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Giovanni Tuzet, PhD*

*DIGESTIVE JURISPRUDENCE RESTATED: ON BREAKFAST AND DIGESTION AS BIAS-AROUSERS***

"Digestive Jurisprudence" is the view that judicial decisions depend on what judges had for breakfast. The view is usually associated with Frank's version of Legal Realism. The paper shows that, disputable as it is, that view comes from the philosophical background of Peirce's pragmatism and the legal background of Holmes' prediction theory. Peirce's pragmatism was an account of concepts in terms of their predictable consequences. Holmes' prediction theory was an account of law in terms of predictions of what judges will do. And

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Legal Realism focused on judicial behavior as determined by various factors including, in its most extreme and provocative version, breakfast quality and digestive processes. The paper does not ascertain whether the digestive view is true (to some extent); rather, it makes the working hypothesis that breakfast quality, or digestion quality, is not a sufficient condition of a certain outcome but, most likely, a bias-arouser.

Key words: *Digestive Jurisprudence*. – *Frank*. – *Holmes*. – *Legal Realism*. – *Pragmatism*.

1. INTRODUCTION

"Digestive jurisprudence" is the view that judicial decisions depend on what judges had for breakfast. It is understandably meant as a descriptive account of judicial decision-making, on the premise that judges are human beings subject to various influences including their digestive process.

If the focus is on the digestive process of judges, then "digestive jurisprudence" is an appropriate name; or, more specifically, "digestive realism" would refer to the movement the idea belongs to in the context of American jurisprudence in the twentieth century. If the focus is on food, instead, "gastronomical jurisprudence" would be a better descriptor. In any case, it was and still is a provocative idea, and I think we need to look at its background before we dismiss it too quickly. My suggestion is to start from philosophical pragmatism, then move to predictive accounts of law, and finally address digestive jurisprudence.

Peirce's pragmatism is in the background of predictive accounts of law. It was a philosophical account of concepts in terms of their predictable consequences. The filiation I see is from this view (Peirce) to the prediction theory of law (Holmes) and to the view of judicial decision being determined by non-legal factors such as digestion (Legal Realism). Holmes' account of law was in terms of predictions of what judges will do. And Legal Realism focused on judicial behavior as determined by various factors including – in its most extreme and provocative version – the quality of judicial breakfast or the quality of judicial digestion. If the digestive view is true, those who want to predict judicial behavior must take into consideration the digestive factors that contribute to it.

I will not try to ascertain whether the digestive view is true and to what extent it is so. I will try instead to state the conceptual and inferential conditions for carrying out such an ascertainment. Or, to put it differently,

what one would expect to find on the assumption that the digestive view is correct.[1] My main point will be that breakfast quality, or digestion quality, is not a predictor of judicial outcome but, most likely, a bias-arouser.

The paper proceeds as follows: I will sketch the philosophical background of American pragmatism taken in Peirce's seminal version (Section 2); then I will move to Holmes' prediction theory of law (Section 3), and will consider the most extreme version of Legal Realism, namely the view, usually attributed to Frank, that judicial decisions depend on what judges had for breakfast (Section 4). As a conclusion (Section 5) my restatement of the digestive jurisprudence view will look at it as an attempt to identify some bias-arousers in judicial decision-making, premised on an empirical account of the law.

That is not meant to disregard the many and significant differences between Peirce's philosophical views, Holmes' account of law, and the agenda of the American Realists. It is a way of presenting the filiation of certain ideas and discussing their most extreme offshoots.

Additionally, one should not forget that the American version of Legal Realism was not the only one: there have been forms of Legal Realism in Europe, notably Scandinavian, Italian, and French,[2] though this is not the place to discuss them. All my references to "Legal Realism" will be to the American movement. Another terminological caveat is needed before one goes into the argument: I will use "digestive realism" as a specification of "digestive jurisprudence", as already pointed out, and will use "digestive factors" to capture a broad category of elements affecting judicial decision, a category including not only digestive processes but also hunger.

2. PEIRCE'S PHILOSOPHICAL PRAGMATISM

Charles Sanders Peirce (1839–1914) was the founder of American pragmatism, whose birth is generally linked to the statement of the so-called *pragmatic maxim*. The elaboration of the maxim took place thanks to the work of Peirce within the *Metaphysical Club*, an intellectual circle active in Cambridge (Massachusetts) in the years immediately following 1870, consisting of scientists and lawyers who were brought together by a keen

1 Whether the purpose of philosophy is to make discoveries is a debatable point; certainly one of its virtues is to prefigure them, to provoke them, to let others make them, by preparing the terrain with critical analysis.

2 See, in particular, Ross 1958; Olivecrona 1971; Guastini 2011; and Troper 2022.

interest in philosophy.[3] The pragmatic maxim and the pragmatism of which it is an expression were born, therefore, from an encounter between scientific and legal sensibilities, framed by a common philosophical reflection.

In that context, Peirce elaborated a *method* of conceptual clarification, or a logical method capable of determining the conceptual content of our claims (or the real meaning of our "conceptions", as he put it); such a method discriminates genuine distinctions from purely verbal ones. The *pragmatic maxim* recommends the following at length (from a classical 1878 article):

> Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.[4]

Peirce's pragmatic maxim calls for an objective criterion of content or meaning; such practical "effects" provide the content of our conceptions. Once those effects are pointed out, one can also proceed to the empirical testing of the claims that pass the maxim's test.

An attentive reading of the maxim involves in fact the discussion of a series of problems that we cannot address here.[5] Let me just anticipate that the maxim's scope can be generalized from effects to consequences, including the expected ones that are conditional on certain happenings or operations performed on the "object of our conception". The maxim predicts not only what will be the case, but also what *would be* the case under certain circumstances.

The maxim is applied, primarily, to concepts that express properties like fragility or hardness. To state of an object that it is fragile, is to identify certain effects that will follow certain happenings or operations performed on the object. For example: if the object is dropped, it will break. To conceive of an object as fragile is to predict that it will break if dropped, that it will not resist a certain amount of pressure, etc. And, in the subjunctive form, one can state that it would break if dropped, etc.

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[3] Cf. Fisch 1964 and Menand 2001. For a description of classical and contemporary pragmatism, see Haack 2006.

[4] CP 5.402. That is not the only version of the maxim, but this is not the proper venue to examine the relevant differences. Cf. among others CP 5.3, 5.412, 5.426–427, 5.438, 5.457, 5.464–467, 5.527–528. See Misak 2013, 29–32 and 2016, 12–17 (claiming that the maxim does not amount to a totalizing account of meaning).

[5] Cf. at least Almeder 1979 and Quine 1981.

As a consequence, the maxim can be applied to entire beliefs that include concepts that are so defined. Take the belief that a certain vase is fragile: if I believe that the vase is fragile, I also believe that it will break if dropped. This connects to our practical attitudes: if I do not want it to break, I will not be disposed to intentionally drop it, I will exercise due care in handling it, etc. Compare the following examples along these lines, taking into consideration the different empirical and behavioral consequences that differentiate them:

(i) This vase is fragile.

(ii) This rock is hard.

(iii) That water is clean.

(iv) That water is polluted.

(v) Boris drank a bottle of water.

(vi) Boris drank a bottle of vodka.

(vii) Boris had a good digestion.

(viii) Boris had a bad digestion.

If Boris had a bad digestion and the typical effects of this consist of his bad mood, irritability, and dismissal of requests, then I will reasonably postpone a delicate request to him; if he had a good digestion and this typically results in good mood, it will be the right time for that request. As a further example, if I believe that Boris drank a bottle of vodka, then I can anticipate some effects on his behavior and I will not be disposed to accept a ride from him in his car, something that I would have no motives to refuse if, *ceteris paribus*, he had drunk a bottle of water. If I believe that some water is polluted, I will not be disposed to drink it given the harmful effects it would have on my body. But if you want to poison the evil monarch you might want to use that water. And so on. Now, we can say that the pragmatic maxim presents these advantages:

(1) it brings to light the operations or investigations that we must perform in order to verify or falsify our beliefs;

(2) it distinguishes, among our beliefs, those that can be verified or falsified from those that cannot, and that thus, in spite of appearances, are devoid of real meaning;

(3) it identifies questions that are merely verbal: if, from two beliefs, different consequences cannot be drawn, then those beliefs are equivalent;

(4) it offers empirical and public criteria for the determination of meaning.

With reference to the second advantage, Italian pragmatists Giovanni Vailati and Mario Calderoni provided various examples of nonsense in their work "Pragmatism and the Various Ways of Saying Nothing" (1909).[6] They exemplified certain claims that are incapable of passing the test of the pragmatic maxim. For example, certain wild generalizations like "Everything is an illusion". No operation or investigation can empirically fix the meaning of this by showing some publicly detectable effects of the belief that everything is an illusion. On the other hand, we can empirically test the belief that that water is polluted, and the harmful effects of pollution are the very meaning or content of it.[7]

There can be, of course, perplexing cases. One example are beliefs that seem senseless but produce very serious effects. Consider the belief expressed by the sentence "Westerners are infidels." One can doubt that it passes the test of the pragmatic maxim: what are the operations or investigations that we would have to perform in order to verify or falsify it? With what empirical and public criteria can we determine its meaning? Yet it is a belief that provokes very serious practical consequences.[8]

Furthermore, the advantages offered by the pragmatic maxim must not cause us to overlook its ambiguities and problems. The main ambiguity of the maxim consists in the fact that there can be two readings of it:

a) a *practical* reading, according to which meaning lies in the practical consequences of the application of a concept;

b) an *observational* reading, according to which meaning lies in the observable consequences of the application of a concept.

Each of these readings presents specific problems. If, for example, we espouse the practical reading, then we encounter the problem of establishing the meaning of historical beliefs. In fact, what practical consequences would

6 Now Ch. 19 of Vailati 2010.

7 One may ask whether the pragmatic maxim is about the consequences of a concept or the consequences of the object the concept is about. Being forced to choose, I would say the former (in an inferentialist way), but the spirit of the maxim is empirical (it recommends to link concepts and empirical or practical consequences).

8 We could say that it provokes emotive reactions, though it is devoid of a cognitive, empirically detectable meaning.

historical beliefs have? What specific consequences would the belief that Brutus stabbed Caesar have on our conduct? It seems difficult to identify such consequences and, on the other hand, it seems absurd to conclude that such a belief is devoid of meaning.[9] Therefore, historical beliefs at least constitute a problem for the practical reading of the maxim. If, instead, we espouse its observational reading, then we encounter problems such as: How can we distinguish beliefs about creatures endowed with consciousness from those about automata? Given that Boris is our fellow creature, what does it mean to believe that he feels pain? If, in fact, the meaning of a belief lies exclusively in its observable consequences, it seems impossible to distinguish a belief about Boris' pain from one about an automaton that behaves in an identical way. Still, for our purposes, we would know that something like Boris' digestion is going to have an impact on how he will behave, on what he will decide, and so on.[10] So we could still appreciate the difference between (vii) and (viii) above, namely good and bad digestion.

Now, coming here, to things that interest us more closely here, we can ask whether the pragmatic maxim can be applied to *normative concepts*. This is an important and subtle question, which we will address after having delineated the legal pragmatism of Holmes.

3. HOLMES' LEGAL PRAGMATISM

The name of Oliver Wendell Holmes (1841–1935) stands out among the legal scholars of the *Metaphysical Club*. As is well known, his writings came to have great importance for American legal theory and philosophy, and his study of law and its history went hand in hand with his judicial activity (he later served as a Justice of the United States Supreme Court). Although Holmes never called himself a pragmatist, his work and his thought certainly reveal a pragmatist spirit in many respects.[11] One of his most renowned and controversial conceptions is that of *law as prophecy*, namely prophecy of what courts will do on certain conditions. What does it mean, in fact, to have a legal obligation? It means to be (likely) sanctioned by a court in case of failure to fulfill the obligation. For example, to have a debt means to

[9] On this point, see Quine 1981, 156. A way out consists in reading the maxim in observational terms and making reference, counterfactually, to the experiences that one would have had in such past circumstances.

[10] In *Twilight of the Idols – The Four Great Errors*, 6 – Nietzsche said that good conscience might be the outcome of good digestion.

[11] See Haack 2005. On the legacy of Holmes cf. Grey 1989.

be (likely) sanctioned by a court if the creditor sues the debtor in order to obtain payment. Legal rights, Holmes adds, can be defined by means of the same method.

Holmes did not go as far as to claim that prophecies can be based on what judges had for breakfast. The digestive process did not enter his picture. He was concerned with the content of *legal* rights and duties. In this respect he was quite close to Peirce's concerns on conceptual clarification. But notice that one can follow Holmes' lead in a significantly different direction and be concerned with the causal factors of judicial decisions; if so, the prophecies of what courts will do could be based on non-legal factors such as digestion. If so, our story departs from the conceptual concerns of the beginnings and becomes decidedly empirical.

Holmes' conception is often named a *prediction theory of law*. In order to grasp its meaning, Holmes says, it is necessary to assume the point of view of a "bad man", who does not care about the moral value of his actions, but only about their material consequences.[12] This allows us to distinguish morality from law: the *consequences* of violating their precepts are different.

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[13]

Legal conceptions are often confused by moral or theoretical considerations that do not touch upon the *real life* of the law.

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to *know* what the Massachusetts or English courts are

[12] "A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can" (Holmes 1897, 459).

[13] Holmes 1897, 459.

> likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[14]

Scholars of pragmatism have compared Holmes's prediction theory with Peirce's pragmatic maxim, wondering if one of the two, and which one, was influenced by the other.[15] Now, in my opinion, establishing the priority of one over the other is both historically difficult and of little theoretical importance. What seems to be certain is the affinity between the two. They share the basic pragmatist principle by which anyone wanting to understand the meaning of something must consider its consequences. If the constructions and distinctions of legal doctrine do not correspond to distinct practical consequences, then they are devoid of meaning. Analogously to our earlier illustrations regarding the pragmatic maxim, we can compare the following examples and consider the different consequences that distinguish the legal concepts used in them:

(*i*) This is a rental contract.

