama ličnih i porodičnih prilika. Obim potrebe se utvrđuje prema porodičnom stanju u momentu konstituisanja prava. Lazić smatra da je takvo rešenje nepravično i da bi trebalo dozvoliti povećanje (o smanjenju ne kaže ništa) obima zahvatanja plodova shodno promenama u porodici uzuara (rođenje ili usvojenje deteta, zaključenje braka itd.), ali ne i usled stvaranja nove porodice (npr. ženidba) (Lazić 2000, 64–65).

[24] Danas se pravo upotrebe razlikuje od plodouživanja samo u obimu ovlašćenja i nemogućnosti prenosa vršenja prava na drugo lice; čl. 630 Code Civil; § 1091 BGB. Vid. Rašović 2005, 353–355; Apelacionoi sud u Beogradu, Gž 1687/2014 28. 4. 2014, *Paragraf Lex*; Apelacioni sud u Kragujevcu, Gž 1988/2019 3. 12. 2019, *Paragraf Lex;* Apelacioni sud u Novom Sadu, Gž 2987/2016 20. 10. 2016, *Paragraf Lex*; *https://codes.droit.org/PDF/Code%20civil.pdf*; *https://www.gesetze-im-internet.de/bgb/BGB.pdf*, poslednji pristup 3. jul 2022.

D.7.8.8. pr. *Ulpianus libro 17 ad Sabinum: Sed neque locabunt seorsum neque concedent habitationem sine se nec vendent usum.*[25] [Ko ima pravo korišćenja kuće ne može drugima ustupiti prostorije ili pravo da u njoj žive bez njih; takođe, ne može (pravo upotrebe) dati u zakup.]

D.7.8.11. *Gaius libro secundo rerum cottidianarum sive aureorum: Inque eo fundo hactenus ei morari licet, ut neque domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit: nec ulli alii ius quod habet aut vendere aut locare aut gratis concedere potest.*[26] [Uzuar može boraviti na imanju onoliko koliko ne smeta vlasniku zemljišta i onoliko koliko ne smeta onima koji obavljaju poljske radove: on ne može pravo koje ima prodati ili dati u zakup ili besplatno drugom licu.]

D.7.8.12.6. *Ulpianus libro 17 ad Sabinum: Operas autem servi usuarii non locabit neque alii utendo concedet, et ita Labeo: quemadmodum enim concedere alii operas poterit, cum ipse uti debeat?...*[27] [Kao što nam Labeon kaže, uzuar ne sme davati u zakup usluge roba na kome ima pravo korišćenja, niti ga ustupiti drugome; jer kako čovek može ustupiti takve usluge drugome, kada se od njega zahteva da ih sam koristi?]

Pravo upotrebe, kao strogo lična službenost, konstituiše se u korist određenog lica i, kao takvo, neprenosivo je i nenasledivo. Rimsko pravilo o neprenosivosti prava upotrebe zadržavaju i ABGB (§ 507) i SGZ (§ 372), iako Hadžić šturo normira pravilo rečima: *No samu stvar takvi ne može izmeniti, niti na drugoga preneti.* Uzevši u obzir kontinuitet rimskog prava, ali i SGZ, nejasno je odakle dilema u domaćoj sudskoj praksi u vezi sa tim da li je pravo upotrebe prenosivo. Da li je reč o konfuziji koja je posledica nepostojanja posleratnih normi, neznanju ili kreacionizmu srpskih sudova?

Na upućeno pitanje privrednih sudova Privrednom apelacionom sudu: *Koja ovlašćenja ima titular lične službenosti „prava upotrebe„? Da li „pravo upotrebe" podrazumeva pravo titulara da samo neposredno iskorišćava predmet lične službenosti, odnosno da li pravo upotrebe sadrži ovlašćenje titulara da predmet lične službenosti izda u zakup drugom licu bez obaveštenja / saglasnosti vlasnika predmeta lične službenosti?*, Privredni apelacioni sud je

[25] *https://droitromain.univ-grenoble-alpes.fr/*, poslednji pristup 3. jul 2022.

[26] *Ibid*.

[27] *Ibid*.

na sednici Odeljenja za privredne sporove održanoj 19. i 20. novembra 2019. godine i na sednici Odeljenja za privredne prestupe održanoj 20. novembra 2019. godine izneo odgovor u kome se, između ostalog, kaže:

> *Upotrebilac (uzuar) ne može ugovorom preneti na treće lice ni pravo upotrebe u celini, ni vršenje pojedinih ovlašćenja.*
>
> *Ali, sopstvenik poslužne stvari može, ugovorom sa upotrebiocem ili testamentom, dozvoliti upotrebiocu da zaključi ugovor o zakupu poslužne stvari i da pribira zakupninu radi zadovoljenja ličnih i porodičnih potreba.*
>
> *Pravna doktrina („Stvarno pravo", deveto izdanje, izdavač „Nomos", autora prof. dr Obrena Stankovića i prof. dr Miodraga Orlića, str. 227) upućuje na to da je takvo rešenje sadržano i u drugim modernim zakonicima*.[28]

Usvajanjem Zakona o nevažnosti pravnih propisa, SGZ prestaje da bude važeća kodifikacija građanskog prava u Srbiji. Međutim, u članu 4 tog zakona se predviđa:

> *Pravna pravila sadržana u zakonima i drugim pravnim propisima pomenutim u čl. 2 ovog zakona, koja u smislu čl. 3 ovog zakona nisu proglašena obaveznim, mogu se po ovom zakonu primenjivati na odnose koji nisu uređeni važećim propisima, i to samo ukoliko nisu u suprotnosti sa Ustavom FNRJ, ustavima narodnih republika, zakonima i ostalim važećim propisima donetim od nadležnih organa nove države, kao i sa načelima ustavnog poretka Federativne Narodne Republike Jugoslavije i njenih republika* (stav 1).
>
> *Državni organi ne mogu svoja rešenja i druge akte zasnivati neposredno na ovim pravnim pravilima* (stav 2).

Kako u posleratnom periodu materija ličnih službenosti nije uređena, SGZ je nastavio da bude važeći pravni propis u toj oblasti.[29] Zbog toga čudi to što je Privredni apelacioni sud dao odgovor takve sadržine kada postoje predratne

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[28] Privredni apelacioni sud, Odgovori na pitanja, 20. 11. 2019, *Paragraf Lex*.

[29] Iako se u čl. 3 Zakona o nevažnosti pravnih propisa predviđa: *Prezidijum Narodne skupštine FNRJ može odrediti da se pojedina pravila sadržana u zakonima i drugim pravnim propisima pomenutim u čl. 2 ovog zakona primenjuju, određujući pri tom potrebne izmene i dopune* (stav 1); *Ovo pravo imaju i prezidijumi narodnih skupština narodnih republika za pravne propise čije donošenje na osnovu Ustava FNRJ spada*

norme koje se imaju primeniti u datom slučaju te se postavlja pitanje zbog čega kao relevantan ne navodi doktrinaran stav o pravilu iz domaćeg već iz drugih pravnih sistema.[30] Vođeni tim argumentom, domaći sudovi bi, u slučajevima kada neka materija nije regulisana posleratnim a bila je uređena predratnim pravnim normama, trebalo da primene strana pravna rešenja, a ne domaća predratna, kako je propisano Zakonom o nevažnosti pravnih propisa. Time se znatno narušava pravna sigurnost jer se ne zna koje od različitih uporednih rešenja bi bilo primenjeno. U Odgovoru se ne navodi iz kog stranog pravnog sistema treba preuzeti rešenja i primeniti ih niti se to čini u udžbeniku na koji se u Odgovoru poziva.

Osim toga, takvo rešenje, koje je u suprotnosti sa pravom Republike Srbije, ruši i načela prava upotrebe postavljena još u klasičnom rimskom pravu, koja je definisao Labeon pre dve hiljade godina (D.7.8.10.4), da je pravo upotrebe uže od plodouživanja. Rešenje iz Odgovora uzuaru daje mogućnost da mu vlasnik dozvoli „*ugovoro ... ili testamentom... da pribira zakupninu*“, što odgovara obimu ovlašćenja koji ima plodouživalac, a ne kaže se da bi time sopstvenik stvari uzuara učinio plodouživaocem. Takav stav suda može se tumačiti kao negiranje samostalne prirode prava upotrebe. Na kraju ostaju pitanja da li se sud stavio u ulogu zakonodavca i da li *curia novit iura*.

4. ZAKLJUČAK

Kada izlažu materiju koja se odnosi na službenost upotrebe, pisci udžbenika rimskog prava na srpsko-hrvatskom govornom području listom navode sledeće: *usus* je lična službenost koja ovlašćuje imaoca prava da stvar upotrebljava i ubira plodove u meri u kojoj je to dovoljno za zadovoljenje ličnih i porodičnih potreba; uzuar nije bio ovlašćen da vršenje prava ustupa

u nadležnost republika (stav 2), sudovi su počeli da popunjavaju pravne praznine direktnom primenom odredaba SGZ, bez posebne odluke Narodne skupštine. Takođe, Lazić piše: „Na osnovu čl. 4 Zakona o nevažnosti sudovi mogu primenjivati 'pravna pravila' iz odredaba: §§ 340, 342, 371–391. Ne mogu se primeniti §§ 392 (osim st. 1), 393 i 938.“ (Lazić 2000, 37; Živković 2014, 184–185; Vodinelić 1996, 400–404; Vrhovni sud Srbije, Rev. 355/2006 8. 7. 2006, *Paragraf Lex*; Apelacioni sud u Beogradu, Gž. 667/10 23. 7. 2010, *Paragraf Lex*; Vrhovni kasacioni sud, Rev. 493/2010 13. 6. 2011, *Paragraf Lex*; Apelacioni sud u Kragujevcu, Gž. 1500/2011 13. 6. 2011, *Paragraf Lex*; Apelacioni sud u Beogradu, Gž. 14797/2010 16. 11. 2011, *Paragraf Lex*; Apelacioni sud u Beogradu, Gž. 5531/17 31. 5. 2018, *Paragraf Lex*)

[30] Na mestu u udžbeniku koje je citirano u Odgovoru se kaže: "...zakonicima je propisano da je neprenosivo ne samo pravo upotrebe nego ni njegovo vršenje. Ta odredba, međutim nema imperativni karakter, barem što se tiče vršenja prava upotrebe“ (Stanković, Orlić 2014, 227).

drugome; pravo se gasilo smrću lica ili usled *capitis deminutio*; na sve ostale odnose u vezi sa vršenjem prava shodno su se primenjivala pravila o plodouživanju (vidi Horvat 1980, 161; Stojčević 1985, 175; Milošević 2016, 287–288). Međutim, iza tako šturog određenja uzusa kriju se dinamizam rimskog prava i ista pitanja koja muče pravnike skoro dve hiljade godina kasnije.

Analizirajući tekstove rimskih pravnika sačuvanih u Justinijanovim Digestama dolazimo do zaključka da je uzuar imao pravo upotrebe stvari, bez prava na plodove. Međutim, određena dobra je mogao konzumirati u lične svrhe, radi ostvarivanja potpune upotrebe stvari. Dakle, imalac prava službenosti nije mogao slobodno raspolagati plodovima, te kod uzusa možemo reći da je postojalo „krnje" ovlašćenje titulara prava da koristi prirodne plodove kako bi podmirio lične i porodične potrebe, to jest ostvario pun obim prava. Osim toga, pravo je bilo neprenosivo *inter vivos et mortis causa*.

Recepcijom instituta u srpsko moderno pravo preuzete su iste dileme i pitanja koja su imali i klasični jurisprudenti. Kako nam se čini, tvorac SGZ nije bio puki prepisivač i prevodilac ABGB već je pitanje ubiranja plodova kod službenosti upotrebe uredio bliže klasičnom rimskom nego austrijskom pravu. Srpski zakonodavac, ugledajući se na rimske pravnike, ograničava pravo upotrebe na korišćenje stvari i predviđa uslovno ubiranje prirodnih, ne i civilnih plodova, isključivo radi potpunog ostvarenja prava, to jest pravilne i potpune upotrebe stvari. *A contrario*, austrijski zakonodavac jasnije i preciznije propisuje da uzuar, osim prava upotrebe, ima pravo ubiranja svih plodova, kvantitativno ograničeno individualnim prilikama uzuara, pri čemu ga ne ograničava se na ličnu upotrebu i daje mu pravo njihovog daljeg pravnog i faktičkog raspolaganja. Rimsko pravilo o neprenosivosti prava propisano je i u ABGB i u SGZ.

Jasno normirano pravilo da je službenost upotrebe neprenosiva i donekle suprotan stav srpskog suda o tom pitanju naveli su nas da sveobuhvatnije sagledamo taj institut. Privredni apelacioni sud prenebregava postojanje predratnih zakonskih normi i kao argumente za to da je pravo prenosivo navodi doktrinarne stavove i uporednopravnu praksu. Ne samo što je to shvatanje *contra legem* već je i u suprtonosti sa prirodom instituta i njegovom samostalnošću u odnosu na pravo plodouživanja.

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THE RIGHT TO USE IN ROMAN AND SERBIAN LAW

Summary

The right to use is a personal servitude, which authorizes the holder to use the property within the limits of their needs. According to the Roman classification, it is personal servitude, together with the right of ususfructus, free housing and use of the work of someone else's slave or animal. Formed in post-classical Roman law, with minor changes, the institute was absorbed into Serbian medieval law, and subsequently, in the mid-19th century, into the Civil Code of the Principality of Serbia. Servitude is also recognized in the law of the Republic of Serbia. The dilemmas concerning the scope of rights – whether the holder acquires fruits or can transfer the right to another – gave headaches to both Roman jurisprudents and jurists today. An interpretation by the Commercial Court of Appeal, regarding a question about the abovementioned controversies, posed by a lower court, has highlighted the problems regarding the institute.

Key words: *Roman law. – Austrian Civil Code (ABGB). – Serbian Civil Code (SGZ). – Personal Servitudes. – Right to use (usus).*

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CRKVENI PRISTANAK ZA NASTAVNIKE TEOLOGIJE – RAZMIŠLJANJA SA STRANE

Dosadašnja diskusija o potrebi crkvenog blagoslova za univerzitetske nastavnike teologije u Srbiji ukazala je na pravne elemente i probleme tog pitanja. Međutim, postoji i teološka dimenzija koja je povezana sa samorazumevanjem teologije kao nauke: kad se teologija razume kao nauka, onda za nju, u epistemološkom i teorijskom smislu, važe isti uslovi kao i za bilo koju drugu granu nauke, što ne isključuje posebnu ulogu crkve. I druge nauke funkcionišu u određenim društvenim i političkim kontekstima i u određenoj meri su zavisne od njih. Uloga teologije, prema tome, nije tako izuzetna. Pravo je svake crkve da očuva svoju teološku tradiciju, ali je otvoreno pitanje kako se to najbolje postiže. U interesu je teologije, ali i same crkve, da se kontrola nad teologijom prepušta najviše naučnom diskursu.