(*ii*) This is a contract of sale.

(*iii*) Boris committed murder.

(*iv*) Boris committed manslaughter.

Applying the concept of murder to a given case carries different legal consequences than those related to the concept of manslaughter. It is precisely by virtue of these different consequences that the concepts in question are different.[16] This seems beyond doubt; however, regardless of the underlying affinity, the prediction theory presents some specific problems that are distinct from those of the pragmatic maxim.

First of all, there is an ambiguity in the predictive theory: do the successful predictions of judicial decisions constitute our *knowledge of the law* or *the law*? Holmes's writings seem to suggest first one interpretation, then the

[14] Holmes 1897, 460–461.

[15] Fisch 1942 maintains that philosophical pragmatism generalized certain ideas of legal pragmatism. *Contra* see Miller 1975.

[16] In addition to the consequences, which inferentially diversify the concepts, the antecedent circumstances to which the concepts are applicable also diversify them. See Brandom 1994 and 2000.

other.[17] But regardless of Holmes's intentions, the more plausible claim is certainly that knowledge of the law is constituted inter alia by predictions; that the law itself is constituted by a set of predictions seems rather counterintuitive.

There is indeed a serious objection to the prediction theory (if it is understood as definitional of what law is): law mainly consists of *prescriptions*, not of predictions. As is well known, if the predictive theory was meant to reduce prescriptions to predictions, it would propose something fallacious inasmuch as it is fallacious to reduce "what ought to be" to "what is", namely the normative to the factual. H.L.A. Hart in particular addressed this criticism to the predictive theory: we cannot reduce having an obligation to the prediction of punishment. Judges, in fact, when punishing a transgressor, do not determine the consequences that *follow* the anteceding circumstances, but those that *ought to follow* them: they assume the law as the guide to decision and the violation of the law as a reason to punish the transgressor.[18] Furthermore, the normative criticism of judicial decisions would be senseless if the law were only a matter of prediction from causal factors, and not a set of normative rules and standards of conduct. This does not rule out the possibility that digestion plays a causal role in the determination of judicial decisions, but it makes no sense to consider this as part of a conceptual account of law.

In Holmes's defense, Morton White replied that the prediction theory is not a semantic account of "law", but an empirical theory about the connection between obligation and judicial decision.[19] White tries to defend Holmes from the equation of obligation and prediction, placing the emphasis on the role of judicial decisions in the life of the law. If so, Holmes did not want to establish that "having an obligation" and "being punished" are synonyms (as he is often accused to have meant, in the wake of Hart's criticism); rather, his claims pointed to the empirical connection between having an obligation and being (likely) punished by a court in case of failure to fulfill the obligation.

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[17] On the ontological interpretation see Schauer 2009, 126 (ascribing to Holmes the idea that "the essence of law was the *prediction* of judicial reaction to some set of factual circumstances.") On the knowledge interpretation see Tuzet 2013; in a similar perspective, see Dahlman 2004.

[18] Hart 1994, 10–11.

[19] White 2004. See also Leiter 2007, 18, 60.

This is what happens in the "life of the law", which is the expression used by Holmes himself in the well-known opening of his book on the common law: *the life of the law has not been logic, it has been experience*.[20]

White's response is certainly consonant with the pragmatist spirit of Holmes, but there remains an underlying problem: can we apply the spirit of the pragmatic maxim to normative concepts and norms? The problem is that, in the observational reading, the maxim presents itself as a method of conceptual clarification, according to which the meaning of a concept lies in the empirically detectable effects that follow its application. Now, with respect to a non-normative concept like fragility, we can easily detect the effects that follow certain preceding circumstances and constitute the meaning of the concept. Is the same true with respect to normative concepts? Let us take the concept of manslaughter: the consequences that identify its content are *not* those that *follow* its application, but those that *ought to follow* it. It's a normative, legal concept. Not a factual one. A person who commits manslaughter is not punished in a certain way in accordance with a law of nature, but they *ought to be* punished in a certain way given a legal norm.

Of course it may be the case that judicial outcomes are determined by non-legal factors, such as digestion, but in order to claim this we must have a concept of what is legal and what is not, and this concept cannot be reduced to a set of predictable effects. The digestive view has no conceptual import. Similarly, judges can be corrupted, threatened, biased; but the prediction of the decisions of such judges cannot be taken as a conceptual account of legal rights and duties.

Therefore, the problem is this: if we want to maintain the empirical approach of the maxim, then there is no way of capturing normative consequences as such. The only detectable empirical consequences are, in fact, the decisions of the courts. In this sense, Holmes was perfectly in line with the spirit of Peirce's pragmatic maxim, but at the cost of a problematic reduction of the normative dimension of law to the factual and empirically detectable dimension of judicial decisions. If, instead, we want to fully capture such normative consequences, then we can devise a form of "conceptual pragmatism" that specifies, for each normative concept, the normative consequences that constitute its content. But this also has a price – the risk of giving up the empirical dimension of the "life of the law."

[20] Holmes 1881, 5 (ed. 1963). On the idea of experience along these lines, see Tuzet 2018.

Perhaps the above dilemma is more theoretical than practical, since legal pragmatists can do both things: (A) establish the application conditions of a concept and its normative consequences (conceptual pragmatism or inferentialism);[21] and (B) consider the judicial decisions about the application of a concept and make some predictions on future decisions (empirical pragmatism). In any case, I will not try to solve the dilemma in the following. I will rather consider its empirical horn and focus on legal realism and digestive jurisprudence.

4. LEGAL REALISM AND DIGESTIVE JURISPRUDENCE

What if legal categories and legal doctrine are not especially effective predictors of judicial decisions? This is a genuine problem that highlights the need for empirical research to identify the true factors of judicial decisions.[22]

As is well known, American Legal Realism was a movement of legal scholars that flourished in the US in the 1930s. Among their fathers, the Legal Realists counted some pragmatist philosophers and some legal scholars, such as Holmes (for his prediction theory in particular) and the early Roscoe Pound (for his critique of "mechanical jurisprudence"[23]). The Realists focused on the process of judicial decision-making and tried to point out, in particular, the non-legal factors that determine judicial outcomes.[24] Such factors help observers make predictions about those outcomes.

Brian Leiter has claimed that the Realists "laid the foundation for a jurisprudence distinguished by two novel philosophical commitments: *naturalism* and *pragmatism.*"[25]

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[21] See Canale and Tuzet 2007.

[22] The point is well made in Schauer 2009, 127, 132ff. As examples of empirical research on the heuristics and biases of judicial decision, see Guthrie, Rachlinski, Wistrich 2001 and 2007.

[23] See Pound 1908.

[24] See Leiter 2007, 16. Cf. Haines 1922.

[25] Leiter 2007, 21.

> According to Naturalism a satisfactory theory of adjudication must be continuous with empirical inquiry in the natural and social sciences. According to Pragmatism, a satisfactory theory of adjudication *for lawyers* must enable lawyers to predict what courts will do.[26]

This picture of pragmatism applied to law is disputable, since enabling lawyers to predict what courts will do[27] is just a part of the story. However, for Leiter the Realists did not provide a theory of law, for they were basically positivists.[28] Undoubtedly, the Realists provided an account of adjudication.

Now, the most extreme form of realism about adjudication states that it depends on what judges had for breakfast. It is disputed whether any of the American Realists actually claimed anything of that sort.[29] Sometimes Jerome Frank is charged with that extreme view, which is unsurprising given that Frank is generally considered to have been the most radical, skeptical and cynical among the Realists.[30] It has been said in fact that critics of American Legal Realism have promoted a "Frankification" of the movement just to make it wholly implausible and easily rebuttable.[31]

Dan Priel has shown that references to the digestion idea can indeed be found in the works of prominent Realists, such as Karl Llewellyn and Frank, as well as in the works of their contemporaries, both friends and foes, as well as in earlier works.[32] Frank, in particular, insisted on his fact-skepticism as a distinctive feature of his views: the variety of factors and biases that

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[26] Leiter 2007, 30–31.

[27] See Leiter 2007, 52. As a standard objection, see Schauer 2009, 143: "It may be important for lawyers and their clients to predict judicial decisions, but a lawyer arguing to a court can hardly adopt the posture that the law is the prediction of that court's decisions."

[28] On Leiter's view of the Realists as positivists, and some ambiguities in Leiter's position, see Priel 2008. Among other things, Priel (2008, 335) points out the futility of the debate over positivism (hard or soft) for pragmatists who think that theorizing should make a difference to practice (or to experience).

[29] But a reference to "digestive disturbances" is made in Cohen 1937, 9. Cf. Frank 1949, 161–162 and Schauer 2009, 129 (claiming also that Frank's serious point was that "a large number of other less frivolous but still nonlegal factors typically determined judicial decisions").

[30] See in particular Frank 1930 and 1949.

[31] See Leiter 1997, 269 (now Ch. 1 of Leiter 2007).

[32] Priel 2020. Additionally, Priel (2020, 928) suggests how the view might be tested with a controlled experimental setting.

influence the fact-finding process of judges and jurors (notably when confronted with conflicting testimony) makes their factual determinations hard to predict.[33] Digestive factors are a part of this story.

In fact, the digestive jurisprudence view has some illustrious predecessors. I will mention two of them and then discuss what follows from this view if we assume it to be true. The view has at least a couple of noble forerunners from the age of Enlightenment; one is Julien Offray de La Mettrie, the other is Cesare Beccaria.

In his work *L'homme machine* (1747) La Mettrie tells us of a Swiss judge, Mr. Steiguer from Wittighofen, who was the most upright and even indulgent of judges when fasting but was capable of hanging the innocent as well as the guilty when he had feasted.[34]

Surprising as it may sound, Beccaria too held a form of digestive realism in one passage of *Dei delitti e delle pene* (1764). The passage is in chapter IV (on statutory interpretation) and contends that it is extremely dangerous to let criminal judges deviate from the literal meaning of statutes and speculate about the "spirit" of the law: when they do this they become prone to the most various opinions, biases and influences, including the quality of their digestive process. The spirit of the law, in the judges' mouth, can be the result of a good or bad digestion.[35]

Notice that it is not my intention to inquire whether the view of digestive realism is true or is false. This would require a highly sophisticated empirical study, which I am unable to perform. Nor will I dwell on the subtle differences between *digestive* realism (judicial decisions depend on digestive processes) and *gastronomical* or *gourmet* realism (judicial decisions depend on breakfast quality). Digestive realism writ large covers both issues. Nor will I embark in neuroscience to discover the connections between digestive processes, cerebral states and judicial decisions. My aim here is to wonder about the *consequences of that disputed view on the assumption of its being true*. What does it plausibly follow from the fact that the judge had a good breakfast? And what is the difference with a bad one? What is the conceivable process that empirical researchers should test? Notice also that

[33] Cf. Frank 1930, 105–108, 133–143, 177–180; and Frank 1949 16–22, 73ff, 147ff, 181–182. Frank insists on the "personal element" of fact-finding, which is different from the contextual and background factors affecting decision (as one reviewer correctly observes).

[34] Now in La Mettrie 1996, 7–8. Frank 1949, 162 refers to La Mettrie's point.

[35] Compare this with the 19th century judicial opinion quoted by Priel 2020, 909 (an Alabama case where the judge's concern was the association of judicial discretion with biases triggered by "trifles", such as indigestion).

this advice is in tune with the pragmatic maxim, for we want to conceive the consequences of certain views. And in so doing we make predictions about what will be the case if a given view is correct.

Before delving into that, let me recall a couple of assumptions (perhaps too obvious) of the digestive view. First, remember that the claim is descriptive, not normative. Digestive realism does not claim that it is good (or bad) to decide upon a good (or bad) breakfast; it simply states that judges are led to some decisions because of what they had for breakfast. More specifically, Beccaria claims that this happens when they are free to speculate about the spirit of the law, and his point is critical: he does not want judges to decide like that! The basic claim is descriptive and Beccaria develops a critical stance on this issue. Second, the descriptive claim is causal: it causally connects breakfast and decision. But the causal process is a bit more complex. It is likely to go from the quality of the breakfast to the judge's mood, and from this to the outcome of the case.

Now, what is the predicable outcome of a good breakfast, or of a good digestive process, assuming that the causal claim is true? This is a point I always found puzzling. To my knowledge, the literature on digestive realism is surprisingly silent on this.[36] You may wonder whether, in a criminal case, a *good* breakfast will determine a decision for the defendant. This might be the case when decision-makers feel positive about the defendant because of their breakfast. But it might also happen that a good breakfast determines a decision for the prosecution, when breakfast makes decision-makers sympathetic to it. Therefore, breakfast and digestion are insufficient to explain and predict decision.

Suppose that the judge had a large, nice and completely satisfying breakfast: they would be in a good mood, but this is insufficient to predict their decision. You need to additionally know their attitudes towards defendants and prosecutors. It might be that, when they are in a good mood, judges decide for the defendant. But it might also be that in those conditions they decide for the prosecutor. It would depend on whether they have a bias in favor of defendants, or rather in favor of prosecutors. That would explain the difference filling a crucial link in the causal connection.

[36] Cf. Derham 1957, 644 and Schauer 2009, 129–131 (especially fn. 15). As an exception see Kozinski 1993 (criticizing the idea of the judge favoring the party they most identify with, or disfavoring the party they least identify with: for Kozinski the constraints on judicial decisions are too many to make that idea credible, let alone acceptable). Still, as one reviewer suggests, a "good breakfast" might be correlated with a "good outcome", but then an account of what a "good outcome" is would be needed; similarly for a "bad breakfast".

If that is correct, the breakfast or digestive process is not sufficient to explain and predict an outcome. *Digestive processes* (writ large) are what I propose to call *bias-arousers*, to restate the view of digestive jurisprudence: they trigger a process of bias-arousing in which decision-makers let their biases determine the outcome of the case at hand.[37]

To better illustrate how that works, imagine now the case of a *bad* breakfast. Suppose that the judge had a small, sad and gravely unsatisfying breakfast: they would be in a bad mood, but this is insufficient to predict their decision if you do not know their attitudes towards defendants and prosecutors. Would they decide in favor of the prosecutor? Well, if they have a general bias against prosecutors (because they think they are sadistic inquisitors), or if they have a particular bias against the prosecutor of the case (because the prosecutor is black, or Jewish, or whatever), then their bad mood would determine a decision in favor of the defendant through the arousing of that bias. On the other hand, if they have a general bias against defendants (because they think they are generally guilty and deserve the most severe sentence), or if they have a particular bias against the defendant of the case (because the defendant is black, or Catholic, or whatever), then their bad mood would determine a decision for the prosecutor through the arousing of that bias. Apparently, that was the case of Mr. Steiguer from Wittighofen.

Assuming that the descriptive causal claim of digestive realism is correct, the same would be generally true of judicial biases towards plaintiffs and defendants in civil cases. Suppose a judge has, for some reason, a bias against a mining company.[38] That judge is inclined to think, or act to the effect, that a mining company should (not) prevail just because it is a mining company. Digestive processes might arouse that bias. And the same would be true of jury decisions, both civil and criminal. Of course, some of the biases would be different; for instance, a bias against prosecutors would be pointless in a civil lawsuit, unless the decision-maker feels an analogy between prosecutors and plaintiffs. But the basic mechanism would be the same: digestive processes would be bias-arousers.

[37] Analytically, as one reviewer observes, that may call for a distinction between "bias-arousers" and "inhibitory-control-defeaters".

[38] I take the example from Schauer 2009, 131–132.

Therefore, if someone wants to ascertain the truth of digestive realism, they must inquire not only into the digestive processes of judges and jurors but also (and more importantly) into the biases that such processes arouse, and they must establish to what extent these biases remain causally inert without such digestive processes.

In short, digestive jurisprudence restated is the view that digestive processes are not sufficient to explain and predict judicial decisions but might be significant as bias-arousers.[39]

To capture additional factors, one can also consider the role of hunger or, more generally, of mental fatigue. An Israeli study that attracted some recent interest has it that, on sequential parole decisions, judges are statistically more inclined to favorable outcomes after a food break (late morning snack or lunch).[40] This calls for an explanation. One possibility is that, contrary to Mr. Steiguer from Wittighofen, food makes them less harsh and hunger makes them harsher. But one should be careful about projecting the results of a study like that to more complex litigation and decision-making. In a parole decision, judges have to establish whether the conditions for a favorable outcome are satisfied by the person (a prisoner) making the request. Here judges do not deal with different parties developing arguments and counterarguments. In a case with two parties making claims and counterclaims on probatory, interpretive and other issues, it becomes more difficult to predict what the decision will be before or after lunch. If the judge is hungry, will that determine a decision against the plaintiff in a civil case? Or a decision against the defendant? What will happen after lunch? If the judge has a bad digestion will this penalize the plaintiff or the defendant? And what will happen in a criminal case? If digestive factors (including hunger) are bias-arousers, perhaps predictions will be less uncertain.

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[39] In other words, digestive processes can be contributory conditions of judicial decisions. Frank (1949, 162) was aware of this: "Of course, no one, except jocularly, has ever proposed explaining all or most decisions in terms of the judges' digestive disturbances. Yet, at times, a judge's physical or emotional condition has marked effect."

[40] Danziger *et al*. 2011. Cf. Glöckner 2016 (claiming that the magnitude of the relevant effect is overestimated in the Israeli experiment).

Assuming to have a measurement technique, the measurement of some such biases and distortions is harder when decision has to do with complex litigation. The greater the number of claims and arguments, the less predictable the outcome. Additionally, written opinions and the public justification of decisions hardly depend on food or digestive processes.[41]

Two variations on the bias-arousing hypothesis can be added at this point, to make the picture richer. A possibility is that digestive factors play the same role with respect to the party which has an *argumentative burden*. The effect of this will be an acceptance of the status quo. The idea might go like this: when hungry or tired, judges have depleted mental resources and are less attentive to the arguments provided, which implies that it is harder for a party to discharge their argumentative burden. This will equally play against plaintiffs and prosecutors, which on the contrary will all be in a more favorable position after lunch. In sum, according to this hypothesis, mental fatigue generates or triggers a status quo bias (note that the Israeli experiment mentioned above, using control variables, denies other biases such as toward sex and ethnicity). But again, I suspect that this would play together with some more specific biases: if the judge has a bias against criminal defendants and the prosecutor argues shortly before lunch, we might expect that the latter will be in a more favorable position since the less attentive judge will not focus on the possible weaknesses in the argument of the prosecution. The more attentive judge, after lunch, will not miss the deficiencies in the prosecution's argument.

In a similar account, the idea would be that bad breakfast, bad digestion, or hunger can make judges less attentive to arguments that go against a *prima facie solution* of the case. Therefore, the case with a prima facie solution would win when the judge had a bad breakfast, bad digestion, or is hungry or tired. On the contrary, judges who had a good breakfast, good digestion, or enough food, would be more disposed to consider argumentation going against a prima facie solution. A remedy might be to give more food to judges, or more often, as food is an attention-arouser. Mental fatigue will be

[41] Still, one can focus on predictable outcomes, in favor of Legal Realism as an empirical position. "At the core of the Realist claim is the view that judicial decisions are predictable but that the key to prediction of legal outcomes lies neither in the consultation of formal legal authorities nor in the internal understanding or self-reports of judges themselves. Rather, predicting legal outcomes is best accomplished through the enterprise of discovering through systematic empirical (and external) study just what makes a difference in deciding cases." (Schauer 2009, 134) The usual rejoinder is that when a decision has to be justified, it cannot be justified by extra-legal reasons. Then comes the Realist reply (usually attributed to Llewellyn) that for any decision there are possible interpretive canons, etc. (see Schauer 2009, 138).

minimized, but too much food will generate other problems. After a heavy lunch the party with an argumentative burden may be disfavored. This is an eventuality that Frank reported as actual in his own experience.[42]

If we care about the rationality and legality of judicial decisions, we should not dismiss those hypotheses too quickly, not only for the purpose of an adequate description of actual decision-making but also for the purpose of amending it by eliminating such biases and improprieties. As Frank pointed out, awareness of this works as an antiseptic. "The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices."[43]

5. CONCLUSION

Let us take stock by recalling the episodes of our story. Peirce provided a maxim aimed at determining meaning with reference to operational conditions and practical effects. For Peirce's pragmatic maxim, concept application results in conceivable practical effects. Holmes extended the idea to legal concepts. For Holmes' prediction theory, the application of legal concepts consists of predictions of what the courts will do given certain conditions. In the extreme version of Legal Realism (attributed to Frank) the digestive process enters the picture, insofar as it has an explanatory and predictive role with respect to judicial decision-making. Empirical findings about judicial digestion would therefore contribute to the understanding of legal adjudication (and even of law if those findings have a role in the conceptual shaping of legal issues).

This is not to deny the differences in the episodes of this story. With Peirce the argument was conceptual, in terms of conceivable practical effects. With the digestive realists, it was empirical.

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[42] "Out of my own experience as a trial lawyer, I can testify that a trial judge, because of overeating at lunch, may be so somnolent in the afternoon court-session that he fails to hear an important item of testimony and so disregards it when deciding the case." (Frank 1949, 162). Additionally, Miodrag Jovanović has told me of a medieval Montenegro rule according to which witnesses had to be heard before noon, because we better function in the morning.

[43] Frank 1949, 414. Cf. Frank 1948, 936–943.

On the basis of this, digestive jurisprudence restated is the claim that digestive processes are not sufficient to explain and predict judicial decisions, but might be significant as bias-arousers. This claim is empirical rather than conceptual. It is a descriptive and explanatory claim about judicial decision-making. But, as I have said, it requires various conceptual refinements that differentiate it from the too quick claim that decisions depend on what judges had for breakfast.

In addition, the restated claim of digestive jurisprudence does not exclude that other factors and other biases play a role in adjudication, as Frank pointed out, among others. Historical circumstances, political preferences, religious inclinations, economic needs, psychological traits, personal experiences, etc., are all potential factors in judicial decision-making, notwithstanding the fact that they are extra-legal factors (according to a standard account of what we mean by "law"). We should not neglect them even if they are hard to identify and disentangle. And we need further empirical work to test the restated hypothesis of digestive realism.

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CANONICAL JURISPRUDENCE IN THE KINGDOM OF BOHEMIA IN THE MIDDLE AGES

During the High and Late Middle Ages, canon law played a crucial role. This study provides an overview of ecclesiastical legal scholarship in the Czech lands, i.e. in Bohemia (in the Archdiocese of Prague) and in Moravia (in the Diocese of Olomouc). The development of a legal jurisprudence went hand in hand with the development of ecclesiastical administration in the second half of the 14th century and in the early 15th century, which evolved into a compact system. An important factor in this was the establishment of Prague University, including the Law Faculty, in 1348, and also, in particular, the establishment of the separate Prague Law University in 1372. Amongst the major canonists who left work behind were Štěpán of Roudnice, Bohuslav of Krnov, Kuneš of Třebovle, Mikuláš Puchník, and Jan of Jesenice, amongst others.

Key words: *Canonical jurisprudence*. – *Canonists*. – *Kingdom of Bohemia*. – *Medieval* canon *law*. – *Prague Law University*.

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1. INTRODUCTION

Canon law played an important role within the medieval Church. Besides lawyers dealing with Roman law, it was canonists in particular who represented medieval legal scholarship. This study focuses on canonical jurisprudence in the Kingdom of Bohemia in the Middle Ages. It looks in particular at Prague Law University, which enabled citizens of the whole of central and northern Europe to receive a legal education in canon law in the second half of the 14th century and in the early 15th century. Because it was a separate law university without any other faculties, this made it unique within Europe. In addition, the study will look at the most prominent ecclesiastical lawyers who operated within the Kingdom of Bohemia in the Middle Ages. The most prominent figures come from the second half of the 14th century and early 15th century, when the Law University operated in Prague. These figures came from the Czech lands, or else they were naturalised foreigners of mostly German origin.

In an effort to synthetize the topic, Pavel Krafl (2023) has produced an overview of the history of ecclesiastical law in the Czech lands. Also of note is the volume *Sacri canones servandi sunt* (2008) in regard to medieval canon law in the Czech lands and east-central Europe. In regard to the history of the Law University, the university registry is a key source (Album 1834), as is Jiří Kejř's monograph on the same institution (1995a); Kejř also contributed a chapter on Prague's Law Faculty and University to *A History of Charles University* (1995b; 2001). In addition, Jiří Stočes (2010b) wrote a monograph on Prague university nations.

Monographs have been written on a number of distinguished canonists. Jiří Kejř (1965) wrote about the Hussite lawyer Master Jan of Jesenice. Miroslav Černý has looked in depth at the figure and works of Kuneš of Třebovle. He published a monograph on Kuneš, which includes Kuneš's extant synodal sermons and the tract *De devolutionibus non recipiendis* (Černý 1999). Prior to that, he published Kuneš's tract on escheat (Černý 1988). Jiří Svoboda wrote a study on the ecclesiastical lawyer Štěpán of Roudnice. This work centres around an analysis of the content of Štěpán's penitential book and pastoral manual *Quaestiunculae* (Svoboda 2000). Dominik Budský studied the canonist and Prague official and Vicar General Mikuláš Puchník. He produced a content analysis and critical edition of Puchník's procedural manual (Budský 2016a).

Canon law was applied to a lesser extent in the Czech lands from the Early Middle Ages, and was more fully applied in the period following the Fourth Council of the Lateran. It can be considered to have been fully implemented within the life of the Church and society in the second half

of the 14th century and in the first two decades of the 15th century until the outbreak of the Hussite Revolution, which completely overturned the previous administrative and legal system in Bohemia, i.e. in the Prague and Litomyšl dioceses. In Moravia, i.e. in the Olomouc diocese, the administrative and judicial systems continued to operate with no major interference from the Hussites (Krafl 2023, 60–70).