Ključne reči: *Teologija. – Crkveni pristanak. – Blagoslov. – Nihil obstat. – Bogoslovski fakulteti.*

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1. UVOD

Retko se dešavalo da kadrovska rešenja u akademskom svetu izazovu toliko javno uzbuđenje kao što je to bio slučaj poslednjih godina s odlukama kojima je bilo otpušteno nekoliko profesora sa Pravoslavnog bogoslovskog fakulteta (PBF) Univerziteta u Beogradu (UB). Reagovali su crkveni, a posebno svetski mediji i raspravljali o tome koliko Srpska pravoslavna crkva (SPC) treba da utiče na sastav i rad tog fakulteta. I na stranicama ovog časopisa se razvila diskusija o tom pitanju (Rakitić 2022; Vukomanović 2022). Izgleda da je u međuvremenu pronađeno zakonsko rešenje. Međutim, Vukomanović (2022) ukazuje na pravne probleme koji su povezani s tim rešenjem. Prema tome, nije isključeno da sadašnja situacija nije poslednja reč u odgovoru na pitanje kako treba da izgleda trougao UB – SPC – PBF.

Hteo bih ovim tekstom da ukažem na neke elemente koji su, kako mi se čini, bili prenebregnuti u dosadašnjoj diskusiji. Budući da nisam pravnik nego teolog, ne nameravam da se bavim pravnim aspektom ovog pitanja nego aspektima samorazumevanja teologije pa i crkve. Pošto nisam pravoslavni nego rimokatolički teolog, ne nameravam da razmatram konkretan slučaj PBF nego ću se ograničiti na elemente koji su zajednički svim crkvama. Katolička crkva ima svoj način postupanja, posebno u slučajevima u kojima je sklopila konkordat s dotičnom državom.[1] Ali problem je isti za bilo koju crkvu: kakav je odnos između teološke nauke i crkve? Kako se oblikuju identitet i realnost neke crkve u odnosu na njenu teologiju? Taj dinamičan odnos je predmet i pravnog i teološkog razmišljanja, a on sobom nosi i ceo niz epistemoloških i teorijskih pitanja. On pretpostavlja konfesionalnu teologiju, onakvu kakva ona danas preovlađuje u Evropi. Valjalo bi razmišljati i o odnosu konfesionalnih i natkonfesionalnih teoloških fakulteta ili o stavu crkava prema tim fakultetima koji postoje naročito u Engleskoj i u Severnoj Americi, ali to je već druga tema.

2. SVRHA CRKVENE KONTROLE

Rakitić (2022) u svom članku prikazuje istorijsko poreklo ideje crkvenog pristanka na izbor profesora. Autor se koncentrisao na zapadnu tradiciju, s obzirom na to da su univerziteti (u modernom smislu) nastali u Zapadnoj Evropi. Ta istorijska perspektiva može da bude veoma korisna. Ona nam,

[1] O nemačkom postupku vidi moju kratku skicu: *https://teologija.net/teologija-i-crkva-pogled-iz-druge-perspektive/*.

naime, pokazuje da prvi cilj crkvene kontrole onih koji predaju teologiju nije bila čistoća, dakle ispravnost učenja, nego kvalitet akademskog predavanja. Mada su oba ta aspekta povezana, ona nisu ista. Crkvi je teologija bila previše dragocena i važna kako bi mogla da dopusti da se predaje na neadekvatnom nivou. Modernih naučnih standarda tada nije bilo, tako da se crkva brinula o tome kako su predavači ispunjavali svoju obavezu. To se vidi i po tome što se radilo o *predavanju* teologije, ne o publikacijama. Tek kasnije se dogodilo da se crkveni pristanak odnosi i na sadržaj onoga što je bio predmet teološke nastave, a posebno na sadržaj teološkog istraživanja koje je po svojoj naravi bilo mnogo više u centru javne pažnje.

Crkvena kontrola se tada povezala sa cenzurom, dakle sa kontrolom onoga što je bilo napisano, a postala je važnija kad se pojavila mogućnost štampanja knjiga. Katolička crkva je kasnije razvila tu svoju kontrolnu funkciju skoro do savršenstva, uključujući sastavljanje spiska knjiga koje katolici nisu smeli ni da poseduju a kamoli da čitaju, čuveni *Index librorum prohibitorum* (Indeks zabranjenih knjiga). U pravoslavlju, međutim, takvog pokušaja potpune kontrole (koji ni u Katoličkoj crkvi nije uspeo) nikad nije bilo. U Rusiji je postojala državna cenzura koja je (zbog tesne povezanosti crkve i države) cenzurisala i nepodobne teološke tekstove, ali pravoslavne crkve kao takve nikad nisu izgradile sistem kontrole teoloških misli sličan katoličkom. I treba naglasiti da su se u istoriji crkve razlike u razumevanju učenja rešavale uglavnom teološkom raspravom, dakle naučnim diskursom koji je vremenom ostavio po strani stanovišta koja nisu bila ubedljiva. A kad je bilo potrebno, saborskim odlukama je definisano šta je u skladu s crkvenom tradicijom, a šta nije. U antičko doba takva odluka se zvala „granica" (gr. ὅρος, *horos*, lat. *finis* – otud de-fini-cija), tim odlukama se, dakle, razgraničavalo ispravno od pogrešnog, to jest pravo učenje od jeresi.

Ali kad posmatramo sve to, treba imati na umu da je ovde reč o kontroli crkve nad svojim učenjem, a (još) ne o kontroli pojedinih teologa koji su bili u tako definisanim granicama. Zbog toga je ograničenje njihove delatnosti (uključujući i nastavu) problematično pitanje jer čovek koji nije proglašen za jeretika se, prema tome, nalazi u okvirima crkve i njenog učenja. Zabrana predavanja se, dakle, mora odnositi na nešto drugo, a ne na njegove teološke stavove. Rekosmo, na početku je to bio instrument očuvanja kvaliteta nastave, a ne kontrole toga da li je ono što određeni predavač kaže svojim studentima u saglasju s onim što je nadležni crkveni autoritet smatrao ispravnim. Prema tome, valja razmisliti kakav je značaj te srednjovekovne zapadne prakse za današnju situaciju (bilo koje crkve).

3. *NIHIL OBSTAT* I BLAGOSLOV

U katoličkoj tradiciji se danas za crkveni pristanak koristi termin *nihil obstat*, ništa ne sprečava (da jedan kandidat bude profesor teologije), dok se u pravoslavnoj tradiciji uobičajeno govori o „blagoslovu" koji dotični mora da dobije od crkve. Zanimljivo je da se tim različitim terminima naglašavaju različiti sadržaji. Blagoslov je crkvena radnja kojom se Bog moli da nekome da blagodat, a *nihil obstat* je pravni termin koji ima svoju osnovu u dogovorima između crkve i države. Ideja blagoslova podrazumeva da se na njegovog primatelja priziva Božji blagoslov, dakle da se njemu želi nešto što je iznad moći onoga ko ga daje. Već je prema tome sama ideja povlačenja blagoslova (u tom smislu) problematična jer implikuje da davalac blagoslova ima neku moć nad Božjim radnjama. Ukoliko je reč o pristanku koji se izražava time što se osoba preporučuje Bogu, onda bi logična posledica povlačenja blagoslova bila da se njegov davalac distancira od svoje prethodne radnje (i da moli Boga da uradi to isto). *Nihil obstat*, s druge strane, deo je jednog ugovora i kada se jedna strana tog ugovora drži tamo predviđenih načela, onda i druga mora adekvatno da reaguje. Drugim rečima: kad katolički biskup dogovorenim putem povuče *nihil obstat*, onda je i država obavezna da postupi na odgovarajući način, to jest da shodno tome isključi dotičnog iz nastave teologije na univerzitetu. U mnogim zemljama to nema kobne posledice za tog nastavnika jer ostaje profesor (i zadržava svoje prinadležnosti), samo što više ne može da predaje i ispituje teološke predmete. Time je i osigurano da se povlačenje crkvenog pristanka ne može koristiti kao kazna koja bi ugrozila egzistenciju tog predavača.

Prema tom razumevanju, izgleda da je blagoslov zamišljen kao nešto trajno, barem u smislu da je nepovratan. On je izraz lojalnosti crkvenih vlasti prema kandidatu koji je i sâm pokazao svoju lojalnost prema crkvi i teologiji. U principu, reč je o trajnoj lojalnosti, prema prethodno rečenom. Međutim, ljudi se menjaju tokom svojih života, a crkveni pristanak se može odnositi samo na određeni trenutak. On je, dakle, izraz neke nade, nekog poverenja u to da će se taj profesor (koji će se razvijati tokom svog života kao svako živo biće) razviti u smeru koji je koristan i plodonosan za teologiju, a time i za crkvu. Garancije za to nikad nema. *Nihil obstat* je u tom smislu na neki način iskreniji jer uključuje mogućnost „pogrešnog" (u smislu crkvene kontrole) razvoja i odgovarajuće reakcije crkvenog autoriteta – povlačenja *nihil obstat*-a. A blagoslov je više izraz poverenja za koje se može pretpostaviti da je doživotno. Time što se daje blagoslov, kandidat se preporučuje za rad u teološkoj nauci jer se veruje da će ispuniti nadu koja je položena u njega. A ta nada podrazumeva i slobodu intelektualnog razvoja. Takva sloboda je istorijski omogućavala napredak teološkog mišljenja, posebno prevazilaženje pogrešnih shvatanja i jeresi. Primera radi, da nije bilo teologa koji su mislili

drugačije od (tada prevladavajuće) norme, ne bismo danas imali ikone u hramovima. Danas nismo u sličnoj situaciji kao u vreme ikonoborstva, ali teologija mora da ima mogućnost kretanja i neobičnim stazama.

Piscu ovih redova je poznato da se blagoslov danas u pravoslavlju koristi faktički, u pravnom smislu, kao neka dozvola za nešto („moj duhovnik mi je dao blagoslov da idem na taj put"). Ali to je sužavanje pravog smisla blagoslova, koji je mnogo širi od jednostavne dozvole. Blagoslov može dati svako sveštено lice, pa i laik (za to ima mnogo primera, kao u kontekstu svadbe ili krsne slave). Blagoslov u smislu dozvole za teološku nastavu, međutim, u slučaju PBF, ne daje čak ni episkop, nego Sinod, dakle rukovodeće telo SPC. Time se želi jamčiti da odluka bude saborna, a ne rešenje jednog pojedinca. Međutim, ostaje otvoreno pitanje ko može da dâ konačan sud o ispravnosti crkvenog učenja. Sigurno crkva kao takva, ali kad se to svodi na grupu ljudi ili čak na jednu osobu (kao u katoličkoj crkvi), onda to postaje komplikovanije.

Jedan važan element je, dakle, to što se blagoslov u principu odnosi na čoveka, na pojedinca, a ne na to šta taj pojedinac misli ili veruje. Blagoslov služi poboljšanju stanja čoveka (koje je svima nama uvek potrebno), on sadrži želju za njegovom dobrobiti, a ne odobravanje neke njegove crte ili karakteristike, kao što je ono što on predaje studentima ili piše u svojim publikacijama.

Prema tome vidimo da terminologija pristanka crkve nije jasna nego ostavlja prostor za tumačenje. Budući da je to crkveno-državni odnos, bilo bi poželjno da se što preciznije reguliše procedura, a to podrazumeva i ingerencije obe strane. Država, konkretnije univerzitet, ima obavezu da izabere najboljeg kandidata za svako radno mesto, i to treba da bude jedini cilj. Obaveza crkve je, pak, drukčije prirode: ona nema zadatak da brine o kvalitetu kandidata nego da očuva teološku tradiciju. Nažalost, ti procesi ni u jednoj crkvi nisu transparentni. U interesu je teologije, pa i crkve, da se kandidatu za profesorsko mesto daje informacija o postupku, kao i mogućnost žalbe.

Rečeno se odnosi na teološku nastavu u slučajevima u kojima je sklopljen dogovor, tako da postoji zakonska osnova između države i crkve o položaju teologije u javnim (državnim) nastavnim institucijama. Osim njih, funkcionišu još i brojne crkvene ustanove. U njima nema potrebe za dogovorom s državom jer ona nema nadležnosti. S pravnog aspekta, crkva može u svojim ustanovama da postupa kako god želi, da zapošljava ili otpušta nastavnike, da uvodi nastavne planove ili nove predmete ili da poništava dosadašnje. Ali postoji teološko, a u nekom pogledu i moralno pitanje da li crkva zaista može da postupa proizvoljno. Čini mi se da tu postoje granice, a istorija crkve i

teologije pokazuje da je važno da se one poštuju. To, nažalost, nije uvek bio slučaj; mnogi čuveni i važni teolozi bili su podvrgnuti disciplinarnim merama zbog svojih pogleda, mada su kasnije bili rehabilitovani.

4. NAUČNA SLOBODA I NJENA OGRANIČENJA

Teologija nije jedina nauka pored koje stoji društvena institucija koja ne samo što primenjuje njene rezultate nego i, na određeni način, određuje ili makar utiče na teme, predmete naučnih istraživanja. Pravna nauka, na primer, ne radi u vakuumu nego u kontekstu konkretne države, s konkretnim zakonima, a oni su (odnosno načela na kojima počivaju) predmet pravnog naučnog razmišljanja. Zakoni se mogu odlukom zakonodavca menjati i različiti su u raznim zemljama. Šta bi bilo s evropskim profesorom prava koji bi, na primer, zastupao ideju da ponovo treba uvesti smrtnu kaznu ili mučenje osuđenika? Bio bi izolovan u svojoj struci, kolege bi ga smatrale čudakom i raspravljale bi s njim u akademskim publikacijama i diskusijama, ukoliko bi ih bilo. U tom slučaju ne postoji nikakva institucija koja kontroliše nalaze i pravac istraživanja nauke nego to čini društvo (koje se odlučilo protiv smrtne kazne i mučenja) odnosno zakonodavac. Drugi primer: za nekoliko godina, industrija više neće proizvoditi automobile koji za pogon koriste fosilna goriva. To je društveno-političko rešenje. Profesor mašinskog fakulteta koji bi radio na poboljšanju rada dosadašnjih motora (sa unutrašnjim sagorevanjem) ne bi bio izbačen sa fakulteta zbog toga, ali bi mu društvo na neki način odredilo pravac rada. Kad bi on nastavio svojim smerom istraživanja, fakultet bi mu verovatno uskratio sredstva za istraživačke projekte, ne bi mu više davao novac da ide na naučne kongrese itd., kako bi pokazao: ovo nije pravac kojim mi kao društvo želimo da idemo. Dakle, društvo odnosno država ima svoje mehanizme kojima utiče na polja istraživanja u akademskoj sredini, a da time ipak ne povredi autonomiju univerziteta.