2. FOREIGN STUDIES OF CZECH SCHOLARS

Sources only really give fragmented information on scholars from Bohemia and Moravia at European universities, and it is very difficult to get an idea of their numbers. Apparently, not many Czechs studied law at foreign universities. It appears they only rarely studied at Italian universities with renowned law courses (Bologna, Padua, Vicenza). King Přemysl Otakar II's chaplain, Jakub, received a doctorate of law at Bologna (around 1250), followed by Matěj of Mutěnín (1371). Oldřich of Paběnice, administrator of the Prague diocese during the absence of Bishop Jan IV of Dražice, received a doctorate of decrees in Paris. Olomouc official and Vyšehrad Dean Jan Paduánský received a doctoral degree in law at the university in Padua, where the Czechs had their own university nation, as did Konrád of Bohemia (1382), Jan of Pomuk (1387), Zikmund Albík of Uničov and Jan Náz (1399). Bohuš of Zvole received a doctorate in Vienna (1454–1457), as did Bohuslav Hasištejnský of Lobkovice in Ferrara (1482). Other clerics received licentiates or bachelor degrees in Bologna, Padua, Paris, Montpellier and other locations, or else there is evidence that they studied there. We also assume that certain individuals who resided in cities and towns with renowned universities were studying law. In regard to the early 14th century, we can also see figures who had doctor of law degrees, e.g. the Prague canon Jan of Ostrov, the Kouřim archdeacon Rapota, and the Břevnov monk and later Rajhrad provost Jan. We do not know where these people studied.[1]

[1] See Tadra (1897, 235–236, 243–244, 251, 258–260, 262–265, 266–273, 275, 277–279); Bláhová (1993, 156–157, 163); Zahradník (1904, 228–232); Černá-Šlapáková (1970–1971, 70). See also, Jireček (1903, 70–71); Boháček (1975, 20–23); Ott (1913, 56–70); Ott (1877, 182–188, 217–229), about studies see Ott (1877, 184–188), on legal education and titles (221–225). An overview of Olomouc Chapter canons with doctorate, licentiate or bachelor's degrees in law, according to the place where they obtained their degree, is given in Zemek (1990, 80–81). For example, *Acta nationis Germanicae universitatis Bononiensis* gives the number of students from Bohemia and Moravia, mostly from the second half of the 15th century; see Knod (1899, 3, 19, 23, 48, 53, 90, 91, 127, 135, 163, 185, 217, 226, 234, 263, 265, 275, 283, 309–310, 332, 366, 370, 400, 426–427, 459–460, 533, 585, 600, 611,

3. PRAGUE LAW UNIVERSITY

A law education at university level could only be acquired in the Kingdom of Bohemia, and also in east-central Europe, after the founding of the university in Prague (1348). Pope Clement VI made it possible for all its faculties to be set up, including the Law Faculty. His privilege only mentions canon law, as Roman law was not considered relevant in a non-Romanised country. By 1350 at the latest, Štěpan of Roudnice and Bonsignore de Bonsignori were teaching there. Even at this earliest time, there were evident differences between lawyers and students at other faculties, in particular the Faculty of Arts. In 1360, Arnošt of Pardubice, the Chancellor of Prague University and Archbishop of Prague, published his *Ordinationes*, which was meant to help secure peace at the university. One rector was to head the university, with arts and law rectors taking turns, while the vice-rector was always to be from the other faculty. The situation did not improve, however, and not even Archbishop of Prague Jan Očko of Vlašim's new detailed statute of 1368 was able to resolve it.[2]

Eventually, a separate law university was set up in 1372 as a result of the schism between the Law Faculty and the university's other faculties. This dispute was the consequence of the inorganic connection of two concepts of school administration – the Bologna concept (according to which university authorities should be run by students) and the Paris concept (according to which university authorities should be run by the university's professors). Even after this division, the link between the Law University and the remaining three faculties persisted: while two *universitates* were established, one *studium generale* remained (Kejř 1995a, 19–26; Moraw 1992, 11–12; Svatoš 2000, 13–15).

633, 658, 661), page references to persons of Bohemian origin, without distinction between the faculties where they studied. For students from the Bohemian lands studying abroad in the post-Hussite period (all fields, no specification), see *Acta Universitatis Carolinae, Historia Universitatis Carolinae Pragensis,* Vol. 4 (2/1963), 37–46; Vol. 2 (2/1961), 97–132; Vol. 3 (3/1962), 139–159. On teachers at foreign faculties of law during this time, see Burmeister (1974).

[2] See Dějiny (1995, 163–165); Moraw (1992, 13, 17; 1986, 446, 449); Zelený, Kadlec (1978, 68, 71); Šmahel, Silagi (2018, XVII–XXI, 4). A comment about the Law Faculty in an anonymous pamphlet evidently dating back to 1393 and known as *Planctus cleri* is a reflection of the tensions between artists and lawyers in a later period (Odložilík 1927, 43). For the latest on the time frame and authorship of the text, see Pořízka (1999, 113–118).

Only students became rectors of Prague Law University (including bachelors who were continuing their studies). The office was held by many high status members of the aristocracy and clerics with large prebends. Even so, it is notable how few rectors had achieved a bachelor's degree (Kejř 1995a, 35). Rectors were elected by an eight-member council comprising representatives of university nations. Each of the four university nations (Czech, Polish, Saxon and Bavarian) had two representatives. The newly elected rector was presented to the Archbishop. One member of the university asked for his affirmation. This was followed by the Archbishop's confirmation, only after which did the rector receive his powers. He took up his rights and obligations at an official assembly, at which one of the honoured members would deliver the *recommendatio rectoris*. This recommendation kept to an established pattern, including the use of the same quotations, mainly from the Bible. One of the texts which speakers regularly quoted from was a chapter of the *Decretum Gratiani*, *Sit rector,* D.43 c.1 (Kejř 1995a, 76).

The Law University evidently elected its rectors regardless of their particular university nation. Instead, jurists took more account of the candidate's social status and prestige. The largest number of rectors came from the Czech university nation, and this related to ties to the local social environment. Nicolaus Geuhneri de Praga, for example, was rector repeatedly, for a total of seven times (Stočes 2010b, 156–157). Some Law University rectors later became bishops: George of Hohenlohe was Bishop of Passau, Bertold, Passau canon, Bishop of Freising, and Johann of Brunn was Bishop of Würzburg (Moraw 1992, 24–25; 1986, 459). There is no evidence of a professorial *consilium universitatis* at the Law University, and it probably did not exist as a statutory body (Kejř 1995a, 76).

We do not encounter theoretical papers of domestic origin at Prague's Law Faculty and at the Law University, as were typical of the older universities of southern and western Europe with centuries of tradition. Mostly, we only find evidence of university lectures, manuals for legal practice and spiritual administration, and repetitions (which are interpretations of a precisely defined source that aimed to provide an exhaustive interpretation summarising all opinions and contradictions). Of what originally numbered roughly 400 codices, Jiří Kejř found only thirty-one, over half of which were in the Olomouc Chapter library. Some works migrated to foreign countries: Štěpán of Roudnice (*Quaestiunculae*), Mikuláš Puchník (procedural manual), and Bohuslav of Krnov (lectures on the Books of the Decretals). The most common reports are on lectures regarding *Liber extra* (Kejř 1995a, 57, 90–91).

The Books of the Decretals was a subject taught by Bonsignore de Bonsignori in the first half of the 1350s, by Wilhelmus Horborch from 1369, by the previously mentioned Bohuslav of Krnov between 1380 and 1396, probably by Jiří of Bor from 1397, and perhaps also by Adam of Nežetice. As of 1371, Goswinus de Adenstedt and Ulricus Grünhut were *extraordinarie legentes*. Liber sextus and Clementin*ae* were taught by Jiří of Bor, in 1363 by Bertoldus de Spira, in 1371 by Johannes de Bliden (at that time also rector of the still four-faculty university), and also in 1374 by Fridericus Paganus. By 1386, Matěj Petrův of Chrást or of Skramníky was ordinary professor for Liber sextus and *Clementinae*. Sometime between 1398 and 1407 it was taught by Johann Weilburg. In 1382, Mikuláš Puchník and Johann de Dulmen took their dispute over the right to teach *Liber sextus* to the Prague Consistory court. Mikuláš Puchník won and was duly selected for the lecture. We have less information on the professors who taught the *Decretum Gratiani*. It is unclear whether it was Štěpán of Roudnice, or of Uherčice who taught the *Decretum*. In 1376, it was taught by Ludovicus Thalhelm. Jiří of Bor taught it for eight years, with his lectures beginning sometime around 1390. After him, it appears that Nicolaus Kliczke gave his interpretations of the *Decretum* (Kejř 1995a, 52–54). Roman law remained a fringe interest – the first and only doctor of both laws was Jan Náz, in 1402 (Moraw 1992, 29; Kejř 1995a, 66). The Italian scholar Uberto de Lampugnano and envoy of the Duchy of Milan to King Wenceslas, Giangaleazzo Visconti, gave one-off lectures in Prague: these took place in 1385 (Kejř 1996, 249–270; Kejř 1995a, 111–121; Zelený, Kadlec 1978, 93–95; Černý 2008, 385–389).

In contrast to the rival three-faculty Prague University, the Law University did not become a centre of the struggle for intellectual reform which was changing Czech society at the turn of the 15th century. Elitist, conservative, and connected to the church hierarchy, the Law University remained aloof from contemporary affairs. The conservative worldviews of its lawyers prevented it from joining the radical Wycliffe reformist group, which had taken over the Czech university nation at the three-faculty Prague University (Kejř 1995a, 91–92; Stočes 2010b, 160–161).

From 1372 until the university's dissolution at the start of the Hussite Revolution, 3,563 students were enrolled. An academic title was not required for an ecclesiastical career; all that was required was to acquire a certain amount of knowledge and only a small number of the enrolled actually received academic titles. A total of 235 students achieved a bachelor's degree, and 47 achieved a licentiate or doctorate. We do not have precise data on the social composition of the Law University. There was a strict differentiation between *simplices* and *nobiles* (about 7% of all those enrolled were *nobiles*). *Pauperes* comprised around 20% of students, although none

of them achieved an academic title (Kejř 1995a, 95–96). There are eight scholars from the city of Plzeň recorded as enrolled at Prague Law University, coming from leading burgher families, and also people recorded as *pauperes* (Stočes 2010a, 61–62). At the Law University, nations were understood as they were at Bologna-type universities, in contrast to the three-faculty Prague University, which conceived its nations using the Paris University model. Arriving scholars evidently chose for themselves which of the four university nations they wanted to be enrolled in. Furthermore, nations were not territorially defined (Stočes 2010b, 141, 143).

The largest of the university nations in numerical terms was the Saxon nation (35.5%), followed by the Polish nation, comprised mostly of Silesian Germans (26.1%), then the Bavarian nation (19.3%), and the Czech nation (19.1%) (Kejř 1995a, 97; Borovičková, Sukkariová, Stočes 1993–1994, 68). When the separate Law University was set up, and during the first years of its existence, the largest group was the Bavarian nation, but the number of matriculated Bavarians fell consistently, and from 1393 the Bavarian nation was the smallest. The numbers of matriculated Czechs and Poles fell significantly after 1372, and then rose to their highest levels in 1389. From the mid-1390s, the number of those matriculated in the Czech nation was stable, around 10% annually (Kejř 1995a, 97; Borovičková, Sukkariová, Stočes 1993–1994, 68). There were large numbers of students from the cities of Legnica and Wrocław within the Polish university nation. Differences between the university nations were also observed with respect to the types of prebends that enrolled members received. More than 60% of members of the Bavarian university nation held the ecclesiastical post of canon, while this was under a third for the Polish nation, and less than a fifth for the Czech nation. Parsons were dominant within the Czech and Polish nations, while in the Bavarian nation they comprised only around 19% of members (Borovičková, Sukkariová, Stočes 1993–1994, 69, 73).

During the 1380s, the Saxon nation began to predominate, its members comprising 41% of the total number of Law University members. For people from the Holy Roman Empire's peripheral areas, Scandinavia, and the Baltic region, who registered within the Saxon nation, the Law University in Prague was the most accessible and closest means of acquiring a legal education, thus important for gaining significant prebends and offices. The establishment of the university in Erfurt did not change this situation; there was balanced mutual *peregrinatio academica*. The existence of separate law teaching without the influence of masters at the faculty of arts was also important. In contrast, the smaller numbers of Bavarian nation members was a consequence of the establishment of universities in Heidelberg and

Cologne, and the reforms of the university in Vienna. The enrolment of Bavarian nation members fell consistently, while numbers of members of the Polish and Czech nations rose from the 1390s (Stočes 2010b, 144–145).

A core feature of all developments at the Law University was the school's links with the Prague Church and its Archbishop. A number of highly qualified lawyers taught at the university, although their main focus still remained their official Church activities and career (Kejř 1995a, 97). In 1385, twelve of twenty-two teachers belonged to the Czech university nation. These Czech teachers were linked to the Prague Archbishopric, where they held major roles and prebends in parallel. As a consequence of this, they remained at Prague Law University for longer than teachers from abroad, who did not have access to local prebends. We know that many of the teachers who were foreigners only taught for a few years, and that they saw a high turnover. Limited access to Prague prebends was also the cause of the departure of many Prague teachers for newly founded universities in Germany. The last foreign doctor is documented in 1402, and from that time the teaching staff comprised only members of the Czech nation. Members of the Czech university nation also received more academic titles at the Law University, and this also related to easier access to prebends, which helped to cover expensive examinations and graduations (Stočes 2010b, 151–52, 159, 160).

In 1409, Wenceslas IV issued the so-called Decree of Kutná Hora, which changed the proportion of votes at the three-faculty Prague University (1409). Until that time, each of the four university nations had one vote, but the decree changed the proportion in favour of the Czech nation (three votes for the Czech nation, compared to one vote for the other nations) (Dějiny 1995, 91; Nodl 2010, 244–245). The result of this was students leaving the three-faculty Prague University, but also a fall in members of the Saxon, Polish and Bavarian nations at the Law University, even though the Decree of Kutná Hora did not apply to the Law University. It is estimated that most members of these three nations at the Law University left Prague. Most law students went to Leipzig; thirty-three lawyers who left came from the Polish and Saxon nations (Šmahel 1967, 77–78; Kejř 1995a, 105–106; Stočes 2009, 65–70; 2010b, 161). This was followed by a collapse in interest in studying law in Prague. We cannot determine precisely when the Law University ceased operations. The final act of its existence was the intitulation of three students by the rector elected for the 1418–1419 year (Kejř 1995a, 107).

Separate prosopographic research was undertaken for the Saxon nation at Prague Law University (Stočes 2010b, 177–231; 2012, 17–28). Between 1372 and 1417, 1,245 people were enrolled as members of the Saxon university nation. When it first opened, there was scant representation of the Saxon nation at the Law University. The number of matriculations

increased overall until 1385. Exceptions were the years 1380 and 1381, when the land was afflicted by a plague epidemic. From 1385, the number of those matriculated began to fall again, initially steeply, and then more gradually. At the start of the 15th century, numbers of those matriculated amounted to around twenty per year. In 1409, nobody was matriculated. In the subsequent period, the numbers of those matriculated can be counted in single figures. We can conclude that the Saxon nation had exceptionally strong representation at the Law University in the 1380s (Stočes 2010b, 194, 196–197).