Ali ko kontroliše profesore u ostalim naukama, na primer, u humanističkim naukama, istoriji, književnosti, filologiji i drugim? Niko ih ne kontroliše formalno, u smislu da postoji institucija koja može da odredi šta je podobno i šta nije. Ali ta kontrola je inherentna nauci kao sistemu samokontrola. Nauka postoji samo zbog naučnog diskursa koji unapređuje naša znanja i spoznaju određene oblasti. Naučne teze se potvrđuju (*verification*) ili opovrgavaju (*falsification*) u tom diskursu. To je proces koji može dugo da traje, ali koji je neophodan za postojanje nauke. Zbog toga su neslaganje sa stavovima drugih, javno suprotstavljanje tim stavovima i samostalna promena sopstvenih nalaza neophodni elementi naučnog progresa. Za neupućene to deluje ponekad kao slabost i mana, ali samo taj sistem samokontrole

omogućava napredak i dalje spoznaje. To su pokazale diskusije o pandemiji u poslednje tri godine; retko da je naučna diskusija (a kamoli iz oblasti kao što su virologija i epidemiologija) bila toliko u centru javne pažnje. To je izazvalo zabune mnogih ljudi koji nisu svesni tog pristupa nauke. Oni su očekivali gotove odgovore, kakve nauka, srećom, često i može da pruži, a dobili su naučni diskurs koji im nije dao putokaz koju su želeli.

Taj princip važi i za teologiju. Kad u teologiji ne bi bilo napretka i promene, novih saznanja i otkrića, ona ne bi imala mesto na univerzitetu nego bi se mogla naučiti, kao što se nešto uči u školi. Ali ona se razume kao naučna grana, što znači da svaki njen rezultat može, sredstvima razuma, svako zainteresovan da reprodukuje – i da tim putem dođe do istog rezultata. Čovek koji je razuman (i koji je stekao neka predznanja) može da razume ili da obrazloženo odbije rezultate teološkog razmišljanja i istraživanja. Uslov za to je, naravno, da prihvati tezu o postojanju više realnosti, Boga, koja se kao takva ne dâ dokazati nego je aksiom, ali čak i nevernik može da razume strukture teološkog razmišljanja i da rezultate prihvata ili odbija – samo što su oni za njega bez religioznog značaja. Ali teologija nije jedina nauka koja polazi od aksioma; i druge imaju svoje, na primer, medicina, koja nije „neutralna“ nego je njen cilj da služi zdravlju čoveka, ili opet pravo koje želi da postigne što pravednije društvo. Prema tome, teologija se kao nauka razlikuje od ostalih samo svojim predmetom, dok su metode (u epistemološkom smislu, ne u praktičnom radu) iste.

5. CRKVA I OČUVANJE TRADICIJE

Kako onda crkva može da očuva svoju teologiju? Za razmišljanje o tom pitanju treba da se razmišlja i o pojmu tradicija, predanje. Crkva čuva tradiciju – ali i tradicija je nešto živo. Predanje znači proslediti iskru, vatru, a ne hladan pepeo, dakle čuvati ono što je živo, promenjivo. Istorija crkve je puna primera koji pokazuju taj živi razvoj crkvenog naučavanja. Ali tu se crkva nalazi na osetljivom putu na kojemu preti opasnost proizvoljnosti, s jedne strane, i doktrinarizma, s druge strane. Razumljivo je da ne može svako proglasiti bilo šta kao učenje svoje crkve – to bi bilo proizvoljno i ubrzo ne bi bilo jasno šta je suština vere. Ali lek protiv toga je živa diskusija u teologiji kojom se kristališe dominantno mišljenje – ponekad i više od jednog; u svim hrišćanskim crkvama o određenim pitanjima postoji nekoliko teoloških stavova koji se smatraju valjanim. Uloga crkve se može uporediti s ulogom nasipa duž velike reke. Najbolje bi bilo da nasip nikad ne mora da se koristi. On je tu za svaki slučaj, ali dok se reka nalazi u okvirima nasipa sa obe strane, ne postoji problem. A doktrinarizam je čvrsto insistiranje na

nepromenljivosti čak i formulacije crkvenog učenja, što označava neistorijski pristup prema pitanju predanja. Takav stav se u protestantizmu zvao „fundamentalizam", a kasnije se taj pojam koristio i za druge veroispovesti, posebno za islam.

Crkva, dakle, ima osetljiv zadatak da vrši svoju funkciju nadzora nad teologijom najbolje tako što je uopšte ne vrši, to jest da ne interveniše iako ima pravo na to. Crkveno učenje se ne čuva „čistim" zabranama nego diskursom, kao što to biva i s drugim humanističkim naukama. Crkva je vezana svojom tradicijom. Jasno je da je tradicija problematičan termin, koji treba objasniti i tumačiti. Zbog toga objašnjenje zahteva i ta povezanost, dakle odnos crkve prema tradiciji. Ovde se može samo napomenuti da u tom pitanju postoje konfesionalne razlike, s tim što pravoslavne crkve, kao i Katolička, imaju tendenciju da poistovećuju crkvu s tradicijom. Prema tome, tradicija nije nešto šta crkva poseduje nego je (kao što kaže i reč „predanje") ona u isto vreme i proces prenošenja – predaje iz jedne generacije u drugu. Dakle, to je istorijski proces koji podleže, kao i sve u istoriji, promenama i razvoju. Jasno je da je to komplikovano i dinamično događanje, o kojem ovde ne možemo detaljno da diskutujemo.

6. DRUGA POLJA CRKVENOG UTICAJA NA TEOLOGIJU

Pitanje je da li crkva treba da ima još neke ingerencije prema teološkim fakultetima, osim davanja saglasnosti prilikom zapošljavanja novih nastavnika. Važan element je struktura nastavnog plana, to jest koliko časova ima svaki predmet, i koji predmeti se uopšte predaju. Tu postoje konfesionalne tradicije; tako su kod protestanata biblijske nauke znatno važnije nego kod drugih, patrologija ima viši status kod pravoslavaca itd. U zemljama na čijim univerzitetima postoje nekonfesionalne teološke studije, kao u Engleskoj ili Severnoj Americi, crkve uglavnom imaju dodatne studije za svoj kadar ili ih odmah šalju (posebno buduće sveštenike) u crkvene ustanove. To pokazuje važnost tih tradicija. Kad konfesionalni fakulteti deluju u okviru svetskih univerziteta, crkve su uglavnom rezervisale sebi pravo da utiču na nastavni plan. Međutim, to se odnosi na strukturu, ali ne i na sadržaj teološke nastave.

Drugo zanimljivo pitanje je izbor studenata. Da li državni univerzitet može od studenta da traži, osim propisanih dokumenata (matura, prijemni ispit), i dodatne uslove, na primer pripadnost određenoj crkvi ili pismeno mišljenje sveštenog lica? Ako student želi da se upozna s konfesionalnom teološkom kulturom a nije član te konfesije, trebalo bi da ima tu mogućnost na univerzitetu. Univerzitet je javna ustanova koja se finansira porezima svih građana; prema tome, ne postoji razlog da studije budu otvorene samo za studente koji ispunjavaju dodatne uslove. Pisac ovih redova je pre više od 40

godina pohađao predavanja na PBF koji je tada još bio u vlasništvu SPC. Nije bio zvanično upisan (jer bi to bilo problematično za stipendistu SFRJ), ali je bio vrlo zadovoljan što je postojala ta mogućnost koja mu je dala šansu da studira ono što je hteo. Isto tako, studenti i doktorandi SPC su, s blagoslovom crkvenih autoriteta, bili na katoličkim i protestantskim fakultetima u inostranstvu i mnogo njih je steklo naučne titule, što je doprinelo razvoju i napretku teologije u Srbiji.

I ovde primer iz druge nauke može da bude od koristi: da li bi se na medicinski fakultet mogao upisati čovek koji je položio sve potrebne ispite, ali koji kaže da ne veruje u školsku medicinu nego u natprirodne snage i da namerava da se kasnije u životu bavi vračarenjem i isceljivanjem ljudi pomoću magije? Trebalo bi da može. Ako bude nastavio sa svojim planovima, on će kasnije naići na velike poteškoće i prepreke. Ali nije zadatak univerziteta da to spreči. Profesori će pokušati sve da mu dokažu ispravnost svojih medicinskih dostignuća, ali i ako ostane pri svome, može da ostane na fakultetu ukoliko ispunjava sve obaveze, to jest polaže sve ispite. Slično bi bilo sa studentom teologije koji ne pripada dotičnoj crkvi ali koji želi da studira njenu teologiju. Zašto mu se to ne bi omogućilo? Prema tome, ne vidi se razlog da crkva ima uticaj na izbor studenata teoloških fakulteta.

7. ZAKLJUČAK

Pravo je svake verske zajednice da odredi celokupan svoj unutrašnji i spoljni život, uključujući svoje forme bogosluženja, svoje načine odlučivanja i sadržaje svoje vere. Ali nijedna verska zajednica ne stoji izvan nekoliko konteksta – svaka se nalazi u određenom vremenu, na određenom mestu i u kontaktu je sa ljudima iste ili druge (ili nikakve) vere. To znači da ne postoji verska zajednica koja ne podleže promenama, kao i sve drugo u istoriji. Međutim, posebnost vere je u tome što zahteva da postoji i nešto nepromenljivo, nešto trajno u njoj. Zadatak je verske zajednice da to identifikuje, a onda može mirno da dopusti promene i razlike u svemu ostalom. Istorija svih teologija, ne samo hrišćanskih, pokazuje da to uopšte nije lako ni trivijalno.

Crkveni pristanak kao preduslov za predavanje na teološkim fakultetima jedna je (od više) konkretizacija tog problema. Kad se crkva, kao što to u mnogim crkvama biva, razume kao organizam koji se sastoji od ljudskog i od natprirodnog, onda je razumljivo zašto taj proces sobom može da nosi toliko problema. Kad se, međutim, sva ta pitanja nepristrasno posmatraju i kada se onaj natprirodni faktor uzme ozbiljno, postaje jasno da crkva ne bi trebalo da se boji ovog ili onog teološkog pravca. Za vernike, istorija je pokazala da na kraju i crkva i teologija ostaju u principu na ispravnom putu, bez obzira na stranputice kojima su morale da idu i koje su valjda uvek neophodne.

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CHURCH CONSENT FOR THEOLOGY PROFESSORS – AN EXTERNAL PERSPECTIVE

Summary

The past discussion on the necessity of church blessing for university theology instructors in Serbia has highlighted the legal elements and problems related to this issue. However, there is a theological dimension that is linked to the self-understanding of theology as a scholarly discipline: when theology is understood as a scholarly discipline, the same epistemological and theoretical conditions apply to it as to any other discipline – which does not exclude a special role of the church. Other scholarly disciplines also function in certain social and political contexts and are dependent on them to a certain extent. The role of theology is therefore not that exceptional. It is the right of every church to preserve its theological tradition, but the question remains open how this is best achieved. It is in the interest of theology, as well as of the church itself, to cede control over theology mostly to the scholarly discourse.

Key words: *Theology*. – *Church consent*. – *Blessing*. – *Nihil obstat*. – *Faculties of theology*.

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PRAVNI FAKULTET KAO ALMA MATER*: POVODOM DVE PEDESETOGODIŠNJICE*

I

Pravni Fakultet Univerziteta Crne Gore u Podgorici je na svečanosti održanoj 22. decembra prošle 2022. godine proslavio pedeset godina postojanja. Kolege iz Podgorice su predstavnicima Pravnog fakulteta Univerziteta u Beogradu dali značajno i vidljivo mesto na ovoj svečanosti. Ovo je prilika da se podsetimo uloge Pravnog fakulteta u Beogradu kao institucije i njegovih profesora u nastajanju podgoričkog Pravnog fakulteta.

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Sve je počelo još krajem 1968. godine. Na IV sednici Fakultetskog veća održanoj 13. decembra 1968. godine dekan prof. Pavle Dimitrijević je obavestio Veće da se Sekretarijat za obrazovanje, kulturu i nauku Socijalističke Republike Crne Gore (klasičnim rečnikom rečeno: Ministarstvo za obrazovanje, kulturu i nauku) obratio s molbom da se osnuje Centar za vanredne studije u Titogradu. Toj molbi se pridružila i Skupština opštine Titograd i tamošnji Radnički univerzitet „Milun Božović". Ova molba je bila proučena i prvi kontakti su bili obavljeni. Fakultet je upoznat sa potrebom za osnivanje ovog centra, jer je predstojao upis oko 200 vanrednih studenata. Ponudu je bio učinio i Pravni fakultet u Splitu, ali „predstavnici određenih ustanova smatrali su za potrebno da se prvo obrate Pravnom fakultetu u Beogradu, s obzirom na to da u Titogradu postoje dva fakulteta koji su sastavni deo Beogradskog univerziteta". Fakultetsko veće je dalo načelnu saglasnost za osnivanje Centra za vanredne studije u Titogradu i naložilo Komisiji za saradnju sa privredom i društvenim službama da sprovede ovo u delo.

Komisija je to u narednim mesecima i učinila i podnela Fakultetskom veću izveštaj 13. oktobra 1969. godine[1]. U Izveštaju se najpre pominje da je utvrđeno interesovanje svršenih maturanata u Crnoj Gori za ovakve studije. Potom, da su uspostavljeni kontakti i vođeni razgovori sa nizom ustanova i organa u Crnoj Gori o načinu i formi pomoći pri ovom organizovanju. Navodi se da su vođeni razgovori sa Radničkim univerzitetom koji je trebao da preuzme na sebe tehničke poslove u vezi sa radom centra.

Komisija je predložila način organizacije nastave. Na svim predmetima prve godine, osim predvojničke obuke, održalo bi se po 40 časova, što bi činilo ukupno 200 časova. U oktobru i novembru 1969. bi se održalo 80, a u aprilu i maju 1970. godine 120 časova. Ispiti bi se održali, u skladu sa Statutom Pravnog fakulteta u Beogradu, u junskom, septembarskom i oktobarskom roku. Potom su izloženi finansijski detalji. Centar bi se izdržavao od godišnjih „doprinosa svakog pojedinog studenta u iznosu od 1.200 dinara godišnje". Od 150.000 dinara ukupnih troškova, 100.000 dinara bi pripalo Pravnom fakultetu za organizaciju nastave i ispita, honorare nastavnicima, putne troškove i drugo, a 50.000 dinara za organizaciju Radničkom univerzitetu, sa kojim bi se sklopio ugovor na godinu dana. Posebno se napominje da je iznos studentske „participacije" od 1.200 dinara „prihvaćen kao veoma umeren od svih, a posebno od samih zainteresovanih kandidata".

[1] Greškom na dokumentu je zapisana 1961. godina, ali iz svega što je u dokumentu zabeleženo jasno je da se radi o 1969. godini.

Komisija je predložila da centar vodi kolegijum od dva nastavnika i jednog radnika Sekretarijata koji bi bili Uprava centra.