Most people from the Saxon nation were identified as being from Stralsund and Lüneburg. Additionally, there was a large group of people from the major Hanseatic cities on the Baltic and North Sea coasts. The next largest group came from the Episcopal towns of Roskilde, Hildesheim, Lund, Magdeburg, Brandenburg, Skara, Turku and Halberstadt. In terms of regions, the most frequently seen were those from Pomerania (21% of those enrolled), followed by Lower Saxony (within its present-day borders, 13%), Sweden within its historical borders (including Finland, 10%), present-day Saxony-Anhalt (10%), Brandenburg and Neumark (9%), Denmark within its historical borders (including Schleswig and areas in present-day southern Sweden), (9%), Mecklenburg (7%), Friesland and the Netherlands (6%), Holstein (5%), Westphalia (4%), present-day Latvia and Estonia (3%), Hesse (1%), and Norway (1%) (Stočes 2010b, 199–203). The presence of greater numbers of students from the Saxon university nation was the result of Brandenburg joining the Luxembourg possessions, though Luxembourg's political and dynastic ties to Pomerania certainly also played a role (Stočes 2010b, 197, 205–206).

An analysis of the social origins of members of the Saxon university nation implies large numbers of Hanseatic city burghers, followed by burghers from other towns and cities, and members of the nobility. There were negligible numbers of villagers, these coming from Friesland. 70% of those matriculated paid the matriculation tax in full, 19% for *pauperes* and 2% for *nobiles* (Stočes 2010b, 210–211, 215).

We can say that Prague Law University was of great importance in shaping the Church hierarchy in the northern parts of the Empire, in Scandinavia, and in the Baltic region. Between 1372 and 1385 alone, four future archbishops (in Magdeburg, Trondheim, and two in Lund) studied at Prague Law University as members of the Saxon nation, as did sixteen future bishops (in Aarhus, Brandenburg, Havelberg, Lavant, Linköping, Odense, Ratzenburg, Ribe, Roskilde, Schwerin, Skara, Västerås, and two each in Halberstadt and Strängnäs). Later, between 1385 and 1417, five future archbishops studied as members of the Saxon nation (in Bremen, Lund, Prague, and two in Riga),

alongside fifteen future bishops (in Bergen, Brandenburg, Chur, Kuressaare, Naumburg, Olomouc, Oslo, Piltene, Strängnäs, Tallinn, Verden, and two each in Tartu and Västerås). Between 1372 and 1385, three future papal auditors also studied there (Stočes 2010b, 227–228; 2012, 24–25).

Prague Law University graduates also worked in the city administrations of Hanseatic cities. The first group comprised people employed by the city, including city scribes, notaries and other clerks. A second group comprised burghers who took on roles of councillors or mayors (Stočes 2008a, 208–234). People from almost all social classes enrolled at the university as *pauperes*, including the nobility. Although students registered as paupers only exceptionally received an academic degree, they did receive prebends. Pauper Fridrich Deys of Wünnenberg achieved the most prominent career, becoming a papal auditor (Stočes 2008b, 463–465).

Many Prague Law University graduates worked in roles at other, mostly central European, universities. One hundred and twelve graduates are documented as holding university posts at various universities between 1386 and 1417: 53 people at the Prague Faculty of Arts, 36 people at Leipzig University, and others at universities in Rostock, Bologna, Vienna, and Erfurt (Stočes 2012, 26).

4. DISTINGUISHED CANONISTS FROM THE CZECH LANDS

An eminent Bishop of Olomouc was the Cistercian Robert (1201–1240). He was from England and studied at the University of Paris. He worked at the Bohemian royal chancellery, and was identified with the notary described in diplomatics as Otakarus 5. He took part in the Fourth Lateran Council. He was not involved in Bishop of Prague Ondřej II's struggle for the emancipation of the Church in Bohemia, and remained a loyal ally of King Přemysl Otakar I of Bohemia. He founded the Cistercian monastery at Velehrad (1205), where he was buried. He is the author of the manual *Summa confessorum* with its incipit *Cum sit ars arcium regimen animarum, expedit omnibus, quibus animarum cura concessa est.* Robert wrote the work following the Fourth Lateran Council, and it was certainly completed prior to 1234 (before the *Liber extra* was issued). It is the oldest Latin literary work in Moravia. Four manuscripts have been preserved containing the incipit *Cum sit ars.* A manuscript from Admont is kept in Prague, while others are in Munich, Heiligenkreuz, and Schlägl. There are more common manuscripts which have the title *De decem preceptis,* and are featured in eighteen manuscripts we know of (Kejř 2003, 52–56; Kadlec 1975, 73–77; Kejř 2012, 270–271; Hlinka 2006, 90, adnot. 60; 91).

Renowned lawyers from Bohemia included Hermann of Prague, canon of Prague, Vyšehrad, and later Regensburg. He also appears in sources as Hermannus de Bohemia, or the Romanised form of his name, Armandus de Boemia. He came from a leading Prague burgher family. He studied law at the university in Bologna at the end of the 13th century, where he was present at the time of Boniface VIII, gaining a bachelor's degree and later achieving the title of Doctor of Decrees. He was a papal chaplain, and was given the job of curial executor in dioceses of central and northern Europe. The earliest document mentioning him as papal auditor dates to 1323. On 3 December 1337 he was named Bishop of Warmia (Ermland) after the Warmian elect in Avignon renounced his rights in the bishopric. Prior to the end of April 1338, he was ordained a bishop at the curia. Due to resistance from the Warmian Chapter, he didn't take over the bishopric until August 1340. Due to difficulties, he was allowed to keep his previous benefices. He died on 31 December 1349 (Hledíková 2003, 75–92; Die Bischöfe 2001, 183).

Hermann of Prague is the author of three well-known works: *Concordantia decretalium cum decretis*, *Summula de concordantia scriptorum theoloycorum et iudiciorum*, and *Opusculum de casibus reservatis*. According to J Kejř, *Concordantia* was probably written between 1327 and 1329, and one copy has been preserved in a manuscript of the Moravian Regional Archives in Brno (Kejř 1974, 27–39; Švábenský 1972, 177–179). Summula and Opusculum appear to have been written during Hermann's stay in Avignon during the 1330s, in the period between his recovery from illness in 1333 and his departure from Avignon in 1338. There is a single copy of both these works in Vatican manuscripts (Hledíková 2003, 81; Brinktrine 1924, 358).

Summula de concordantia scriptorum theoloycorum et iudiciorum discusses the seven sacraments. The author bases the text in particular on the works of Thomas Aquinas and Richard of Middleton. The document contains an alphabetical index. *Opusculum de casibus reservatis* is an extensive work which takes up a whole manuscript of 262 pages. It includes a large index. He evidently began working on Opusculum as a Bologna bachelor sometime at the turn of the 14th century. He collected selected normative texts of particular church law for certain central European ecclesiastical provinces and dioceses (including legatine statutes) from the final third of the 13th century and early 14th century. The Opusculum also reflects the decisions of the Vienna Legatine Synod of 1267. The commentary also includes the apparatus with normative texts (Hledíková 2003, 84–91; Brinktrine 1924, 359–374).

One of the first two law professors at Prague University was Štěpán of Roudnice (or also Štěpán of Uherčice). He studied canon law in Perugia and was Vicar General of the Prague archbishopric (1346–1358). He was

a permanent vicar of Arnošt of Pardubice, Archbishop of Prague, in the Prague church, a Prague and Olomouc canon, and a Litoměřice archdeacon. He visited a large number of Church institutions in both Czech dioceses. In the end, he resigned from all his offices and in February 1358 joined the Monastery of the Canons Regular of St Augustine in Roudnice nad Labem. He wrote the penitential book and pastoral manual, *Quaestiunculae*. This work can be divided into two parts, with the first featuring questions related to the sacraments, criminal law, moral pastoral problems, and liturgy. The second part of Quaestiunculae looks at financial and commercial issues. It is particularly influenced by Astesanus of Asti's *Summae confessorum*, Cardinal Henry of Segusio's (Hostiensis's) *Summa aurea*, and Raymond of Peñafort's *Summa de poenitentiae*, and also by the 1349 provincial statutes of Archbishop of Prague Arnošt of Pardubice, and, of course, by the *Decretum Gratiani* and the *Liber extra*.[3]

Another penitential book, preserved in a fragment and entitled *Tractatus casuum per glorisimum magistrum Zanderum ad eruditionem silicium compositus et collectus*, was written by the Olomouc Vicar General and official Sander of Rambow (1373–1380) (Boháček 1960a, 72; 1962, 401; Kejř 2012, 278). The Prague official Boreš operated at the same time; he was author of the small work *Collectum magistri Borssonis, archidiaconi Bechinensis, qualiter religiosi exempti extra monasterium consistentes se habeant ad episcopum et alios prelatos.* This is preserved in an Olomouc Chapter manuscript from the 15th century. Boreš is documented as Bechyně archdeacon from 1364 to 1390, and was official to the Archbishop of Prague in 1381–1383 (Boháček 1960a, 71; 1962, 400; Bartoš 1941–1945, 53–54; Kubíčková 1932, 410, 478).

A major figure at Prague Law University was Wilhelmus Horborch. He was born sometime between 1320 and 1325 in Hamburg. He was a dean in Hamburg (documented in 1365) and canon in Cracow (by 1380). By 1361, he was a Bachelor of Canon Law. That year, he was appointed papal collector. He studied in Bologna from 1367. He is documented as teaching the Decretals at Prague University, and then at Prague Law University from 1369 to 1374. He is listed as a doctor. He played an important role in the Law Faculty's separation from Prague University: on his initiative, Charles IV purchased a building for the new Law University in 1373. In 1376, he was called to Avignon, and he later worked in Rome as a young auditor of the

[3] See Svoboda (2000, 55–70); briefly Svoboda (2008, 379–384); Zelený, Kadlec (1978, 68–70); Kejř (2012, 272–274); Kadlec (1998, 221); von Schulte (1877, 431). An analysis of *Quaestiunculae* is given in Svoboda (2000, 71–255). A copy of their text reached as far as the library in Cambridge; Kejř (1986, 122–123).

Roman Rota. Prague Law University is linked to his repetition in the decretal *Debitores* (X 2.24.6), which looks at usury and interest. Copies of this *Repetitio decretalis Debitores* have been preserved in Prague and Wrocław. He is the author of the well-known and widespread collection of Roman Rota judicature, *Decisiones novae Rotae Romanae.* One of his manuscripts is held in the Moravian Provincial Archives in Brno (Kejř 1995a, 20, 23–25, 50, 52, 55, 57; Zelený, Kadlec 1978, 73–75).

One of the most influential teachers at Prague Law University was evidently Bohuslav of Krnov. His lectures on the *Decretals*, as already noted, were widely found in foreign libraries, and provided extensive commentary. The author was born in Krnov around 1330. He gained a master's degree at the Prague Faculty of Arts, after which he studied law abroad. In 1372, he was recorded with the title of Doctor of Decrees in the Prague Law University register. He is listed as a regular lecturer of the Decretals in 1380, and again in 1385, and he appears to have still been teaching the subject in 1396. He was rector of the Prague Law University in 1381. He held a canonical benefice in Olomouc, and in 1386 he was Dean of Prague's Cathedral Chapter. King Wenceslas IV caused him a sword head wound in anger (1393). The last information about him dates back to sometime between 1412 and 1415 (Kejř 1995a, 50, 52–53; Zelený, Kadlec 1978, 83–84; Boháček 1975, 66).

The second generation of lawyers to come out of Prague higher education included Kuneš of Třebovle. He studied at Prague University, where he gained a bachelor's title. He began as a priest in Vitice, and in 1371 he received expectation of a canon prebend at the Prague Chapter, though the first mention of his being a canon comes from 1375. He was evidently in Padua in spring 1370, where he undertook repetitiones et disputationes. He also acquired some knowledge of Roman law there. At the end of 1371 or in early 1372, he received the title of Doctor Decretorum in Prague. Following Prague Law University's separation from the rest of the university, he became one of its professors. There is, however, a lack of detailed information on his teachings at the university. Kuneš focused on official activities, and from 1377 to 1382 and 1386 to 1389 he was Vicar General at the Archbishopric of Prague. In 1379, he was Archdeacon of Stará Boleslav, and at some point during this period he became custodian at the Prague Cathedral Chapter. He became one of Archbishop of Prague Jan of Jenštejn's main co-workers. He died in 1397 (Černý 1999, 3–21. Cf. Boháček 1975, 71–73; Zelený, Kadlec 1978, 76–78; Černý 1998, 29–35; Kejř 1995a, 61–62).

At the June 1386 synod, after having received a vision of the Virgin Mary, Archbishop Jan of Jenštejn introduced the feast of the Visitation of the Blessed Virgin Mary to the Prague archdiocese. He asked Kuneš of Třebovle to write

a legal justification for this new feast day, and this resulted in *Probaciones de institutione festi Visitationis Marie*, a brief text featuring references to various legal authorities (Černý 1999, 15–16).