Na kraju Komisija naglašava da su se stekli svi uslovi da Centar „otpočne sa radom već ove jeseni". Izveštaj je potpisao predsednik Komisije za saradnju sa privredom i društvenim službama dr Vladan Stanković.[2]

Fakultetsko veće je na svojoj sednici održanoj 15. oktobra 1969. godine prihvatilo predloge Komisije za saradnju sa privredom i društvenim službama. Takođe, odredilo je u Upravu centra za vanredne studije u Titogradu prof. Pavla Dimitrijevića, prof. Jelenu Danilović i Tanasija Janićijevića. Oni su se imali starati o funkcionisanju Centra i sprovođenju odluka Fakultetskog veća i drugih organa u vezi sa ovim radom.[3] Fakultetski savet je na sednici od 23. oktobra 1969. godine jednoglasno doneo Odluku o davanju saglasnosti na Odluku Fakultetskog veća o osnivanju Centra za vanredne studije u Titogradu.[4]

Centar je radio školske 1969/70. i 1970/71. godine. Fakultetsko veće je 29. juna 1971. godine donelo odluku o naknadi upravniku, članu uprave, sekretaru Centra za vanredne studije u Titogradu i drugim službenicima Fakulteta za rad u tom centru.[5] Fakultetsko veće je 27. septembra 1971. godine jednoglasno prihvatilo predlog da se, na osnovu pisma Izvršnog vijeća SR Crne Gore u kome je zamolilo „Pravni fakultet u Beogradu da pomogne da Centar za vanredne studije u Titogradu radi još i ove godine, s tim što bi oni za sledeću školsku godinu preduzeli mere radi otvaranja pravnog fakulteta u Titogradu". Upravnik Centra prof. Pavle Dimitrijević „je naveo da 300 kandidata čeka upis i traže da se nastavi rad u Centru u Titogradu".[6] Tako se ušlo i u treću školsku 1971/72, kako će se ispostaviti poslednju godinu postojanja Centra.[7]

Fakultetsko veće je na sednici od 15. maja 1972. godine imalo kao desetu tačku dnevnog reda „Prestanak nastave u Centru za vanredne studije u Titogradu". Upravnik Centra prof. P. Dimitrijević je obrazložio pismeni

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[2] APf, *Izveštaj Komisije za saradnju sa privredom i društvenim službama od 13. oktobra 1969. godine*, 1–2; *Izvod iz zapisnika sa IV sednice Fakultetskog veća od 13. decembra 1968. godine*.

[3] APf, *Zapisnik sa sednice Fakultetskog veća od 15. oktobra 1969. godine*, 5–6.

[4] APf, *Zapisnik sa sednice Fakultetskog saveta od 23. oktobra 1969. godine*.

[5] APf, *Zapisnik sa sednice Fakultetskog veća od 29. juna 1971. godine*, 12–13.

[6] APf, *Zapisnik sa sednice Fakultetskog veća od 27. septembra 1971. godine*.

[7] Videti APf, *Zapisnik sa sednice Centra za vanredne studije u Titogradu održane 4. februara 1972. godine*.

predlog Uprave Centra o prestanku održavanja nastave u Titogradu, krajem te školske godine. Uprava je učinila ovaj predlog „zbog toga što je Republičko izvršno veće SR Crne Gore donelo odluku o otvaranju Pravnog fakulteta u Titogradu, sa pravom upisa studenata I i II godine". Fakultetsko veće je jednoglasno prihvatilo „predlog Uprave Centra za vanredne studije u Titogradu o prestanku održavanja nastave sa 30. IX 1972. godine".[8] Tako je prestao da postoji Centra za vanredne studije Pravnog fakulteta u Beogradu sa sedištem u Titogradu, nakon tri školske godine, 1969/70, 1970/71. i 1971/72.

Zakonom koji je donela Skupština SR Crne Gore 25. maja 1972. godine osnovan je Pravni fakultet u Titogradu kao nastavno-naučna i obrazovna ustanova u kojoj se organizuje i razvija obrazovni i naučno-istraživački rad u o oblasti pravnih i njima srodnih društvenih nauka. Tom prilikom je istaknuto da se„osnivanje ove visokoškolske Ustanove nameće kao neophodno sa stanovištva ukupnih društvenih potreba Republike".

Pored Centra za vanredne studije koji je omogućio da iz njega nastane novi Fakultet, profesori Pravnog fakulteta u Beogradu dali su veliki i nemerljiv doprinos ovom nastanku. Od sedam članova Matične komisije koju je formiralo maja meseca iste godine Izvršno vijeće SR Crne Gore, četvorica su bili profesori Pravnog fakulteta u Beogradu: Milan Milutinović, predsednik Matične komisije i članovi dekan prof. Nikola Stjepanović i profesori Pavle Dimitrijević i Vojislav Bakić. Od četvorice prvih nastavnika, koje je izabrala Matična komisija, dvojica su bila raniji profesori Pravnog fakulteta u Beogradu: Nikola Srzentić i Branislav Nedeljković, koji su izabrani za redovne profesore. Prvi dekan novoosnovanog Pravnog fakulteta u Titogradu postao je profesor Srzentić. Nastava za prvu i drugu godinu studija je počela oktobra 1972. godine.[9]

O osnivanju Pravnog fakulteta u Titogradu u Analima Pravnog fakulteta u Beogradu skromno i nepretenciozno je zabeleženo: „U toku školske 1971/72. godine Pravni fakultet je ukazao pomoć, i preko svojih organa i pojedinaca, pri obrazovanju Pravnog fakulteta u Titogradu."[10]

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8 APf, *Zapisnik sa sednice Fakultetskog veća od 15. maja 1972. godine*, 9.

9 *Pravni fakultet 35 godina. 1972–2007 (na sigurnom putu),* Podgorica 2007, 34–36.

10 APf, *Izveštaj o radu Fakulteta u školskim godinama 1971/72. i 1972/73,* Beograd februar 1974, 7.

II

Pravni Fakultet u Kragujevcu je 7. oktobra 2022. godine obeležio 50 godina postojanja pravnih studija u tom gradu. Svečanost je bila povod da se setimo tih početaka.

Fakultetsko veće je, na sednici od 26. juna 1972. godine, pod tačkom IX i IXa raspravljalo o otvaranju odeljenja u Kragujevcu i imenovanju upravnika tog odeljenja. Najpre je prodekan prof. Radomir Đurović podneo izveštaj o preduzetim merama za otvaranje odeljenja u Kragujevcu. Potom je usledila diskusija u kojoj su učestvovali profesori N. Stjepanović, V. Bakić, I. Maksimović, J. Danilović, V. Simović, V. Brajić, D. Kavran, A. Vacić, D. Šoškić, V. Rajović i R. Đurović. Na kraju je Fakultetsko veće donelo odluku da predloži otvaranje Odeljenja beogradskog Pravnog fakulteta u Kragujevcu i imenovalo za upravnika tog Odeljenja dr Živomira Đorđevića, vanrednog profesora Pravnog fakulteta u Beogradu.[11]

Fakultetski savet je o ovome raspravljao na sednici od 29. juna 1972. godine. Na početku je prodekan R. Đurović (i predsednik Komisije za finansijska pitanja) upoznao članove Saveta sa predlogom Skupštine opštine Kragujevac da Pravni fakultet u Beogradu otvori svoje odeljenje u Kragujevcu. Vođeni su razgovori sa predstavnicima Skupštine opštine Kragujevac, razgledane su buduće radne prostorije i konstatovano da postoje uslovi za normalan rad. Prema nacrtu ugovora, Skupština opštine Kragujevac je trebalo da stavi Pravnom fakultetu u Beogradu na raspolaganje oko 90 miliona starih dinara za „ovu kalendarsku godinu za potrebe ovog odeljenja".

Posle ovog obrazloženja i diskusije u kojoj je učestvovao dekan i nekoliko članova Saveta, Fakultetski savet je doneo Odluku o osnivanju Odeljenja beogradskog Pravnog fakulteta u Kragujevcu. Član 1: „Osniva se Odeljenje Beogradskog Pravnog fakulteta u Kragujevcu." Odeljenje je imalo status osnovne organizacije udruženog rada bez svojstva pravnog lica u okviru Pravnog fakulteta u Beogradu (čl. 2). Član 3 je propisao da Odeljenjem rukovodi upravnik koga imenuje Veće Pravnog fakulteta u Beogradu iz reda nastavnika. Upravnik je imao naredbodavna prava u granicama ovlašćenja „koja na njega prenese dekan". Uzajamna prava i obaveze, a naročito materijalni uslovi i finansijska sredstva za najmanje pet školskih godina bili bi regulisani ugovorom između Pravnog fakulteta u Beogradu i Skupštine opštine Kragujevac (čl. 4). Do konstituisanja organa upravljanja Odeljenja, organi upravljanja Pravnog fakulteta u Beogradu donosili bi sve odluke koje se odnose na organizaciju i rad Odeljenja (čl. 5). Članom šest ovlašćeno je

[11] APf, *Zapisnik sa sednice Fakultetskog veća od 26. juna 1972. godine*, 7–9.

Fakultetsko veće da daje objašnjenja i uputstva za primenu i sprovođenje ove odluke. Prema odredbi člana sedam, ova odluka je imala da važi od dana potpisivanja ugovora iz člana četiri, a stupala je na snagu danom potvrde od strane Skupštine SR Srbije.

Nakon usvajanja Odluke, dekan je predložio da se u dnevni red uvrsti posebna tačka „Donošenje odluke o broju studenata za upis u prvu godinu studija Odeljenja u Kragujevcu u školskoj 1972/73. godini". Ovo je bilo usvojeno i nakon diskusije Fakultetski savet je doneo pomenutu Odluku. Član 1 propisao je da se na Odeljenje beogradskog Pravnog fakulteta u Kragujevcu „može upisati do 200 redovnih i neograničen broj vanrednih studenata". Uslove upisa i način izbora kandidata imao je odrediti Savet Fakulteta konkursom (čl. 2). Član 3 je predvideo da tekst konkurs za Odeljenje u Kragujevcu bude isto kao za Pravni fakultet u Beogradu.

Fakultetski savet je raspisao konkurs za prijem studenata „na Pravni fakultet u Beogradu – za Odeljenje u Kragujevcu u prvu godinu studija školske 1972/73. godine". Predviđeno je da se upiše do 200 redovnih studenata. Odabir kandidata bi se vršio prema uspehu u gimnaziji „i to tako što bi se najpre primili kandidati koji su gimnaziju završili sa odličnim i vrlodobrim uspehom, s tim što bi se za školsku 1972/73. godinu uzeo u obzir i uspeh na završnom ispitu (maturi), s obzirom na promenjeni sistem polaganja i sadržinu maturskog ispita u gimnaziji". Prijem kandidata imao se vršiti po sledećem redu:

„1. Dobitnici Vukove ili njoj po rangu ravne diplome;
2. kandidati koji imaju odličan uspeh u najmanje tri svedočanstva bilo kog razreda gimnazije ili završnog ispita;
3. kandidati koji imaju odličan uspeh u dva svedočanstva bilo kog razreda gimnazije ili završnog ispita i najmanje jedan vrlodobar uspeh;
4. kandidati koji imaju odličan uspeh u jednom svedočanstvu bilo kog razreda gimnazije ili završnog ispita i najmanje dva vrlodobra;
5. kandidati koji imaju odličan uspeh u svedočanstvu o završnom ispitu i četvrtom razredu gimnazije;
6. kandidati koji su završili Višu vojnu akademiju;
7. kandidati koji su završili drugi fakultet;
8. kandidati koji imaju vrlodobar uspeh u svih pet svedočanstava gimnazije;
9. kandidati koji imaju vrlodobar uspeh u najmanje tri svedočanstva gimnazije;

10. kandidati koji imaju vrlodobar uspeh u najmanje dva svedočanstva gimnazije;
11. kandidati koji imaju vrlodobar uspeh na završnom ispitu i četvrtom razredu gimnazije;
12. kandidati koji su položili prijemni ispit kandidata bez propisane školske spreme na ovom Fakultetu."

Ukoliko broj od 200 ne bi bio popunjen iz kategorije odličnih i vrlodobrih kandidata, to bi bilo učinjeno „iz grupe svih ostalih kandidata, tj. onih koji su gimnaziju završili sa dobrim i dovoljnim uspehom i to prema proseku ocena svih predmeta iz svedočanstava do četvrtog razreda gimnazije i svedočanstva završnog ispita".

Odeljenje beogradskog Pravnog fakulteta u Kragujevcu primalo je te školske 1972/73. godine neograničen broj vanrednih studenata: 1) kandidate koji su završili gimnaziju sa završnim ispitom; 2) kandidate koji su diplomirali na drugom fakultetu; 3) kandidate koji su završili Višu vojnu akademiju, i 4) kandidate koji su položili prijemni ispit za kandidate bez propisane školske spreme za upis na Pravni fakultet. Kandidat koji je želeo da bude primljen za vanrednog studenta trebalo je da bude u radnom odnosu ili da bude prijavljen Zavodu za zapošljavanje ili da iz opravdanog razloga ne može da studira kao redovan student (primera radi, bolest dužeg trajanja, uporedno studiranje i slično). Po završetku prve godine studija mogao se vanredni student, ako želi, upisatu u drugu godinu studija kao redovni student.[12]

Skupština SR Srbije je 14. jula 1972. godine donela Odluku o potvrdi Odluke o osnivanju Odeljenja Pravnog fakulteta u Beogradu, sa sedištem u Kragujevcu.[13]

Konačno, Pravni fakultet u Beogradu i Opština Kragujevac su zaključili ugovor „o finansiranju Odeljenja Pravnog fakulteta u Beogradu, sa sedištem u Kragujevcu" 26. jula 1972. godine. Opština se obavezala da će odmah „obezbediti sredstva za normalan rad Odeljenja", pre svega prostorije za korišćenje, „deo zgrade bivše Učiteljske škole sa potrebnim pripadajućim prostorijama u ukupnoj površini od oko 2.500 kvadratnih metara", kao

[12] APf, *Zapisnik sa sednice Fakultetskog saveta od 29. juna 1972. godine* (koji je sadržao „Odluku o osnivanju Odeljenja beogradskog Pravnog fakulteta u Kragujevcu" i „Konkurs za prijem redovnih i vanrednih studenata na Pravni fakultet u Beogradu – za Odeljenje u Kragujevcu u prvu godinu studija školske 1972/73 godine"), 2–5.

[13] APf, *Odluka o potvrdi Odluke o osnivanju Odeljenja Pravnog fakulteta u Beogradu, sa sedištem u Kragujevcu Skupštine SR Srbije od 14. jula 1972. godine.*

i potrebna finansijska sredstva za redovnu delatnost. Pravni fakultet u Beogradu se obavezao da će blagovremeno da organizuje i redovno održava nastavu i ispite na Odeljenju.[14]

Na osnovu „preporuke Univerziteta u Beogradu kojim se apeluje na fakultete da se primi veći broj studenata od konkursom određenog broja", a posle izlaganja upravnika Odeljenja u Kragujevcu prof. Ž. Đorđevića, Fakultetsko veće je na sednici 29. septembra 1972. godine odlučilo da se na prvoj godini studija Odeljenja beogradskog Pravnog fakulteta u Kragujevcu „poveća broj redovnih studenata od 200 na 280 redovnih studenata". Na istoj sednici Fakultetskog veća su donete još dve odluke vezane za Odeljenje u Kragujevcu: prva, da će vanredni studenti doprinos uplatiti na žiro račun Odeljenja i druga, o formiranju komisije za prijem jednog službenika za rad u Odeljenju u Kragujevcu.[15]

Svečano otvaranje prve školske godine na Odeljenju beogradskog Pravnog fakulteta u Kragujevcu je održano 23. oktobra 1972. godine. Koliko je značaj otvaranje Odeljenja imalo za grad Kragujevac svedoči i to da je uvršteno u program Oktobarskih svečanosti.

O otvaranju Odeljenja u Kragujevcu u arhivi matičnog Pravnog fakulteta ostao je trag u duhu tadašnjeg suvoparnog birokratskog rečnika: „Posle niza diskusija i razmatranja pitanja, a u zajednici sa Opštinom Kragujevac i uz saradnju republičkih organa, doneta je odluka o obrazovanju Odeljenja u Kragujevcu, kao posebne organizacije udruženog rada u sastavu Pravnog fakulteta u Beogradu. Isto tako obezbeđeno je i izvođenje nastave na prvoj godini studija, a perspektivno i na narednim godinama."[16]

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[14] *Pravni fakultet 1976-2016,* Kragujevac 2016, 27–28.

[15] APf, *Zapisnik sa sednice Fakultetskog veća od 25. septembra 1972. godine*, 8.

[16] APf, *Izveštaj o radu Fakulteta u školskim godinama 1971/72. i 1972/73,* 7.

/PRIKAZI

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Demarais, Agathe. 2022. *Backfire: How Sanctions Reshape the World Against U.S. Interests*. New York: Columbia University Press, 293.

> 'We can shut down the Turkish economy.'
> US Secretary of the Treasury
> Steven Mnuchin, October 2019.

After browsing just the book's front cover, the reader wonders: how on earth can US (economic) sanctions backfire? How it is possible that the most powerful nation in the world, a nation that complacent contemporary American political thought (Mandelbaum 2022) considers a hyperpower, has been wilfully introducing something that backfires and has reshaped the world against US interests? What are the hidden pitfalls of the US economic sanctions that have made them backfire? Why are the US decision-makers unable to spot these pitfalls? Or, perhaps, they can, and they already have, but they just do not care?

Agathe Demarais, the Global Forecasting Director of the *Economist Intelligence Unit*, boldly confronts this conundrum in an uncompromising manner, without evading a single relevant issue. At the very beginning of the book – in the Preface – the author spells out the reasons why the US government, both the executive and legislative branches of it, has been

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imposing economic sanctions against so many countries and so frequently in the past several decades. The first is that the sanctions are a quick way for the United States to demonstrate resolve and to punish what is considered unacceptable behaviour by some countries and their decision-makers. Although it is a good selling point for sanctions for the US public, demonstrating the nations' decisiveness on the international stage, these swift moves are usually hasty, without thorough and meticulous consideration of the direct and side effects, let alone that some side effects can be discovered only *ex-post*, but even then, the 'ripple' effects of sanctions remain understudied, as the author suggests.

There is no universal blueprint for 'good' sanctions, those that are efficient and with moderate adverse side effects. As the author demonstrates throughout the book using numerous case studies of US sanctions in recent history, each situation is specific: the countries against which sanctions are imposed and their economies are different, as are the political institutions, the aims of the sanctions differ (both those announced and those hidden), therefore there are no ready-made, off the shelf solutions for 'good' sanctions. Nonetheless, meticulous consideration takes time, inevitably undermining the first selling point of the sanctions – they are no longer the swift way. In terms of political rating, this is a very important feature, especially if the public is aroused – by media reports, social networks frenzy and advocacy of NGOs – to 'do something' mode. Because 'do something' is actually shorthand for 'do something and do it *right now* without considering the consequences'.

The second selling point of the US sanctions, according to the author, is that sanctions are a low-cost policy. On the one hand, only a handful of civil servants are needed to draft sanctions and not many more for their implementation. Demarais points out that the burden of implementing US sanctions falls on multinational (real sector) companies and banks, which shoulder lost opportunities and compliance costs. This is a refreshing view compared with the mainstream academic contributions on sanctions (e.g. Mulder 2022) which completely neglect the burden of sanctions on the business world, not only on US-based businesses but on businesses regardless of where they are located. Furthermore, in addition to the lost business opportunities and increased transactions costs, in the numerous case studies the author provides ample evidence that US sanctions have been inconsistent over time regarding their application, creating substantial

uncertainty when sanctions are not imposed at all, declining expected returns on investments and other business endeavours, decreasing both international trade and investment flows, and growth rates.[1]

On the other hand, Demarais points out that the immediate political and human costs of sanctions to the US also appear to be low, making them more attractive than other forms of coercion in international relations, such as military intervention. Sanctions fill the policy void in the diplomatic space between ineffective declarations and potentially deadly full-fledged military operations. 'With sanctions, the U.S. administration can pressure countries to comply with its demands from the safety of Washington' (p. x). Naturally, the human costs to the population of the country that the US sanctions are imposed on are not of concern to the US public, so it is also not of concern for US decision-makers, as the politicians have constituents to please and appearing to act decisively to defend US interests is usually a vote winner. The reader, supporting this line of argumentation, could even accept it from another viewpoint. Who (in America) cares about the well-being of some people in some 'far away country'! Furthermore, the difference between the present 24/7 media and social networks coverage of ostensible villains around the world and Neville Chamberlain's time is substantial – punishing people in some nasty country boosts the approval ratings of the US policy-makers who impose the sanctions. They deserve it – justice is done! After all, it was the Serbs who supported Milošević and the Russians who have supported Putin. Considering the (negligible) cost side, it is not surprising that sanctions have become so popular in the US over the past several decades.

Finally, the author points out that US sanctions have proven to be effective in persuading countries to alter their behaviour and refers to Iran as a case in point. 'If sanctions had not put tremendous pressure on the Iranian economy, it is doubtful that Tehran would have ever agreed to sign the 2015 nuclear deal' (p. x-xi). Well, the reader understands this insight as a selling point of the sanctions for the US policy-maker, meaning the sanctions *can* be efficient, i.e. effective in the pursuit of US foreign policy goals. The point is that the author provides ample evidence throughout the book that most US sanctions have not been efficient, even counterproductive in the majority of cases.

[1] The author points out that, for example, despite lifting the sanctions against Iran in 2015, European firms remained wary of re-entering the Iranian market as they all thought the United States would not stay true to its word and would soon reimpose sanctions on the Islamic republic. They were correct, proving how credible the deterrent effect of the sanctions is, even if they are not in place.

With these political incentives in mind, the author specifies the aim of the book. 'This book is not for or against sanctions. It does not take a view on whether the United States should resort to sanctions when it feels that its interests are being threatened. However, if it wants to ensure the long-term effectiveness of arguably its most powerful economic weapon, America has to build a clear picture about the side effects of sanctions and of how these shape the strategies of companies, allies, and enemies across the world' (p. xii).

The aim of the book is so relevant, because at the end of June 2020 the US government had around 70 sanctions programs, targeting more than 9,000 individuals, companies, entire countries, and economic sectors in virtually every country in the world (Eineman 2020). The author points out that some sanctions focus on non-state actors, such as Islamist terror groups, Latin American drug cartels, and Syrian warlords. Other programs apply to whole countries, such as Venezuela, Cuba, or North Korea. Iran and Russia are by far the most targeted nations, subjected to thousands of sanctions designations, probably with Russia taking a comfortable lead following its 2022 aggression in Ukraine.

Part One of the book (*Sanctions Genesis*) starts with a brief history of sanctions, with the first sanctions of the modern era – Continental Blockade, i.e. Napoleon's trade sanctions against Great Britain – with two main takeaways. First, it was not effective, since the French Navy was not capable of imposing a thorough naval blockade of the British Isles, hence Great Britain readjusted its overseas trade routes,[2] but also smuggling goods to and from continental Europe, making the Continental Blockade ineffective. Lesson#1: countries under sanctions adapt in order to evade them or at least to lessen their impact. To what extent they will succeed depends on the many factors, the reader would add – there is no unambiguous answer. The second takeaway is that the Continental Blocked hurt the French economy and its public finances. Lesson#2: 'Sanctions do not harm only their intended targets: the measures often cause ripple effects and may incur costs for the country that imposes them, too' (p. 5).

Fast forward to the 1960 and the early stage of the US sanctions, this time against Cuba, as the US trade embargo imposed by President Dwight Eisenhower, in response to Cuban leader Fidel Castro's decision to

[2] There is a significant difference to a situation 130 years later, with German unrestricted submarine (U-boat or *U-boot* from *Unterseeboot*, in naval parlance) warfare that almost accomplished nearly impregnable naval blockade of the British Isles. In words of a key decision-maker (Churchill 1949, 529): 'The only thing that ever really frightened me during the war was the U-boat peril'.

nationalize three American oil refineries. The author points out that the real, though not disclosed objective of the sanctions was a regime change in Havana. With American companies absorbing 73 per cent of Cuba's exports and providing 70 per cent of its imports, to the US policy-makers the trade embargo seemed a lethal weapon against the regime in Havana. Nonetheless, there has been no trade embargo imposed by the Soviet Union, countries of Western Europe and Canada, so Cuba adjusted to the US sanctions and start trading with all other nations (Lesson#1). This took its toll, a country cannot get trade preferences and aid from the Soviet Union for nothing, but the main mechanism that the US policymakers hoped would work – pain inflicted on the population would inflict popular unrest and removal of Castro from office, with a more US-friendly regime stepping in – simply did not occur.[3] In short, Fidel Castro died in office of the old age, but the regime remind. Nonetheless, all the sanctions against Cuba are still in place, despite all the evidence that they have not been effective, because the US policymakers are sending a message to the world: we are never wrong. Under that façade, US policy-makers learned the lesson that sanctions must be global in order to work. That is basically the origin of contemporary US secondary sanctions, which are addressed later in the book and this review.

The author points out that it is difficult to assess the effectiveness of sanctions, 'given that we do not have the counternarrative: no one knows what would have happened if sanctions had not been imposed in the first place' (p. 7). Well, counterfactual analysis is rather common in contemporary historiography, and although it is not exact (let alone failproof), it provides some framework for analysis. Fidel Castro attempted to establish normal relations with the US in the early stage of his rule, and it is undoubted that the trade embargo pushed him closer to Moscow and away from the US. Perhaps the outcome would have been the same without the US sanctions, but it is evident that they did not help achieve US strategic goals.

Trade embargoes, a traditional mechanism of sanctions, can be circumvented in different and imaginative ways (Early 2015), and the author provides ample examples as evidence for the insight that trade flows are notoriously difficult to oversee, especially in remote corners of the world. It was the US administration that also realised that. Hence, according to Demarais, financial sanctions, which target banking ties, were born. These

[3] A simple truth is that when the ruler acknowledges that the aim of the sanctions against his country is regime change, he has no incentives to cooperate – he is doomed whatever he does. The sanction then, with him on the throne, and with a little help from government propaganda, become a cohesive factor for the society, breeding xenophobia, and proving to be a general excuse for all the disasters occurring in the country.

enable the US Treasury's Office of Foreign Assets Control (OFAC), which was created in 1950, but at the time fairly innocuous, to become the main star of the US sanctions show.

The point is that trade is an exchange: the flow of products is accompanied by the flow of money, and the latter is channelled by banks. Hence, follow the money. International trade is done to a great extent in US dollars, directly or indirectly, because of the depth and liquidity of the US dollar markets, meaning that transactions are done via a corresponding account in one of the US banks. Furthermore, according to the author, OFAC has initiated a secret partnership with SWIFT, the Belgium-based cooperative that provides the infrastructure to process financial wires around the world. The US administration sent a strong signal, not only to the countries under sanctions and specific entities within the country, but to the international business community, especially multinationals and banks: Big Brother is watching you! In other words, the US Treasury monitors all the transactions, both legal and illegal, and its weapon (cutting access to the US dollar with devastating business effects) is locked and loaded. Hence many Western banks, according to the author, think twice before clearing wires involving companies located in a country that is targeted by the US sanctions, such as Iran.

With all the sanctions mechanisms in place, and based on the recent US experience, the author concludes that there are four factors that 'may help to determine whether sanctions might work (or not): how long they have been in place; whether they have a narrow or a broad goal; the preexistence of trade ties between the United States and the targeted country; and, perhaps most important of all, whether allies are aboard' (p. 39). These questions are intuitive as are the answers, i.e. the necessary conditions for the US sanctions to work. Answering these questions in every specific case of sanctions can provide some guidelines, something like road signs for the case-by-case evaluation and forecasting whether the sanctions will work, but the reader should not mistake them for an academic exercise of producing a 'general' theory of the sanctions' effectiveness.

The reader's concern is the goal of the sanctions because in many cases there is a hidden agenda and the goal that is publicly specified is not the (only) goal of the US policy. In some other cases, the goal of sanctions is specified so broadly that it is very difficult to evaluate, as in the foremost case, whether the sanction's goal has been accomplished. For example, the incumbent US Secretary of Defence Lloyd Austin specified in late April 2022 that '[w]e want to see Russia weakened to the degree that it can't do the kinds of things that it has done in invading Ukraine' (Ryan, Timsit 2022). Not only is that goal extremely broad – weakening a nation is a much broader goal

than even a regime change – and it is virtually impossible to unambiguously conclude whether it has been accomplished, but also it cannot be achieved in the short run: weakening Russia means years of sanctions. Considering the present US sanctions against Russia, they do not fulfil the third condition, as the trade ties between Russia and the US are not substantial, and as to the fourth one – not all the allies are on board and some relevant players (e.g. China) are not allies at all. Nonetheless, with all these negative answers, the reader would hardly bet that the US sanctions against Russia will eventually fail.

Part Two of the book (*Sanctions Crossfire*) deals with the side effects ('ripple' effects, as the author specifies) of US sanctions. The big and true picture of sanctions should include all these effects, not only the goal of the sanctions and the evaluation of whether the goal has been achieved. Even if it is achieved, perhaps the total costs of that achievement outweigh the benefits.

The author has no second thoughts: sanctions entail substantial collateral damage, in military parlance. The point is that the collateral damage – by definition unintended consequences – is misleading. The author doubts that it is possible to design effective sanctions that do not harm civilians 'Sanctions aim to put pressure on the populations of targeted countries to prompt policy changes by their governments. It follows that penalties that do not inflict pain would probably be worthless. This means that by design, sanctions are weapons that have damaging humanitarian consequences' (p. 66). It is true, according to the author, that the sanctions produce fewer deaths than conventional, fully fledge wars, but they kill (civilians) nonetheless. Furthermore, conventional war is regulated by international law, but US sanctions are not. 'Under the Geneva Convention, weapons must discriminate between civilians and combatants. Even in war zones, soldiers cannot do as they please; they must abide by rules that seek to avoid the killing or harming of innocent civilians' (p. 66). The author provides ample evidence of humanitarian crises and the suffering of civilians, including children in many counties that have been under US sanctions.[4]

The other important point is that the US sanctions substantially affect not only firms located in the USA but also firms in other allied countries. According to the author, there are two main mechanisms for that

[4] US officials have been aware of that. When confronted in 1995 with the information that a substantial number of children died in Iraq because of the sanctions, the then–US ambassador to the United Nations, Madeleine Albright, declared, according to the book, that this death toll had been 'worth it', given the need to apply pressure on Saddam Hussein.

impact: extraterritorial penalties and secondary sanctions. As to the US extraterritorial laws and regulations, they are nothing new. In 1789 the United States adopted the Alien Tort Statute, an example of such legislation. Nonetheless, the application of such legislation has become more frequent in recent decades and, according to the author, since 2009 the OFAC has imposed more than USD 4 billion in fines on foreign companies for violating sanctions; over the same period, US firms were fined less than USD 300 million for evading sanctions (Early, Preble 2020).