In 1377, Kuneš of Třebovle was given the task of performing a sermon at the archdiocesan synod on the Feast Day of St Luke, i.e. 18 October. He gave the sermon *Sculte egerunt pastores* on a topic from the Book of Jeremiah. His sermon criticises the usual vices of ambition and pride, lack of Christian love, greed and injustice, gluttony and drunkenness. Finally, it discusses the consequences of a shepherd's badly-led life, specifically the death of his sheep – the believers. We cannot date Kuneš of Třebovle's second synodal sermon, *Domine salva nos, perimus*, although it has been linked to the Prague Synod of 15 June 1377. This sermon is based on the Epistle to Titus, and outlines what characteristics a bishop should have. Kuneš implies that every priest should fulfil these characteristics. The choice of a canonist as a synodal preacher emphasised the legal context. Kuneš of Třebovle's main source for both sermons was the *Decretum Gratiani* and the theological authority it contained. This was complemented by other canon law authorities, such as the collections *Liber extra*, *Liber sextus*, Roman law, and the work of canonists Innocent III, Guido de Baysio, Cardinal Hostiensis, and others (Černý 1999, 22–44, 83–135; 2020, 232–233).

In 1386, the Archbishop of Prague, Jan of Jenštejn, declared his intention of waiving rural escheat in the estates of the Prague archbishopric. It was the son who could claim hereditary rights to the land, not daughters, the widow or other cognates. He received permission in this regard from the Prague Cathedral Chapter. Even so, a dispute arose around the matter, which took on the form of learned discussion. At a session of the chapter, a scholar at the Cathedral Chapter, Vojtěch Raňkův of Ježov (Adalbertus Ranconis de Ericinio), spoke against the archbishop's privilege, which had been textually prepared by Kuneš of Třebovle. Vojtěch Raňkův of Ježov had many theological disputes with Jan of Jenštejn, and he stopped the issuance of the privilege. He wrote the paper *Apologia*, in which he also rejected Jenštejn's Visitation feast day, and, in particular, contested the right of the Archbishop to abolish rural escheats. Vojtěch attacked Kuneš's argument on the basis of the Old Testament Book of Numbers, in which a daughter's legal entitlement to her father's inheritance is acknowledged. In principle, he rejected Old Testament rules if they were not later adopted by legislators into the legal system in force (Černý 1999, 45–61; Boháček 1961, 108–115; Černý 1988; Kadlec 1969, 51–57).

The Archbishop assigned Kuneš of Třebovle the task of responding with a tract, and he then created the tract *De devolucionibus non recipiendis*. This tract includes a description of the dispute between Vojtěch Raňkův of Ježov

and Archbishop Jan of Jenštejn, followed by the wording of Jenštejn's privilege, and extensive arguments by Kuneš based on numerous ecclesiastical law authorities. Kuneš showed that subjects are free people and are not slaves, with a status similar to the position of emphyteutic farmers according to Roman law. He then demonstrated the right of peasants to transfer their movable and immovable properties to their children of both sexes. This was based on natural law. He collected the statements of Holy Fathers and other authorities demonstrating the unlawful nature of the custom of escheat. The idea includes quotes from the *Decretum Gratiani* and *Liber extra*, and comments from Guido de Baysio and Pope Innocent IV (Černý 1999, 62–80, 136–151. Cf. Černý, 1988; 2020, 230–231; Boháček 1961, 108–129; 1975, 72–73; 1951, 407–426).

Another major lawyer of domestic origin was Mikuláš Puchník. He came from a yeoman family based at a fort in Černice near Horažďovice. He received a Bachelor of Arts degree at Prague University in 1373, and a Master of Arts degree in 1377. In 1383, he received a Licentiate of Decrees. From 1375 to 1376, he was school rector in Roudnice nad Labem. In 1377 and 1389 he was mentioned as a university examiner, from 1386 to 1389 he was university vice-chancellor, and from 1389 to 1390 he was university rector. He began his official career in 1383, when he became the Official of the Archbishop of Prague, Jan of Jenštejn. He held the role of official until 1394. In 1392, he became Jan of Pomuk's deputy in the office of Vicar General, and then in 1395 he was appointed the second Vicar General. He is still documented as being Vicar General in 1401, though he should have been recalled in 1398. He is documented as receiving a benefice from 1388, when he became canon in Mělník and Olomouc. That same year, he received a canonry in Prague's Cathedral Chapter. He was involved in a dispute over the church in Hartvíkovice in the Diocese of Olomouc, the benefice of which he held from 1390 to 1392. He is documented as parson at St Nicholas Church in Prague's Old Town from 1391 to 1396, as prebend administrator in Valeč in 1393, and as holder of the parish in Jemnice in 1400. In 1396, he received a canonry at the St George's Chapter in Prague, and in the Vyšehrad Chapter. In regard to the dispute between King Wenceslas IV and Archbishop of Prague Jan of Jenštejn, the King had him locked up and tortured. In 1402, the Prague Metropolitan Chapter chose him as Archbishop of Prague, although he died while he was still archbishop-elect (Budský 2016a, 11–22, 87–103; 2012b, 324–328; 2010, 767–769; 2013, 123–134; 2006, 83–85; 2008b, 578–579).

Sometime between February 1386 and October 1389, Mikuláš Puchník wrote the procedural manual *Processus iudiciarius secundum stilum Pragensem.* This was the first writing of its kind within the Czech legal environment. Puchník utilised his experience as official and professor at

Prague Law University. He created a study which helped readers to obtain a grasp of certain procedural steps – specifically, those involved in the bringing of an accusation and subsequent citation – and gives the example of a specific dispute, along with the form of the statement of claim (*libellus*), the subject of the prosecution, and its justification. The work also looks at the defendant's plea (*exceptio*), the response to the plea (*replicatio*), the interlocutory judgement (*sentencia interlocutoria*), a definition of the subject of the dispute (*litis contestatio*), oaths (*iuramenta*), the suitor's articles (*positiones*), the ways they are rejected by the defendant, and sets of questions according to different types of dispute (*interrogatoria*). The subsequent section looks at the oaths of witnesses and the matter of ascertaining their impartiality (*forma examinandi testium*), the defendant's objections to the witness testimony and against his reliability (*exceptio contra*), the suitor's response to the defendant's pleas (*replicatio*), the defendant's response to the defendant's *replicatio* (*duplicatio*), the final verdict (*sententia diffinitiva*), and the appeal to the papal court (*appelatio*). This is followed by the matter of determining costs for the dispute (*expensium taxatio*), the appeal against the judgement in an interlocutory dispute (*forma appelationis ab interlocutoria*), the matter of determining legal representatives for managing the dispute (*forma procuratoria*), the presentation of seven types of judicial files according to the content of the dispute (*forme libellorum*), and an example of an appeal regarding the awarding of a benefice to a poor cleric. Finally, the reader finds a list of ecclesiastical punishments (*censure ecclesiastice*), the form of lifting excommunication entrusted to a local parson (*forma commissionis absolutionis*), the form of lifting excommunication by a judge (*forma absolutionis*), the form of lifting the excommunication of a deceased person (*absolutio mortui*), and the form of canonical admonition (*forma monitionis*) (Budský 2016a, 29–42, 114–201. Cf. Boháček 1958, 5–35; Budský 2012b, 328–340; 2012a, 80–81).

Processus iuriciarius secundum stilum Pragensem exhibits distinctive characteristics and a distinctive style: it is based on the customs of the Prague consistory and explains the course of a canonical trial on the example of a specific dispute in all of its phases. The author introduces complex terms as he goes through each stage of the trial, and adds a number of documents at the end. In contrast to other procedural manuals in use, it focused on a specific case and did not provide a structured theoretical interpretation. The clarity of Mikuláš Puchník's procedural guide supports the hypothesis that it was a study which could have been used at the Prague Law University too. The large number of extant manuscripts which feature *Processus iudiciarius* suggests that it was a widely-used piece of work within Central Europe. Manuscripts can be found today in libraries in Olomouc, Berlin, Eisleben, Leipzig, Munich (2), Rostock, Graz (2), Wrocław (2), and Gdańsk (2), and

we also know of a document once in today's Kaliningrad which is no longer extant. These manuscripts date back to between 1390 and sometime after 1467 (Budský 2016a, 43, 48–49, 63–77. Cf. Boháček 1958, 31–33; 2016b, 215–232).

Jiří of Bor gave successive lectures about all valid canon law collections at Prague Law University. He was named after the parish benefice in Bor, which he gained in 1375 when not yet a priest. He then took on a number of different successive parish benefices and one altar benefice. In addition, he received a canonry in 1396 at the Prague Cathedral Chapter. From 1395 to 1396 and in 1403, he was a deputy official, while from 1396 to 1397 and in 1398 he is recorded as a deputy vicar general. He enrolled at Prague Law University in 1383, receiving a bachelor's degree in 1387, a licenciate of decrees in 1393, and a doctor of decrees in 1396. Wenceslas IV, King of Bohemia, appointed him lector of Decretals at Prague Law University probably in 1397, after eight years of lecturing on the *Decretum Gratiani*, the *Liber sextus* and the *Clementinae*. In 1409, he was a member of the Prague archbishop's commission which was to investigate John Wycliffe's books. Jiří of Bor was the author of instructions which explain to readers how to act at a place affected by an interdict. This was produced in regard to the declaration of this sanction by Archbishop Zbyněk Zajíc of Házmburk against Prague in 1411. Jiří of Bor also wrote a text in which he concludes that the interdict on Jan Hus was justified and refutes some of his opinions regarding the Church (Zelený, Kadlec 1978, 85–88; Černý 2000, 225–230).

Jan Náz combined both knowledge of canon law and Roman law. He appears to have been the son of a Prague burgher Jindřich Náz. He acquired a Master of Arts degree at Prague University's Faculty of Arts. In 1391, he enrolled at Prague Law University, but he ended up continuing his studies in Padua, probably in 1394. He became an ultramontane rector there in 1396, received a licentiate in 1397, and acquired the doctorate degree *in decretis* in 1399. At this time, he was in receipt of a canon's prebend at the Prague Cathedral Church. He later left to study Roman law at the University of Bologna. He was the first and only doctor of Roman law at Prague Law University, where he defended this degree in 1402. As royal counsellor to King Wenceslas IV, he took part in the Council of Pisa in 1409, and a year later he was the king's envoy to Pope Alexander V in regard to heretical books in Bohemia. In the second decade of the 15th century, he was an auditor at the papal rota in Rome. He took part in the Council of Constance in 1415–1416, where he spoke out against Jan Hus. He was subsequently appointed bishop in Chur, Switzerland, in 1418. He died in 1440. We have an

extant speech of his, which he gave when opening lectures for the academic year of 1400 at Padua University (Zelený, Kadlec 1978, 97–99; Zelený 1970, 207–212; Pořízka 2000, 31–32).

Jan of Jesenice stands out particularly amongst Hussite-oriented Czech lawyers. He achieved the title of Bachelor of Arts in 1397 at Prague University, and received a bachelor's title at Prague Law University in 1407. A year later, he received a master's degree at the Faculty of Arts. He was apparently poor, as can be determined from his deferment of university fees in 1397 (Kejř 1965, 6–7, 94–96). He became public notary *auctoritate apostolica et imperiali*, and four of his notarial instruments, which he wrote between 1401 and 1414, remain extant today. In his 1408 notarial instrument, he and his colleagues describe the appeal of Jan Hus's pupil, Master Matěj of Knín, accused of heresy (Nuhlíček 2011, 229, No. 566).[4] His reformist opinions became apparent in 1407, when he defended his thesis at Prague University that an unjust verdict was not binding, and claimed that all the apostles were equal, i.e. that St Peter was not first amongst them. He also declared here that an interdict declared by a person in mortal sin was not valid (Kejř 1965, 9).

In 1410, Jan of Jesenice went to Rome as a procurator of Master Jan Hus. As a result of the activities of Hus's opponents there, he was sent to jail on suspicion of heresy. He escaped from prison and returned to Bohemia (Kejř 1965, 43, 60–61, 64). In 1413, the aggravation of Master Jan of Jesenice's interdict was declared, with Prague Archbishop Conrad of Vechta using this fact to aggravate the interdict on Prague. This resulted in people rioting, during which Prague's Hussites seized most of Prague's churches. Jan of Jesenice was the target of attacks at the Council of Constance, but he was partially protected by secular power. In the end, he fell into the hands of the Czech nobleman Oldřich of Rožmberk and died in his dungeon (Kejř 1965, 99, 103, 124).

In 1409, Master Jan of Jesenice took part in the quodlibet disputation with the quaestio *Utrum iudex sciens testes false deponere et accusatum esse innocentem debet ipsum condempnare*, mainly based on Wycliffe's tract, *De civili dominio*. The author strongly rejected the idea that judges should be bound by false evidence, and emphasised the necessity of the free consideration of evidence by judges, in which he was mainly thinking about witness evidence. There are four extant manuscripts of the quaestio (Kejř 1954, 25–37, 53–65; 2006, 212–216; 1965, 13–14, 155). Jan of Jesenice took on the defence of King Wenceslas' Kutná Hora Decree of 1409, which gave

[4] J. Kejř (1965, 8) disputes that Jesenice worked as a notary.

members of the Bohemian nation a decisive voice in the affairs of Charles University in Prague. His work made use of quotes from the Decretum Gratiani, *Liber extra*, and Roman law (Kejř 1965, 15–16, 156; Kejř 1954, 8, 11–12; Nodl 2010, 257–263). Jesenice's quaestio *Utrum iudex corruprus ferens sentenciam pro parte corrumpente gravius peccat quam corrumpens* dates to early July 1409. He deals with the issue of violations of the judge in the quaestio, and classifies methods which can move judges to act wrongly. These include fear, material greed, hate, and love. Compared to a fearful judge, he considers the existence of a bribed judge to be the greater sin. This is because such a judge acts knowingly and willingly, whereas in the other cases the judge's freedom to decide is limited. Jesenice compares a judge afflicted by material desire to Judas, and a judge affected by fear to Pilate. His opinions in regard to the College of Cardinals and the deposed pope, Gregory XII, were in line with those of King Wenceslas IV and against Archbishop of Prague Zbyněk Zajíc of Házmburk. In this work, Jan of Jesenice also defends King Wenceslas IV's decision in regard to the votes of individual nations at the university (Kejř 1954, 4–12, especially 7–9; 1965, 20, 157).

Kejř considers Jesenice's lecture in which he provides a commentary on the faults of the trial of Jan Hus to be one of the best legal works presented at Prague University. Specifically, this was *Repetitio pro defensione causae M. Ioannis Hus*. His main thesis is the claim that excommunication does not apply if the particular person was not admonished by name. He analysed regulations about excommunication regarding persons who come into contact with the excommunicated. He notes the exemption of university members from the archbishop's powers; his interdict against them was therefore ineffective. His interpretations lead on to an analysis of the Hus trial, and he comes to the conclusion that the trials against Master John Hus were unjust and invalid. He also documented that the excommunication of persons who were excommunicated alongside Hus was also invalid. He states that the sentence against Hus was unlawful. The *Repetitio* has a rich scholarly apparatus. It bases itself on the *Decretum Gratiani* and its *Glossa Ordinaria*, *Liber extra*, *Clementinae*, and Roman law, specifically the *Digesta*, the *Codex Justinianus*, and the *Autenticum*. It makes use of a wide spectrum of canon law authors, such as Huguccio of Pisa, Guilelmus de Monte Lauduno, Innocent IV, Ioannes Andreae, Goffredus, Hostiensis, Durand, Guido de Baysio, and less renowned figures such as Ioannes Monachus, Garsias Hispanus, and his contemporary Petrus de Ancarano. All this knowledge and the formal perfection of this speech make him one of the finest Czech canonists of his time (Kejř 1965, 68–70, 157–158).

Jan of Jesenice used canon law materials to write *Replicatio contra falsa consilia.* He did so in response to materials produced in 1413 by a consilium of a number of anti-Hussite doctors (Kejř 1965, 78–79). Master Jan of Jesenice submitted an analysis of authorities for communion under both forms in the tract *Auctoritates pro communione sub utraque specie*. This spread widely, as attested to by the twenty-nine extant manuscripts (Kejř 2006, 218–224). The tract *Summa de iustitia et nullitate sententiarum contra Hus*, which was meant to be present in the Library of the Czech nation's hall of residence at Prague University, has not been preserved (Kejř 2006, 216). Kejř also attributed authorship of *Ordo procedendi*, which describes the main events of the trials of Jan Hus at the Prague Archbishop's court and Papal Court up to his departure for the Council of Constance, to Jan of Jesenice (Kejř 2007, 57–67; 2006, 132–145).[5]

The Heidelberg Master Friedrich Eppinge gained a bachelor's degree and master of arts in Heidelberg, and then became a Bachelor of Canon Law in 1405. He subsequently worked at Prague University in the years up until the issuance of the Kutná Hora Decree. Following an interlude in Dresden, he returned to Prague. He took part in the activities of the reformists and devotees of Wycliffe's teachings. He defended selected Wycliffe theses at the university in 1412 alongside Master Jan Hus and Master Jakoubek of Stříbro. Specifically, he wrote about unjust excommunication, in this way producing a comprehensive work whose influence is evidenced through numerous extant manuscripts: his *Posicio de excommunicatione* is preserved in nine extant medieval manuscripts (Prague, Bautzen-Gersdorff, Vienna). This work is the only one we can attribute to this particular author with certainty. Most canonists held the opinion that even an unjust excommunication was binding, whereas Hussite theoreticians in contrast emphasised the moral aspect of true guilt. In contrast to other Hussite theoreticians, Eppinge makes use of legal sources and keeps to the legal form, avoiding moral theology and ethics. His work cites the *Decretum Gratiani*, *Liber sextus*, the *Glossa Ordinaria* to the *Decretum Gratiani* prepared by Bartholomeus Brixinensis, and the *Novella in Sextum* by Ioannis Andreae and Henricus Bohic. Although the ideas of *Posicio de excommunicatione* fall within contemporaneous thoughts on excommunication, the text itself remains an independently conceived work. He was held in great respect by both his pupil Jan Drändorf, who was investigated by the inquisitorial court, and also by Czech masters (Kejř 1976b; 2006, 170–181; Zelený, Kadlec 1978, 99–100; Kejř 1995a, 92; Boháček 1975, 66–67).

[5] Most recently, D. Coufal (2014) used indirect evidence to attribute ownership of codex K 16 from the Prague Chapter Library to Jan of Jesenice.

5. EDUCATION OF HIGHER CHURCH DIGNITARIES

A canon law education was an important requirement for performing leading roles in the administration of dioceses and in the exercise of judicial authority. Ten of the twenty-seven Vicar Generals of the Archbishopric of Prague in the pre-Hussite period held law degrees: besides the abovementioned Kuneš of Třebovle, Jan Paduánský, and Jan Welflin of Pomuk, also Matěj Petrův of Chrást or of Skramníky, Jan Ondřejův, and Jan Kbel were doctors of decrees, while Jan of Pořešín had a doctorate of law, and Jan Kantor of Litomyšl, Jan of Brusnice and Mikuláš Puchník of Černice had a Licentiate of Law. A knowledge of law was a logical precondition for holders of the office of official, although a completed education with a doctoral degree was more of an exception. Of Prague officials, for example, Hostislav Všemilův of Prague had a doctorate of decrees, as did Olomouc officials Heidenreich, Jan Paduánský, Záviš of Zapy, Jan Ház, and Bohuš of Zvole (Krafl 2023, 241).

Many later Archbishops of Prague acquired a law education: Arnošt of Pardubice (1344–1364), for example, studied law alongside theology, receiving a licenciate of decrees in Padua,[6] as did Jan of Jenštejn (1378–1395/1396), who gained a bachelor of decrees, and Zikmund Albík of Uničov (1411–1412), who achieved a doctorate of decrees (Hledíková 2008, 23–24; Vyskočil 1947, 184–185; Boháček 1975, 36; Spěváček 2004, 54). Of the Bishops of Olomouc, Jan Mráz (1397–1402) had a doctoral degree, while Kuneš of Zvole (1430–1434) and the abovementioned Jan Ház of Brno (1450–1454) and Bohuš of Zvole (1454–1457) were doctors of decrees (Krafl 2014, 96).

An analysis of the education of members of the Prague Metropolitan Chapter shows that for the period from the mid-14th century until the Hussite Revolution, there was a clear predominance of persons who were educated in law or had graduated as lawyers (Budský 2008a, 27–28; 2006, 66, 74, 75, 77, 79, 81–83). Data on some students of law and university graduates can be found in rotuli submitted to the Holy See asking for benefices to be assigned. The names of many lawyers are also found in the acts of the consistory court (Kejř 1995a, 14–15, 88).

Some lawyers found positions in the Holy See. Friedrich of Pernštejn, a member of a leading Moravian noble family, became the Papal Penitentiary some time prior to 1304. He was subsequently Archbishop of Riga,

[6] The leading European canonist Iohannis Andreae kept in written contact with Arnošt of Pardubice (Bartoš 1957).

returning to the papal curia in 1325 following disputes with the Teutonic Order, and as executor of papal statements, he mainly focused on Czech matters (Hledíková 2003, 55–75; 2002; 2010, 461–475). Some lawyers from Bohemia and Moravia worked as auditors of the Roman Rota: in the 1320s and 1330s, Hermann of Prague; in the 1410s, Jan Náz of Prague; and prior to the period 1411–1431, Kuneš of Zvole. The latter named was also auditor of the Conciliar Rota in the Council of Basel (Pořízka 2000, 31–32).

6. LIBRARIES AND THEIR CONTENTS

The most significant and most extensive extant collection of manuscripts of a canon law nature is found in the Olomouc Chapter library. Legal manuscripts represent the second largest number of medieval codices in the library collection, following theological manuscripts. The vast majority of these works comprise theoretical works of medieval literature, drawn from Italian and French schools from the 12th–14th centuries. The library is a useful source of knowledge with respect to finding out about imported European literature, especially considering that the library was not affected by the Hussite Revolution, as church libraries were in Bohemia. Miroslav Boháček has identified a total of 247 legal codices of both a canon law and Roman law nature within Olomouc Chapter library legal manuscripts (Boháček 1960a, 3–5, 74–80; 1962, 309–310, 403–412).

Many clerics and church representatives collected valuable books with ecclesiastical law content. We do not find manuscripts with canon law works at rural parish offices, except for provincial and synodal statutes. We mostly find legal canonical manuscripts in the large libraries of monasteries, chapters, university halls of residence, and the libraries of major prelates with a law education (Kejř 2008, 366–367). The Dean of the Vyšehrad Chapter, Vilém of Lestkov, owned a huge collection of books with legal content (a total of 114 volumes). After his death, Charles IV purchased the collection for Charles' Hall of Residence at Prague University. A collection of twelve canon and Roman law manuscripts was owned by the Olomouc official Pavel of Prague. Nine manuscripts with canon law texts are extant in the parish library at the Church of St James in Brno (Krafl 2023, 206–207).

Large numbers of canon law works can be found in the libraries of the Canons Regular of St Augustine monasteries. Much canon law is contained in the library of the Canons Regular of St Augustine monastery in Třeboň, including manuscripts and incunables. It includes the *Decretum Gratiani,* books of decretals, and works written by Ioannes Andreae, Hermann de Schildesche, Giovanni da Lignano, Henricus de Merseburg, Jacobus de

Teramo, and Albertanus of Brescia. The library contains many penitential books (Dragoun, Ebersonová, Doležalová 2021, 119–122). The library of the Canons Regular of St Augustine Monastery in Roudnice features works by Ioannes Andreae, Abbas Antiquus, Huguccio of Pisa, Guillaume Durand, Bartholomeus Brixinensis, Batholomeus de Concordio, Bernard of Pavia, Aegidius Fuscarius, and Raymond of Peñafort, amongst others (Kadlec 1992, 130).

The manuscripts at the Research Library in Olomouc, previously owned by Bohuš of Zvole, Bishop of Olomouc, and afterwards by the Olomouc Carthusians, contain in particular the transcripts of Vienna university lectures. Unpreserved or unidentified manuscripts owned by Bohuš contained the necessary and usual books of the *Corpus iuris canonici* and other tracts, interpretations, concordances and manuals; to name but one, Guillaume Durand's procedural manual, *Speculum iudiciale* (Boháček 1960b, 83, 90, 107).

The humanist and Doctor of Canon Law Bohuslav Hasištejnský of Lobkovice (cca 1461–1510), who studied at the universities in Bologna and Ferrara, left behind a collection of thirty-six printed books or convolutes with canon law content, fifteen of which he brought with him directly from Italy. Nine of them were printed in Bologna. Most of them were works of Bologna lawyers of the 14th and 15th centuries. Seven of the purchased incunables were printed by Henricus de Colonia, who specialised in publishing the works of Bologna professors (Boldan 2008, 436). The library of the Dean of Prague's Cathedral Church, Alexius Třeboňský, featured a collection of forty-five mainly printed, but also handwritten, books with canon law content, according to a 1495 catalogue (Hlaváček 1959, 242–244).

Over the centuries, the libraries suffered major losses. The greatest loss for those studying the history of canon law in the Czech lands is the complete disappearance of the manuscripts of Prague Law University. We have found no traces of them whatsoever (Kejř 2008, 367).

The many manuscripts contained in Czech and Moravian libraries contain valuable canon law works of a monographical nature. These include, for example, a unique copy of Odofredus's work, *Summa de libellis formandis*, and Roffredus's *Libelli in iure canonico* (Kejř 1976a, 99–101). Of the extant works in the Olomouc Chapter's library, one should at least note the monographs on marital law written by Ioannes Andreae (*Summula super quarto libro Decretalium* and *Apparatus/Lectura Ioannis Andreae super Arbore consanguinitatis et affinitatis*) and Ioannes de Deo (*Commentum arboris de consangiunitate et affinitate*), a work on jurisdictional powers

(*Libellus dispensationum*) and a work on appointing people to offices (*Liber pastoralis*), both from the latter-named author (Boháček 1960a, 54–55; Boháček 1962, 377–378).

7. SUMMARY AND CONCLUSION

In the second half of the 14th century, Prague became an important political centre in Europe. As well as the Bohemian crown, the House of Luxembourg gained the crown of the Roman Kings, and later the Roman Emperors, while under Charles IV and Wenceslas IV, Prague was not just the capital of the Kingdom of Bohemia, but also of the Holy Roman Empire. Prague University, founded by Charles IV (1348), became a centre of learning. An important impulse for the development of canon law in Bohemia and canon law erudition was the establishment of the Law Faculty at Prague University, and subsequently the establishment of the separate Prague Law University. While it was not at the same academic level as Italian centres of education, it did provide canon law education to students from across the entirety of central and northern Europe. We have most information about lectures on the Decretals of Gregory IX. Some of the works of university members that spread abroad include Štěpán of Roudnice's *Quaestiunculae*, Mikuláš Puchník's procedural book, and Bohuslav of Krnov's lectures on the books of the Decretals.

It should also be noted that during the Middle Ages, only Roman law and canon law were regarded as learned laws, meaning that only these laws were cultivated in a scholarly manner and taught at universities. In contrast to the Roman world, where Roman law remained in force even after the fall of the Western Roman Empire, central Europe adopted Roman law only slowly during the High and Late Middle Ages, and as such it was logically only a marginal topic in Prague, one essentially seen as a basis for studying the institutes of canon law, which grew out of it.

On the basis of his research, Jiří Kejř estimated canonical manuscripts in Bohemian libraries to number about a thousand, each of which incorporated a number of writings. If we also consider codices which are no longer extant, we can assume that there was a wide range of canon law works which were present in medieval times and circulated amongst medieval Czech dioceses. Most of these manuscripts date to the Late Middle Ages. An estimated 400 manuscripts with canonical writings have been identified in medieval library catalogues. Of this number, only thirty-one can be identified with extant codices. Extant manuscripts thus represent just 10% of the original number (Kejř 1997, 142–143).