Secondary sanctions, the other mechanism for impact on non-US businesses is straightforward. They threaten to punish foreign businesses, wherever they are located in, including US-allied countries, that do not respect US sanctions against individuals, entities, and nations. Firms that are placed under secondary sanctions 'lose access to the US dollar for their international transaction and must leave the American market. In addition, their executives may be subject to individual penalties' (p. 71). Secondary sanctions can be imposed on both firms from the real sector and financial sector, and it is international banks with global networks that are especially vulnerable to these sanctions. All these companies are caught in the sanctions' crossfire.

The author explains that there are two main motives for these measures. The first one is the Cuban experience in which Cuba adjusted to the US sanctions by switching to trading with other countries, making the sanctions virtually ineffective. Hence international sanctions are needed for the isolation of a country to be effective. Sanctions imposed by the UN Security Council would do the trick, but the problem for the US administration is the veto power of Russia and China which has frequently undermined US international relations goals. The way out of this awkward situation for the US government is to use extraterritorial penalties and secondary sanctions.

The other reason for them to be applied is US domestic politics. It is US businesses that are subdued by the US sanctions, as American firms cannot do business with some or all firms in the counties that are under US sanctions. They lose the market and lucrative business deals to their competitors from countries that have not imposed sanctions. Accordingly, US businesses have every incentive to lobby against US sanctions, for the obvious reason – they undermine their business. The US government, especially the legislative one, is very sensitive to business lobbying. Hence, the obvious way out of the conundrum – how to simultaneously demonstrate decisiveness to the domestic constituency by imposing sanctions on other countries and keeping content the US businesses that are against the sanctions because of the restrictions – is to impose the same restriction on non-US businesses. In short, this is a lose-lose equilibrium.

There is more bad news to come. With all the companies worldwide becoming liable to US sanctions, the number of people tasked with keeping track of legal requirements regarding sanctions has increased substantially in the past two decades. 'Nowadays, about 15 percent of the staff of a major bank works in the compliance department, making sure that all transactions respect international rules. For a major bank such as Citi, this represents 30,000 people ... HSBC's risk and compliance budget stands at US$1 billion per year' (p. 67). This means increasing transaction costs and decreasing economic efficiency – the resources dedicated to compliance could have been allocated to productive ends, producing goods or services for the customers, or being engaged in research and development (R&D) – innovating, either improving existing products or introducing completely new products. These costs are aggravated by rather nebulous US sanctions provisions, intentionally fostering uncertainty, for more leverage for the government in the implementation, generating augmented deterrence.

Furthermore, the author points out, the impact of US sanctions is felt well beyond those firms that are caught in the sanctions' crossfire. If the target of sanctions is producers of commodities, either countries or specific large producers, then substantial ripple effects are created on the commodities markets. The impact of the downstream side effects of these sanctions, on all producers that directly or indirectly purchase commodities, can be massive and ubiquitous. The author demonstrates that in a few case studies, with the global aluminium market and sanctions against Russia-based company Rusal being sanctioned as the most important one. The consequences were as grim as unintended, as the sanctions ended up having unexpected side effects on commodity markets, and consequently on hundreds of manufacturing and related companies in dozens of countries. Furthermore, some of the side effects were counterproductive. 'Ironically, sanctions looked set to benefit Chinese metals producers; they had ample spare capacity and made it clear that they were keen to fill the void left by Rusal. By sanctioning Rusal, the United States was penalizing global aluminum consumers while inadvertently supporting Chinese metals makers' (p. 93). Perhaps, some people in Washington DC still have not realised that these days China is America's main rival.

The saga of (already destroyed, by whomever, at the time of the publishing of the book) Nord Stream 2 is a long and telling story about US sanctions against Soviet/Russia gas pipelines to Western Europe, motivated by a blend of foreign policy and domestic lobbying considerations. The story started with the first Soviet–German attempts to establish a gas partnership, but it reached its pinnacle with Nord Stream 2. and all the US sanctions in all these cases have been of a stop-and-go pattern, without a clear goal, let alone a

roadmap for achieving the goal. Perhaps the crescendo was achieved with the arch-volatile Trump administration; the story told by the author is the one of its casualties. In addition to the companies, with exception of some US-based beneficiaries (gas suppliers), the main causality is the relations between the allies – America and Western Europe.[5] The fractures have been sustained, and most of them have at least healed, mainly courtesy of Russian President Putin's recent actions, but the scars remain. It is these scars that will be a cost component of the projections of the US allies for a very long time. These costs only increased with Trump's presidency and its aftermath, as none of the US allies can 'be sure that the United States will never elect another president who wants to make America great again at the expense of everyone else?' (p. 133). The reader wonders what happened to the cost-benefit analysis that was initially introduced precisely in America. It seems it is not used in Washington for foreign policy decisions.

Part Three of the book (*Sanctions Blues*) starts with a review of the recent developments on the sanctions-busting front. The point is that, according to the author, in recent years Washington's enthusiasm for sanctions has fuelled the development of state-backed mechanisms aimed at circumventing America's coercive measures. 'U.S. allies and foes alike are openly taking steps to evade American sanctions, which they often believe are an abuse of power. These sanctions-busting mechanisms vary, but they have one thing in common: they all seek to build alternative financial channels that bypass the U.S. dollar' (p. 125). The US dollar's omnipresence around the world, explains the author, is due to the lack of direct links between central banks of many countries, hence the US currency, with the depth of its liquidity, is a suitable intermediator in currency exchanges. This starts to change with the introduction of currency swaps, financial derivatives that enable the direct exchange of currencies. The financial institution with the most currency swap lines is – surprise, surprise – the Chinese central bank.

'Yet it would be of no use for them to get rid of the U.S. dollar if they continue to use Western financial channels, such as Swift. The undisputed leader for financial messaging services, Swift is a cooperative that links virtually all banks' (p. 129). It depends on access to the US dollar, hence SWIFT is very cooperative with the US financial authorities, enabling them to monitor all

[5] After the US (Reagan administration) decision to retroactively introduce sanctions on Western companies involved in pipeline construction and maintenance, in July 1982 the UK prime minister Margaret Thatcher declared: 'The question is whether one very powerful nation can prevent existing contracts from being fulfilled. It is wrong that it should prevent those contracts from being fulfilled.' It was the closest US ally in Europe at the time of 'special relations', at least between the leaders (Reagan and Thatcher) of the two countries.

financial transactions and, in that way, enforce US secondary sanctions. As a way around this possible hurdle in sanctions-busting operations, China started to build its own financial messaging service, called CIPS, to process international payments in renminbi. It is still in the infant stage, it processes only a small fraction of SWIFT transactions, but according to the author, it has been appealed to 1,300 banks in 100 countries. It is not a global competitive threat to SWIFT, but the banks that are or can be under US sanctions in what the US administration considers rogue countries, now have an alternative. That was the initial aim. In due course, China's government will be able to monitor a substantial chunk of financial transactions in the world, especially in the countries that are a neuralgic point from the Chines diplomacy point of view.

The US sanctions enforcement effectiveness crucially depends on the dominance of the US dollar as the global reserve currency. Nonetheless, recent developments on the currency front, according to the author, could undermine that leverage. The first development of the kind is the advent of cryptocurrencies, those that are not controlled by central banks, i.e. no government is involved in any way. The author points out that rogue counties already have used cryptocurrencies in trade to avoid the US dollar and the potential US sanctions implementation mechanism. The reader does not share the author's (modest) optimism about the prospects of cryptocurrencies, not only regarding the sanctions-busting mechanism but also as a method of payment. It seems to the reader that they will remain (if they remain at all) only as an investment vehicle. The other development is much more important – digital currencies, those issued electronically by central banks, implying that every customer, household or company, at home or abroad, has a current account with the central bank. It is not helpful that in some segments of the chapter, the author confuses cryptocurrencies and digital currencies. Focusing to the latter, the author claims that the biggest 'leap forward' in digital currencies is unsurprisingly being recorded in China, with the People's Bank of China gradually introducing the digital renminbi. With such a constellation, two transaction parties located anywhere in the world can conduct financial transactions without intermediation based on the US dollar. One of the motives for such a move is obviously US sanctions-busting since it eliminated the US dollar as an intermediary and circumvents US financial monitoring capabilities. The other motive is Beijing's obsession with monitoring financial transactions in general, especially those of its own citizens. The third motive, the author points out, is that with the development of the digital renminbi and further advancement of China as an economic powerhouse, that very currency will become a suitable intermediary currency for international transactions, enabling the Chinese

government to be in the current position of the US administration. Although the book is about US sanctions, no government in the world dismisses economic sanctions for accomplishing its international relations aims.

These aims need not be political – they can be fundamentally economic. The final two chapters of the book focus on the US sanctions against China, specifically against China-based businesses. This is a high-tech game: it is about semiconductors, i.e. microchips, which are components of any electronic products, and there is a growing share of products that are electronic these days. The restriction on China's import of state-of-the-art semiconductors and the hurdles for Chinese firms to produce them on their own is basically an export-control mechanism used in the showdown between the two countries. 'The conflict between America and China is one for economic dominance between an incumbent economic superpower and its rising challenger' (p. 162). Obviously, the primary goal of the sanctions is to prevent the economic challenger from becoming a superpower. Accordingly, crippling Chine's economy – to the extent America can achieve this – is the goal itself and not the mechanism to accomplish some political aim.

This is a U-turn for US foreign policy. It was US President Woodrow Wilson, referred to in the book as the person who introduced sanctions in international law, whose idea was that the threat of sanctions would discourage nations to go war. A century later, the US administration is using sanctions in the economic confrontation with another country, what the author referred to as 'rolling out a revamped version of economic imperialism' (p. 162), with a bipartisan consensus at home.

The author rightly points out that economic imperialism undermines free trade. The trade war that America started with China demonstrates precisely that. Decoupling from China, as a US strategy, and the sanctions that are considered as a crucial method for that decoupling, are conceived in corridors of power in Washington, not in the boardrooms of US companies, as the latter are aware of all benefits of the international division of labour. It seems that it is not quite evident to the US consumers that the division of labour with China has brought cheaper and more innovative products to the market. The author's hint that decoupling from China would backfire on America is quite convincing. What remains to be seen is what the relative lobbying power of business will be, compared to the pressure from the electorate, which is obviously engulfed in an anti-China frenzy.

Taking all this into account, the reader wonders whether the US political elite is aware of what they is doing and what are the consequences of the policies of the sanctions that it is implementing, not only towards China. The

author provides an answer, refereeing to the findings of a US government office: 'In a 2019 report, the Government Accountability Office (GAO) noted that the U.S. government does not know whether existing sanctions programs work, and what effects they have. This is not surprising. The U.S. Treasury does not publish studies on the effectiveness of sanctions before they are imposed or after they have been in place for some time. Nor do the State and Commerce Departments. In fact, such assessments do not exist: before imposing sanctions, an administration checks only whether they could cause immediate humanitarian damage' (p. 38). Hence, the answer should be – it does not know.

Nonetheless, the author refers to the results of a Congressional review of all U.S. sanctions programs since 1970 (Elliott 1997), which demonstrates that targeted countries altered their behaviour in the way that the US government hoped that they would only 13 per cent of the time. In an additional 22 per cent of cases, the policies of the sanctioned states became somewhat (but not fully) more palatable to Washington. Hence, the reader, following the insights of the others (Whang 2011) concludes – the elite knows but just does not care.[6]

Perhaps the explanation is that the US decision-makers take care only of short-term political benefits, related to retaining or hopefully improving their popularity rating, at least before the next elections. US sanctions have proved to be beneficial for them. With such a focus, it is simply irrelevant what are the costs of these sanctions imposed on other counties, international companies, people around the world, whoever. The only exception may be (but it is not always the case) the short-term interest of well-organised businesses, if their lobbying is more effective that the beneficial effects on the US

[6] The author rightfully points out that there is a vicious circle of sanctions. A reasonable questions is: if the sanctions have not achieved the goals, should they be lifted? If the answer is yes, this would diminish the US leverage, because the author points out this will send a clear signal to all sanctioned countries (present and future) that it is reasonable to stick to whatever they stick to for a few years and then Washington will lift the sanction. US administration, quite reasonably, does not want to provide such an incentive, so it is a vicious circle in which the US sanctions, though ineffective stands for decades. Furthermore, it would not go well with the US constituency to lift the sanctions (symbol of the US determination in the international relation) without achieving results. Such a vicious circle, concludes the reader, can be avoided only *ex-ante*. Either by introducing sanctions that are well thought out, hence they accomplish the goal, or do not introduce them at all. Both options, as clearly explained in the book, contradict the domestic political motives for the introduction of US sanctions.

decision-makers' popularity.[7] In this short-term time frame, the ripple effects, most of which are long-term, are also irrelevant. This has created, the reader concludes, a sanctions-obsessed mentality in Washington, considering US sanctions as the panacea for political popularity ratings. And, based on the evidence from the book, all that has backfired horrendously.

The author rightfully considers the backfire of the US sanctions from the perspective of the effectiveness of future US sanctions. 'The time of peak U.S. sanctions has passed. American diplomats will soon be deprived of their favorite weapon to cajole, threaten, or punish U.S. enemies. ... Washington's lack of interest in the side effects of its unilateral policies also united both friends and enemies against U.S. sanctions. For American policy makers, the loss of the previously all-powerful sanctions weapon will be a seismic change' (p. 200). Quite a convincing prophecy! Some US sanctions enthusiasts will not like it. Good! Perhaps they will start to question their approach.

The reader, not disputing this kind of backfire, finds it interesting to consider America's long-term position in the world. For decades America was a beacon for many people around the globe. Friendship with America was important to many nations, for good reason. It was America who saved Europe twice (from various perils, both times German), it was America who speeded-up the decolonisation process, it was America who enabled the swift and efficient reconstruction of Europe after the Second World War, in the Cold War it was America that stood for freedom and democracy, it was American pilots who died in the crashes during the Berlin Airlift. For decades America has been fighting for the minds and hearts of the people in other countries. Nonetheless, that has changed. This book and numerous episodes mentioned in it demonstrate that these days America just does

[7] It is illustrative that after the introduction of the 2022 sanctions on Russia, all the government financial assets in US banks were frozen, with the explanation that such a move was a method of denying Russia's government a source for funding the war in Ukraine. It was expected that Russia would have been denied payment of the obligations due stemming from its US dollar-nominated bonds because that would make Russia default and prevent any possibility of it borrowing money on the international financial market. Nonetheless, due to the lobby pressure of US bondholders, who would have lost their returns on Russia-issued bonds, the US Treasury effectively allowed Russia to service a chunk of its sovereign debt when it became due on 16 March 2022. The constellation of power changed, and the lobby pressure by the bondholders become less effective, hence Russia's further payments of the obligations due were not allowed, on account of the US sanctions. Accordingly, Russia defaulted on 27 June 2022, although the Russian government (The Ministry of Finance) tried to process the payments. The story produced a bitter taste around the world. On the one hand, the US administration declared the noble goals of US sanctions against Russia, on the other hand, these noble goals were side-lined when the lobby pressure of the US-based bondholders was strong enough.

not care about others and their perception.[8] Perhaps that is the reason why there are so many enemies of America (real or perceived) around the world. What is the reason for such a change? Perhaps it was the end of the Cold War.[9] Perhaps, it was the end of ideological competition. Perhaps, it was the complacency of being a hyperpower. Perhaps...

One way or the other, from idealism, from people like Woodrow Wilson and his global projection of America as a beacon of peace and democracy, FDR's 'Arsenal of Democracy', JFK's '*Ich bin ein Berliner*!', and Ronal Reagan's 'Mr. Gorbachev, tear down this wall!', America has become a country without any grand idea whatsoever, a country of Trumps and Bidens, who will be remembered only for their gaffes and uttered stupidities, such as Donald Trump's recommendations for COVID-19 treatment. Also, these days America is a country of the arrogance of its political elite, it is embodied in the bragging statement of the former US Secretary of the Treasury quoted at the beginning of this review: 'We can shut down the Turkish economy.' Well, Mr Mnuchin, in October 2019 you (plural) could possibly do that, and these days it is difficult to say, but if you (plural) are successful, Turkey will probably adapt, and Turkish businesses will probably readjust to the new circumstances. It will take some time, in the short run some GDP will inevitably be lost, but in the long run what would definitely come to stay for the foreseeable future is a lack of confidence in America, both its government and businesses, fostering anti-Americanism for generations. Hence, it is reasonable for someone who is an attested enemy of America to apply Dirty Harry's (Clint Eastwood) appeal to Mr. Mnuchin: 'Go ahead, make my day!'.

The book is riveting stuff for the reader. It encompasses case studies of many episodes of US sanctions in recent decades, starting with Cuba. Almost every case study is very well elaborated. It is not only a description of the situation, but a small story with *dramatis personae*, incentives for each of them, twists and turns along the way, building up the tension, and the outcome in the final act – if any, because some of these stories are still ongoing. Caveats are provided in each case, as are the takeaways that a

[8] It was a Serbian poet, at a literature event held in the mountains of Montenegro during the 1999 US lead NATO bombing of Serbia (known as the Kosovo War in Western historiography), who spelt out the sentence: 'Instead of being loved, America has decided that it should be feared'. Quite succinct (that is what poetry is about) and rather accurate.

[9] It was suggested (Kaempfer, Lowenberg 2007) that the collapse of the Soviet Union initiated a spurt of sanctioning activity because the country that introduced sanctions no longer needed to be concerned that its actions would exacerbate Cold War tensions between the superpowers' blocs.

meticulous observer can gain from it. In short, an abundance of high-quality and delicious food for thought. Not only about sanctions, but especially about contemporary America.

Another quality of the book is its emphasis on something that has been hardly mentioned before: the burden of US sanctions on businesses – not only US-based but especially non-US-based businesses and international companies. The segment of increased compliance costs (i.e. transaction costs) and lost entirely legitimate business opportunities due to fear of US sanctions, which are intentionally kept unclear to foster uncertainty – a situation that economic analysis of law labels as overdeterrence – is extremely illuminating. These insights were almost completely neglected in sanctions literature. Perhaps this is one of the most important inefficiencies created by the US sanctions, and definitely the most neglected one. And inefficiencies, i.e. increased costs, are passed through, at least up to a point (depending on the price elasticity of demand), in the higher prices for consumers.

For the reader accustomed to academic texts, reading this book was somewhat weird in the beginning. In a standard academic text, there is a coherent structure that moves precisely, almost like on the rails, from the departure point to the destination. Then, after a number of pages read, the reader realises that this book narration is similar to González Iñárritu's brilliant 2003 film *21 Grams*.[10] Everything is disclosed in flashbacks – various episodes – and exposed in seemingly random order, but as the film/book moves on, the big picture emerges. The movie deals with human tragedy. So does the book. There are no heroes and villains in the movie – the choices of the characters are constrained by destiny – there are only victims. In the book, there are many victims, definitely no heroes, perhaps some villains, but the reader is just not quite sure whether it is appropriate to paint weathercocks as villains. If something is to be blamed, then it is the short-term blindness of both the elected and the electorate, with a robust and nationwide feeling of American exceptionalism. Reading this book, it seems, can do nothing about the former. Perhaps, let us hope, it can do something about the latter.

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Aleksa ŠKUNDRIĆ, master*

Škulić, Milan. 2022. *Međunarodno krivično pravo: prostorno važenje krivičnog prava, krivično pravo međunarodnog porekla, međunarodna krivičnopravna pomoć, začeci krivičnog prava EU***. Beograd: Službeni glasnik, 833.**

Međunarodno krivično pravo je jedna od najmlađih pravnih disciplina uopšte. Suštinski, sve do kraja Drugog svetskog rata i potonjih procesa u Nirnbergu i Tokiju teško da se i može govoriti o njemu kao posebnoj disciplini. Štaviše, retke su države koje su se do danas i susrele sa njegovom praktičnom primenom u većem obimu. Ipak, budući da u to „neslavno društvo" spada i Srbija, imajući pre svega pretežno negativno iskustvo sa Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju, ne čudi to što se u srpskoj pravnoj literaturi proteklih nekoliko decenija pojavilo pojačano interesovanje za tu pravnu oblast.

Jedan od autora koji je svojim delima veoma doprineo utemeljenju i daljem razvoju srpske međunarodnokrivičnopravne misli jeste profesor dr Milan Škulić, sa sada već višedecenijskim iskustvom u toj disciplini. Osim većeg broja naučnih članaka, Škulić je tokom svoje univerzitetske karijere iz te oblasti objavljivao i radove monografskog karaktera, poput knjiga *Međunarodni krivični sud: nadležnost i postupak* (2005) i *Međunarodno krivično pravo* (2020). Delo *Međunarodno krivično pravo: prostorno važenje krivičnog prava, krivično pravo međunarodnog porekla, međunarodna krivičnopravna pomoć, začeci krivičnog prava EU* predstavlja krunu njegovog bavljenja međunarodnim krivičnim pravom kao disciplinom. Zapravo, čini nam se da nećemo preterati ako tu knjigu ocenimo i kao najsveobuhvatnije sistemsko delo iz međunarodnog krivičnog prava ikada objavljeno na srpskom jeziku. Međutim, osim nesumnjivo velikog značaja tog dela za razvoj

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srpske međunarodnokrivičnopravne teorije, ono takođe ima i određenu praktičnu vrednost, a pogotovo za rad državnih organa u Republici Srbiji, za koje je posebnim zakonom[1] predviđeno da postupaju u odnosu na određena međunarodna krivična dela, poput Tužilaštva za ratne zločine i specijalnih odeljenja Višeg, odnosno Apelacionog suda u Beogradu. Takav svojevrstan „spoj" teorijske i praktične orijentisanosti knjige i nije veliko iznenađenje, pogotovo kada se ima u vidu činjenica da je njen autor, redovni profesor Pravnog fakulteta Univerziteta u Beogradu, istovremeno i sudija Ustavnog suda Republike Srbije, te u tom kapacitetu upućen i na praktična, a ne samo na teorijska pravna pitanja.

Već se na prvi pogled na sadržaj knjige vidi jedna od njenih osnovnih karakteristika – izrazita sistematičnost. Autor se, naime, potrudio da obrađenu materiju konsekventno podeli na više nivoa, odnosno celina, čime se postiže njena izuzetna preglednost. U prvom redu, ceo sadržaj je podeljen na petnaest glavnih poglavlja, koja su dalje izdeljena na više manjih odeljaka.

Prvo poglavlje nosi naziv „Pojam, osnovna načela i izvori međunarodnog krivičnog prava". Kao što se već iz samog naslova vidi, u tom poglavlju Škulić nastoji da odgovori na neka od najapstraktnijih pitanja nauke međunarodnog krivičnog prava. U tom smislu se posebno ističe navođenje nemalog broja mogućih teorijskih shvatanja međunarodnog krivičnog prava u njegovom totalitetu i pojedinih njegovih delova, poput međunarodnog krivičnog procesnog prava. Kada je reč o načelima međunarodnog krivičnog prava, od posebnog je značaja podrobna analiza načela zakonitosti u međunarodnom krivičnom pravu i sa pravnoteorijskog i sa praktičnog aspekta (49–69).

U narednom, drugom poglavlju Škulić se bavi pravilima prostornog važenja krivičnog zakonodavstva. Naime, prema jednom, u istorijskom smislu najstarijem shvatanju pojma međunarodnog krivičnog prava, koje autor navodi i objašnjava u prvom poglavlju (35), ono se svodi upravo na ta pravila prostornog važenja krivičnog zakonodavstva.[2] U tom smislu je opravdano što je Škulić u ovom delu posvećenom međunarodnom krivičnom pravu u najširem smislu reči obradio i tu tematiku.

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[1] Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik RS* 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 – dr. zakon i 6/2015.

[2] Prema takvim shvatanjima, međunarodno krivično pravo bi, barem prema svojoj prirodi, bilo veoma slično međunarodnom privatnom pravu, budući da bi se svodilo na sistem svojevrsnih „kolizionih normi" čiji je zadatak da odgovori na pitanje u kojim se situacijama (koje mogu imati i određene elemente inostranosti) ima primeniti krivično pravo konkretne države.

Treće poglavlje sadrži veoma interesantan i izuzetno iscrpan prikaz istorijskog razvoja međunarodnog krivičnog prava. Najpre se analizira njegova „praistorija", sasvim retki istorijski primeri nekih suđenja koja su imala određene međunarodne elemente, da bi se potom prešlo na prve (doduše, neuspele) pokušaje uspostavljanja međunarodnog krivičnog prava kao posebne grane prava, te uporedo sa tim i prve (takođe neuspele) pokušaje međunarodnih krivičnih suđenja. Posebna pažnja je posvećena procesima u Nirnbergu i Tokiju nakon Drugog svetskog rata jer su to prva prava („uspela") međunarodna krivična suđenja. Dalje, Škulić se bavi *ad hoc* međunarodnim krivičnim tribunalima Saveta bezbednosti Ujedinjenih nacija, a posebno Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju,[3] a centralno mesto tog dela knjige zauzima njegova kritička analiza legalnosti i legitimnosti osnivanja tog tribunala (164–177). Imajući to u vidu, pun smisao dobija i autorova osnovna teza o istorijskom razvoju međunarodnog krivičnog prava i pravosuđa – reč je o jednom nepravolinijskom razvoju, a usvajanje Rimskog statuta i osnivanje stalnog Međunarodnog krivičnog suda pre se može razumeti kao početak jedne nove tradicije međunarodnog krivičnog prava nego kao nastavak stare, u kojoj su se pred organima međunarodnog krivičnog pravosuđa gonili ili samo pripadnici u ratu poraženih država (suđenja u Nirnbergu i Tokiju) ili je takvo krivično gonjenje bilo izrazito selektivno i pristrasno (kao, na primer, u slučaju osnivanja i prakse „Haškog tribunala").

Nakon istorije međunarodnog krivičnog prava, autor u četvrtom poglavlju prelazi na problematiku opšteg dela međunarodnog krivičnog prava.[4] To je veoma važan deo međunarodnog krivičnog prava koji je do sada, što u samom pozitivnom pravu, što u doktrini, u većoj ili manjoj meri bio zanemarivan u odnosu na neke druge delove te grane prava.[5] Zbog toga je i više nego opravdana pažnja koju mu je Škulić u svojoj knjizi posvetio. U suštini, on je u tom poglavlju obradio sva najvažnija pitanja koja se uobičajeno obrađuju u sistemskim delima posvećenim opštem delu krivičnog (materijalnog) prava, kao što su opšti pojam (u ovom slučaju međunarodnog) krivičnog dela i

[3] Imajući značaj koji je delovanje tog, kolokvijalno nazvanog „Haškog tribunala" imalo na Srbiju i, uopšte, na sve zemlje bivše SFRJ, razumljiv je Škulićev metod kojim on u celoj knjizi na odgovarajućim mestima ukazuje na određena pravna rešenja (materijalnopravna i/ili procesna) koja su postojala pred tim tribunalom. Sledstveno tome, u trećem poglavlju, koje je posvećeno istoriji međunarodnog krivičnog prava, autor obrađuje samo određena „opšta pitanja" koja se tiču tog tribunala.

[4] Pun naslov četvrtog poglavlja glasi „Opšta krivičnopravna pravila odgovornosti za međunarodno krivično delo (*opšti deo* međunarodnog krivičnog prava)".

[5] Poput posebnog dela materijalnog prava i procesnog prava, koja su primenjivana pred konkretnim oblicima međunarodnog krivičnog pravosuđa.

njegovi sastavni elementi, oblici učestvovanja u (međunarodnom) krivičnom delu i oblici odgovornosti za (međunarodno) krivično delo, osnovi isključenja odgovornosti za (međunarodno) krivično delo[6] i, naposletku, pitanje kazni i (ne)zastarevanja (međunarodnih) krivičnih dela. Imajući u vidu suštinsku partikularnost međunarodnog krivičnog prava, odnosno činjenicu da na trenutnom stepenu njegovog razvoja ne postoji univerzalno međunarodno krivično pravo već onoliko „međunarodnih krivičnih prava" koliko ima oblika međunarodnog krivičnog pravosuđa, autorova analiza se prvenstveno bavi pravilima opšteg dela krivičnog prava sadržanim u Rimskom statutu stalnog Međunarodnog krivičnog suda, kao do sada najznačajnijem obliku međunarodnog krivičnog pravosuđa. Ipak, na odgovarajućim mestima, autor s pravom ukazuje i na određena rešenja koja su postojala i u pravima nekih, sada već istorijskih oblika međunarodnog krivičnog pravosuđa te tako, primera radi, govoreći o institutu komandne odgovornosti, objašnjava i kritikuje njegovu najširu varijantu u istorijskom smislu, odnosno tzv. zajednički zločinački poduhvat koji je nastao kao plod prakse „Haškog tribunala".

U petom poglavlju[7] autor izdvaja određene zajedničke (opšte) karakteristike za sva konkretna međunarodna krivična dela, odnosno krivična dela koja imaju odgovarajuću međunarodnopravnu komponentu, te takođe iscrpno ukazuje na međunarodnopravni osnov regulisanja brojnih krivičnih dela u unutrašnjem pravu, poput pranja novca (član 245 KZ), povrede ravnopravnosti (član 128 KZ) itd. Potom se u šestom poglavlju[8] posebno obrađuje piraterija, i u pravnoistorijskom smislu kao najstarije međunarodno krivično delo i u smislu pozitivnog prava Republike Srbije (član 294 KZ), ali i neka druga krivična dela protiv bezbednosti javnog saobraćaja propisana krivičnim pravom Republike Srbije.

Sedmo poglavlje nosi naslov „Krivična dela koja spadaju u nadležnost Međunarodnog krivičnog suda". Shodno naslovu, Škulić sprovodi temeljnu analizu sva četiri krivična dela iz stvarne nadležnosti Međunarodnog krivičnog suda, što, imajući u vidu da su sva ta krivična dela veoma složena

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[6] Autor je pod taj termin, u skladu sa pozitivnim međunarodnim krivičnim pravom, podveo i osnove koji se u (evropskokontinentalnoj) doktrini označavaju kao osnovi isključenja protivpravnosti (osnovi opravdanja) i osnove koji se označavaju kao osnovi isključenja krivice (osnovi izvinjenja).

[7] Pun naslov petog poglavlja glasi „Posebni deo međunarodnog krivičnog prava – opšte karakteristike međunarodnih krivičnih dela/krivičnih dela koja imaju odgovarajuću međunarodnopravnu komponentu".

[8] Pun naslov šestog poglavlja glasi „Piraterija kao najstarije/tradicionalno međunarodno krivično delo i druga srodna krivična dela protiv bezbednosti javnog saobraćaja".

te da neka od njih imaju izrazito velik broj oblika, ne predstavlja lak posao. Pritom, svakom od njih autor najpre pristupa pravnoistorijskim metodom, da bi ih kasnije podvrgao klasičnoj dogmatskoj analizi. U osmom poglavlju[9] knjige obrađena su međunarodna krivična dela u užem smislu, sadržana u glavi XXXIV Krivičnog zakonika Republike Srbije.[10] To su krivična dela koja su komplementarna krivičnim delima propisanim Rimskim statutom. U tom smislu, izuzetak predstavlja jedino krivično delo agresivnog rata (član 386 KZ), koje se bitno razlikuje od krivičnog dela agresije propisanog Rimskim statutom, a to je posledica činjenice da Republika Srbija nije ratifikovala amandmane na Rimski statut usvojene u Kampali 2010. godine, kojima je, između ostalog, krivično delo agresije konačno bilo definisano.

Nakon obrade međunarodnih krivičnih dela u užem smislu koja su inkriminisana u unutrašnjem pravu Republike Srbije, Škulić u devetom[11] i desetom[12] poglavlju izdvaja i posebno analizira krivična dela rasne i druge diskriminacije (član 387 KZ) i terorizma (član 391 KZ), kao i sa njima povezana krivična dela. Osim dogmatske analize tih krivičnih dela, autor čini i svojevrstan ekskurs uporednopravnim prikazom inkriminisanja odobravanja, negiranja odnosno relevantnog minimiziranja određenih najtežih međunarodnih krivičnih dela u nemačkom pravu, konstrukcijom inkriminacije koja se kolokvijalno naziva „Aušvic laž“. Takođe, značajno je pomenuti i uvodni deo desetog poglavlja, koje se tiče terorizma, u kojem Škulić, izlažući o terorizmu uopšte, odnosno o terorizmu kao pojavi, pokazuje i zavidan stepen poznavanja kriminologije kao vanpravne krivične nauke. Konačno, u jedanaestom[13] poglavlju se analiziraju ostala krivična dela sadržana u glavi XXXIV KZ, kao što je krivično delo trgovine ljudima (član 388 KZ).

Dvanaesto poglavlje, koje nosi naslov „Krivični postupak pred Međunarodnim krivičnim sudom“ u celini je posvećeno problematici krivične procedure pred tim, za sada prvim i jedinim, stalnim oblikom međunarodnog krivičnog pravosuđa. Konstrukcija tog krivičnog postupka, koja u sebi sadrži i elemente evropskokontinentalnog i elemente adverzijalnog (anglosak-

[9] Pun naslov osmog poglavlja glasi „Osnovna međunarodna krivična dela sadržana u glavi XXXIV Krivičnog zakonika komplementarna odredbama Rimskog statuta“.

[10] Krivični zakonik, *Službeni glasnik RS* 85/2005, 88/2005 – ispr. 107/2005 – ispr. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94//2016 i 35/2019.

[11] Pun naslov devetog poglavlja glasi „Rasna i druga diskriminacija kao krivično delo protiv čovečnosti i drugih dobara zaštićenih međunarodnim pravom“.

[12] Pun naslov desetog poglavlja glasi „Terorizam i druga krivična dela terorističkog karaktera u glavi XXXIV Krivičnog zakonika Srbije“.

[13] Pun naslov jedanaestog poglavlja glasi „Druga međunarodna krivična dela u glavi XXXIV Krivičnog zakonika Srbije“.

sonskog) krivičnog postupka, zahteva posedovanje produbljenih znanja iz oblasti uporednog krivičnog procesnog prava, ukoliko se želi uhvatiti u koštac sa njenom naučnom obradom. Kvalitetom i obimom analiziranih pitanja, Škulić je pokazao da je jedan od najboljih savremenih srpskih poznavalaca upravo krivičnoprocesne komparativistike, a pogotovo da suvereno vlada ustrojstvom i sistemom adverzijalne krivične procedure.[14] Sama izlaganja pravila postupka pred Međunarodnim krivičnim sudom prate sistematiku uobičajenu za udžbenike iz krivičnog procesnog prava – najpre se izlažu pravila koja spadaju u njegov opšti, a potom i pravila koja čine njegov posebni deo. U tom smislu autor najpre izlaže[15] o nadležnosti Međunarodnog krivičnog suda te o osnovnim procesnim subjektima i njihovim funkcijama, a zatim prelazi na analizu pojedinih stadijuma i faza postupka. Škulić se ne libi ni da na određena rešenja iz Rimskog statuta i/ili Pravila o postupku i dokazima iznese primedbe, te tako, primera radi, kritici izlaže rešenje prema kojem je predviđeno da, osim stručnjaka za krivično pravo, kandidati za sudije Međunarodnog krivičnog suda potpuno ravnopravno mogu biti i stručnjaci iz nekih drugih oblasti međunarodnog prava koje po svojoj sadržini nisu krivičnopravne (međunarodno humanitarno pravo i međunarodno pravo ljudskih prava), budući da se od sudija Međunarodnog krivičnog suda očekuje da rešavaju pitanja krivičnopravnog karaktera (524–525). Uz to, kao još jedan primer autorove kritike aktuelnih rešenja postupka pred Međunarodnim krivičnim sudom možemo navesti ukazivanje na nedovoljnu regulisanost pitanja izricanja kazne (661–662).

U trinaestom poglavlju knjige govori se o međunarodnom krivičnom izvršnom pravu.[16] To je oblast koja je, kao uostalom i krivično izvršno pravo uopšte, nepravedno zapostavljena u nauci, iako ima nesumnjiv značaj za „za-

[14] Škulić je svoja znanja iz oblasti anglosaksonskog krivičnog procesnog prava posebno pokazao na primeru krivičnog procesnog prava SAD, kao danas tipičnog predstavnika adverzijalne krivičnoprocesne tradicije, koje je na sistemski način obradio u svojoj nedavno objavljenoj monografiji *Osnovi krivičnog prava Sjedinjenih Američkih Država* (2021, 242–357).

[15] Na ovom mestu ukazujemo na to da je izlaganje o načelima postupka pred Međunarodnim krivičnim sudom sadržano u prvom poglavlju knjige, neposredno nakon izlaganja o načelu materijalnog međunarodnog krivičnog prava (76–102).

[16] Pun naslov trinaestog poglavlja glasi „Elementi međunarodnog krivičnog izvršnog prava".

tvaranje kruga" krivičnopravne reakcije na kriminalitet.[17] U tom smislu, Škulić izlaže i analizira još uvek donekle rudimentarna pravila međunarodnog krivičnog izvršnog prava.

Četrnaesto poglavlje, „Međunarodna krivičnopravna pomoć", podeljeno je na četiri celine. Najpre je dat kratak osvrt na teorijska pitanja međunarodne pravne pomoći u krivičnim stvarima, te se u tom smislu navodi njena tradicionalna teorijska podela na malu i veliku krivičnopravnu pomoć (700–701). Potom se autor bavi opštim pravilima, ali i posebnim vrstama međunarodne krivičnopravne pomoći u krivičnom pravu Republike Srbije. Nakon toga ukratko se izlaže o Interpolu i njegovoj ulozi u postupcima međunarodne krivičnopravne pomoći. Poslednja celina u tom poglavlju bavi se međunarodnom saradnjom i krivičnopravnom pomoći sa Međunarodnim krivičnim sudom.

Poslednje, petnaesto poglavlje[18] posvećeno je krivičnom pravu Evropske unije kao pravu u (potencijalnom) nastajanju.[19] Kao posebne celine obrađuju se osnovni zajednički krivičnopravni mehanizmi na nivou EU, delovanje Suda pravde EU u krivičnopravnoj oblasti i osnovi međunarodne krivičnopravne pomoći na nivou EU.

Osvrt na teme kojima se Škulić u ovoj knjizi bavio još jednom potvrđuje na početku izraženu konstataciju – da je to najsveobuhvatnije sistemsko delo iz oblasti međunarodnog krivičnog prava ikada objavljeno na srpskom jeziku. Sam način na koji je autor pristupio tim temama je takav da se one maksimalno približavaju čitaocu, i to ne samo onom koji je stručnjak iz oblasti krivičnog prava, već u velikoj meri i čitaocima-laicima. Naime, osim već naglašene sistematičnosti rada, Škulić piše jasnim, preciznim jezikom, bez nepotrebnih uobičajenih fraza, što njegov tekst čini prijemčivim i zanimljivim za čitanje. Kvalitetu samog rada značajno doprinosi i veoma opširna korišćena literatura, što domaća, što strana,[20] i nemali broj obrađenih odluka iz sudske prakse nacionalnih i međunarodnih sudova.

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[17] U literaturi se, naime, ističe da je „svrha propisivanja i izricanja krivičnih sankcija i njihovog izvršenja jedinstvena, što ukazuje na sadržinsku povezanost materijalnog (i procesnog, prim. A. Š.) i izvršnog krivičnog prava" (Srzentić, Stajić, Lazarević 1986, 11).

[18] Pun naslov petnaestog poglavlja glasi „Osnovni krivičnoprocesni/krivičnopravni mehanizmi na nivou Evropske unije i začeci krivičnog prava EU".

[19] Napominjemo da je Škulić osnovne teorijske postavke o krivičnom pravu EU, te svoj načelni stav o njima, izneo u prvom poglavlju knjige (37–38).

[20] Obimnosti, kvalitetu i aktuelnosti korišćene literature značajno su doprineli istraživački studijski boravci autora u u Nemačkoj, pogotovo u dva navrata (2003–2005. i 2019) na Institutu za inostrano i međunarodno krivično pravo „Maks Plank"

Iako postoje izvesne zebnje u tom pogledu, što opravdano, što neopravdano, ipak smatramo da će međunarodno krivično pravo opstati kao posebna grana prava te da će se dalje razvijati većom ili manjom brzinom[21] te da je neophodno nastaviti sa daljom edukacijom srpskih pravnika u toj disciplini. Imajući to u vidu, čini nam se nespornim da će ovo novo, kapitalno Škulićevo delo ne samo u godinama, već i u decenijama koje dolaze predstavljati najznačajnije sredstvo za sticanje produbljenih znanja iz međunarodnog krivičnog prava.

LITERATURA

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[2] Srzentić, Nikola, Aleksandar Stajić, Ljubiša Lazarević. 1986. *Krivično pravo Socijalističke Federativne Republike Jugoslavije – opšti deo*. 13. izdanje. Beograd: Savremena administracija.

[3] Stojanović, Zoran. 2017. *Međunarodno krivično pravo*. 10. izdanje. Beograd: Pravna knjiga.

[4] Škulić, Milan. 2005. *Međunarodni krivični sud: nadležnost i postupak*. Beograd: Pravni fakultet Univerziteta u Beogradu.

[5] Škulić, Milan. 2020. *Međunarodno krivično pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.

[6] Škulić, Milan. 2021. *Osnovi krivičnog prava Sjedinjenih Američkih Država*. Beograd: Pravni fakultet Univerziteta u Beogradu.

u Frajburgu (koji je nedavno preimenovan u Institut za istraživanje kriminaliteta, bezbednosti i prava „Maks Plank"), na osnovu istraživačke stipendije, odnosno alumni programa Humboltove fondacije.

[21] I u literaturi se konstatuje da „ostaje realna nada da će Međunarodni krivični sud daljim razvojem međunarodnog krivičnog prava postati respektabilna institucija, čije će izbegavanje svaku državu koštati bar dela njenog ugleda koji uživa u međunarodnoj zajednici" (Stojanović 2017, 186), odnosno da je „međunarodno krivično pravo postalo samostalna pravna disciplina koja je nenadomjestiva za suzbijanje onih oblika savremenog kriminala koji ugrožavaju osnovne vrijednosti čovječanstva, a posebno onih najopasnijih kojima se države pojedinačno nisu u mogućnosti adekvatno suprotstaviti" (Babić 2011, 27).

/VARIA

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2. apstrakt i ključne reči,

3. rukopis i spisak literature,
4. dodaci, tabele i slike.

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Tekstu prethodi apstrakt koji je strogo ograničen na 150 reči. Apstrakt ne sme da sadrži neodređene skraćenice ili reference.

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3. RUKOPIS I SPISAK LITERATURE

Zbog anonimnog recenziranja, imena autora i njihove institucionalne pripadnosti ne treba navoditi na stranicama rukopisa.

Tekstovi moraju da budu napisani u sledećem formatu:

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- razmak između redova u glavnom tekstu: 1,5,
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- veličina slova u glavnom tekstu: 12 pt,

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- numeracija stranica: arapski broj u donjem desnom uglu stranice.

Druge autore treba navoditi po imenu i prezimenu kada se prvi put pominju (Petar Petrović), a zatim samo po prezimenu (Petrović). Ne treba navoditi „profesor", „dr", „g." niti bilo kakve titule.

Sve slike i tabele moraju da budu pomenute u tekstu, prema redosledu po kojem se pojavljuju.

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The United Nations Commission on International Trade Law – UNCITRAL

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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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Domaća imena koja se pominju u rečenici ne treba ponavljati u zagradama:

- Prema Miloševiću (2014, 224–234)...
- Rimski pravnici su poznavali različite klasifikacije stvari (Milošević 2014, 224–234)

Strana imena koja se pominju u rečenici treba da budu transkribovana, a u zagradama ih treba ponoviti i ostaviti u originalu. U spisku literature strana imena se ne transkribuju:

- 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 Universitätsbuch-handlung.

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.

T: Vasiljević (2007, broj strane),

L: 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.

Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

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

Više od tri autora

T: Prema istraživanju koje je sproveo Tarner sa saradnicima (Turner *et al*. 2002, broj strane),

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Institucija kao autor

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Delo bez autora

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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...

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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.

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T: Koristeći Grinov metod (Greene 1997), napravili smo model koji...

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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.

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T: Tome je posvećena jedna sveska časopisa *Texas Law Review* (1994).

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Komentari

T: Smit (Smith 1983, broj strane) tvrdi...

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L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

Ne treba koristiti senčenje ili boju na grafičkim prikazima. Ako je potrebno vizuelno istaći pojedine razlike, molimo vas da koristite šrafiranje i unakrsno šrafiranje ili drugo sredstvo označavanja.

Ne treba koristiti okvir za tekst ispod ili oko slike.

Molimo vas da koristite font *Times New Roman* ako postoji bilo kakvo slovo ili tekst na slici. Veličina fonta mora biti najmanje 7.

Grafici ne sadrže bilo kakvu boju.

Naslovi slika su navedeni i na zasebnoj stranici sa dvostrukim proredom pod nazivom – Legenda korišćenih slika.

Slike ne mogu biti veće od 10 cm x 18 cm. Da bi se izbeglo da slika bude značajno smanjena, objašnjenja pojedinih delova slike treba da budu postavljena u okviru slike ili ispod nje.

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