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FIDIC FORCE MAJEURE CLAUSE FROM THE VIEWPOINT OF SERBIAN LAW

The purpose of this paper is to present force majeure as stipulated in FIDIC forms, which are nowadays frequently in use when negotiating the conclusion of construction contracts concerning major projects. An important remark is that these forms have been greatly influenced by common law systems where operation of force majeure is dependent on the contractual definition and wording of the clause. On the other hand, the Serbian Law on Obligations contains its own understanding of force majeure-related concept, which might be amended in accordance with the principle of party autonomy. The paper further aims to elaborate on this interplay between these FIDIC forms and Serbian law. The conclusion is that the FIDIC force majeure clause represents an important contribution to the domestic regime, which does not expressly address scenarios with temporary impediments, which is necessary for successful completion of construction works.

Key words: *FIDIC General Conditions. – Force majeure. – Impossibility to perform. – Serbian Law on Obligations. – Temporary impossibility*.

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1. INTRODUCTION: A CONCEPTUAL ALIGNMENT

The maxim states that a contract is concluded when the parties have reached an agreement regarding the main elements of their transaction. Under the Serbian Law on Obligations – LOO,[1] in terms of a construction contract, it is sufficient for the parties to agree on the subject and on the price of construction works in order for construction contract to be concluded (Biro 1980, 104).[2] Nevertheless, every real-life situation entails a variety of risks that can affect performance of a previously validly concluded construction contract, and the parties are always advised to anticipate as many of those as they can, and to include them in the contracts. Construction projects seem particularly sensitive and uncertain when it comes to these risks, as they are usually directly exposed to forces of nature, such as earthquakes, floods, storms, etc. (which is understood as something that is beyond the parties' control even in a colloquial discussion), while their duration does not contribute to the mitigation of such risks (Nikčević 2021, 519). Also, large infrastructure projects are inextricably intertwined with the public law requirements of the place of construction (e.g. construction permits, safety measures, etc.), which makes them particularly susceptible of the risk of change in pertinent legislation. A reasonable question that arises here is – if the occurrence of an event that hinders performance of the contract cannot be attributed to either of the parties, which party should bear the consequences?[3]

In that sense, when negotiating a construction contract, especially a complex one, in practice party autonomy reigns supreme. Namely, the parties usually go beyond the point where they reach an agreement regarding main elements of their cooperation and go into more detail. There is a plethora of other terms typically considered by contractors and employers that are crucial for the successful, i.e. economical and timely completion of the project. For example, in practice the parties almost without an exemption include a version of a contractual penalty clause, providing that the contractor is required to pay a specific sum in the event that it exceeds the deadline.

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1 Zakon o obligacionim odnosima [Law on Obligations], *Official Gazette of the SFRY* No. 29/78, 39/85, 45/89 – Decision of the Constitutional Court and 57/89, *Official Gazette of the FRY* No. 31/93, *Official Gazette of SCG*, No. 1/2003 – Constitutional Chart, and *Official Gazette of the RS* No. 18/2020). See Art. 630 para. 1.

2 Additionally, Art. 630 para. 2 LOO provides that construction contracts must be concluded in writing.

3 This paper does not discuss the institute of hardship, i.e. change of circumstances, despite its kinship to the concept of force majeure. Usually, hardship deals with the possibility to adapt the contract, which requires further discussion.

Of course, the fact that the parties did not agree on some terms does not mean that they are left without legal protection regarding a particular issue and that there are no rules outside parties' contract that might apply. It is always possible to rely on the default rules of the otherwise applicable law, i.e. if they contain any rules relevant to the situation at hand. When dealing with an international contract, however, things become even more complicated. Different legal systems contain not only different rules, but different conceptual understandings of legal phenomena in some cases, which may lead parties that were initially interested in conducting a construction project to get cold feet just because of different legal backgrounds and understandings of certain contractual concepts. Simply put, an English employer and a French contractor are bound to disagree on some terms of their transaction, because they might not be comfortable with the terms that the other party suggested, as they might be unknown in their legal systems, making it difficult for their canny local lawyers to properly advise them.

Equipping parties with adequate remedies in case of impediments that are outside parties' control might be particularly challenging when drafting a contract. These impediments represent the cornerstone of the legal notion of force majeure, but they are not treated equally in all legal systems (Jaeger 2010, 100). For instance, in French law, which introduced this doctrine (hence, the French term), force majeure encompasses the full package consisting of the cause, its impact on the party's performance, and the legal consequence pertinent to that impact. Specifically, if an event that is beyond the parties' control made it impossible for a party to perform its obligation, the French position would be that the contract is terminated by operation of law or suspended if the impossibility is temporary (Malaurie, Aynès 2018, 546–550). Contrastingly, if the performance of the obligation is still possible, according to position contained earlier in French law, the debtor would not be provided with an escape route (Karanikić Mirić 2020a, 309). This scepticism of the French 'all or nothing' position, as some authors call it (Živković 2012, 242), has recently been changed with the 2016 reform of *Code Civile*. Now it is possible to adapt even a private law contract in the event of changed conditions, due to unforeseeable circumstances (Malaurie, Aynès 2018, 409–411). On the other hand, in common law systems, the consequences of unexpected impediments are still largely dependent on specific contractual provisions and 'force majeure clauses' despite the doctrine of contract frustration having existed for nearly two centuries (Beatson, Burrows, Cartwright 2010, 474). Courts therein traditionally apply the rules outside the parties' contract restrictively due to a deeply rooted belief of the sanctity of contracts in common law systems (Circo 2020, 63–65). Nevertheless, this doctrine is conceptually different from the French understanding of force majeure as it releases the party of its obligation, regardless of whether its

performance became impossible or more onerous (Murdoch, Hughes 2008, 344–345). The necessary condition, however, is that the purpose of the contract has become frustrated.

One of the ways to bridge these differences is via instruments of uniform law that were tailored to facilitate international contracting by professionals from different legal cultures and who get together to discuss various methods for serving the interest of all parties. These instruments usually contain a version of the force majeure concept, but they strive to offer a unique mechanism that is not connected to the understanding from any specific legal system. For example, Article 79 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) deals with the release from liability and adopts a compromised solution which is 'somewhere between' different legal concepts with the similar effect (Milutinović 2005, 443; Brand 2004, 393). This Article even avoids using the term force majeure precisely in order to eliminate any possible confusion or bias towards national doctrines (Milutinović 2005, 444–445; Sekolec 2004, 2–3). Even the instruments that use this term are often followed by disclaimers explaining that force majeure does not have the same meaning as the French doctrine. For instance, Article 7.1.7 Principles of International Commercial Contracts (PICC)[4] is named "force majeure", but its leading commentary explains that force majeure is accepted as a general principle of contract law and that Article 7.1.7 is to be interpreted autonomously, while the drafters kept the French term because of the widespread use of force majeure clauses and practitioners' familiarity with these clauses (Pichonnaz 2015, 866–867).[5]

The previous discussion shows that there can hardly be a single uniform understanding of force majeure concept across different jurisdictions, while the term itself is capable of stirring up discussion even in a room fool of well-versed international lawyers as it can have different meanings.

This paper will analyse and strive to determine the meaning of the force majeure clause contained in another uniform law instrument designed particularly for construction projects – the FIDIC Conditions of Contract for

[4] This is a soft law instrument developed by the International Institute for the Unification of Private Law (*Institut international pour l'unification du droit privé* – UNIDROIT).

[5] In 2003 International Chamber of Commerce (ICC) published its pre-draft force majeure clause for those parties interested in broadening force majeure excuses in their contracts, Pichonnaz 2015, 868–869. The clause is available at: *https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-clause-2003icc-hardship-clause-2003/* (last visited 19 August 2023).

Construction,[6] specifically, the paper presents and assesses the 1999 *Red Book*[7] version of the Force Majeure clause[8] through the lens of domestic law. Even though these forms are largely influenced by common law, their Force Majeure clause strives to reconcile both civil and common law understanding of the concept and keeps the well-known term (Bunni 2005, 535; Klee 2015, 38–39). Interestingly, the newer edition of these forms from 2017, as well as some forms that were developed after 1999,[9] abandoned the term 'force majeure' to avoid confusion or conflict with similar provisions of governing law and switched their wording to 'exceptional risks' or 'exceptional events' (Klee 2015, 38–39).

In any case, these standard forms are frequently used for local projects, especially for state-organised ones where transnational financial institutions appear in the role of lenders (Klee 2015, 90–92), and a detailed assessment of the Force Majeure clause might be beneficial. Apart from that, the recent COVID-19 pandemic and start of the Russo-Ukrainian conflict, which are nowadays often used in commercial practice as reasons for delayed fulfilment of contractual obligations or even impossibility to perform, which only enhances the need to verify the clause's compatibility with Serbian law.

However, notwithstanding the FIDIC forms' widespread use in practice, Serbian legal literature is still rather scarce and counts only a few published papers and defended thesis on FIDIC-related problems in general. Despite

6 These forms were developed under the auspices of International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils* – FIDIC). They represent a number of different contract forms containing bespoke terms, with special attention to large-scale construction projects. As of 1999, the FIDIC forms differ in the risk allocation and scope of the parties' obligations (Baker *et al.* 2009, 19). At the time, the FIDIC published the so-called 'Rainbow Suite' consisting of different forms, i.e. books, each called a different colour. Since then, the FIDIC published new edition of these books in 2017, to reflect even more fair division of responsibility (Chern 2020, 175–176). This paper focuses on 1999 version of the *Red Book* for the sake of convenience, as this is the most frequently used form (Klee 2015, 271). Nevertheless, the FIDIC Conditions of Contract for Plant and Design-Build, i.e. the *Yellow Book*, and Conditions of Contract for EPC/Turnkey Projects. i.e. the *Silver Book*, which are almost as popular as the *Red Book*, contain identical force majeure clauses.

7 The Red Book is also known as 'Conditions of Contract for Construction'.

8 Hereinafter the paper will use capital letters when referring to the FIDIC forms clause to avoid any possible confusion.

9 The term was changed already in the 2008 FIDIC Conditions of Contract for Design, Build and Operate Projects, i.e. the *Gold Book*, where the clause is called Exceptional Risks, while the FIDIC's 2017 editions uses the term Exceptional Events.

that, a doctrinal assessment is necessary for proper understanding of the forms and their compatibility with the domestic law, which is why this paper will address this topic.

2. FIDIC'S 'BETTER SAFE THAN SORRY' APPROACH

As noted by legal scholars, the FIDIC *Red Book* is heavily influenced by common law (Bunni 2005, 54), and as such, it contains a detailed force majeure clause. Clause 19 in the 1999 Conditions of Contract for Construction – Force Majeure strives to offer an all-encompassing and fair risk allocation, while providing the definition and, more importantly, the consequences in case a severe obstacle amounting to force majeure affects the contract. Generally, in the absence of an explicit force majeure clause, the parties to a contract governed by Serbian law rely on a provision from the LOO's general part, which merely states that force majeure-like impediments release the debtor from liability, which is not specific to construction work.[10] This does not always seem appropriate especially when dealing with long-term construction projects which might easily go downstream for reasons outside the parties' control and which require careful anticipation of the consequences of such an impediment. For this reason, the FIDIC forms' bespoke and rather detailed Force Majeure clause seems not only desirable, but necessary when Serbian law is applicable.[11] This part will deal with the FIDIC forms' Force Majeure and underlining mechanisms of the FIDIC's 'better safe than sorry' approach to force majeure impediments from various aspects.

2.1. Defining Force Majeure Under FIDIC

As a creature of contract, the FIDIC's force majeure clause is mostly dependent on its wording. All well-drafted force majeure clauses attempt to provide parties with all aspects concerning the notion – from definition of force majeure to its consequences. In other words, the operation of the force majeure clause depends on the definition of this phenomenon (Baker *et al.*

[10] Section 3 of this paper (especially heading 3.2) analyses this interplay more closely.

[11] The same goes for laws of other former Yugoslav republics where contract law is also based on LOO, and which deal with force majeure in the same manner.

2009, 498). The FIDIC forms' clause offers such a definition, and the manner in which it is drafted suggests that it strives to bring these standardised contracts closer to the civil law systems.

Specifically, Sub-Clause 19.1 para 1 describes the specific qualities that an event or a circumstance must have in order to fall within the FIDIC notion of force majeure. It states that 'Force Majeure' means an *exceptional* event or circumstance: (a) which is *beyond a party's control*, (b) which such a party *could not reasonably have provided against* before entering into the contract, (c) which, having arisen, such a party *could not reasonably have avoided or overcome*, and (d) which is *not substantially attributable* to the other party.[12]

This broad definition of force majeure largely resembles the understanding of force majeure within major civil law systems, which usually describe in general terms what qualities circumstances must have in order to excuse the party (Conrad 2023, 239–240; Hök, Stieglmeier 2023, 281; Moss, Schneider, Fiechter 2023, 561). As noted, the focus of the FIDIC forms is on what happens rather than on the type of event (Chern 2020, 143). Civil law jurisdictions are nowadays familiar with all the qualities laid down by the FIDIC, or at

[12] The FIDIC forms are all about risk allocation. The FIDIC's Force Majeure clause might be seen as such a provision dealing with risk allocation, but as Bunni (2005, 535) notes its purpose goes beyond. There are other provisions in the FIDIC's 1999 *Red Book* dealing with circumstances that are indeed external to the parties' control and which determine the consequences of those circumstances even when they are not that exceptional. The general risk allocation clause is Clause 17 – Risk and Responsibility, where the division of risks between the parties is laid out in some detail, as noted in Robinson (2011, 85). Other clauses are also worth mentioning as they deal with impediments outside the parties' control. For instance, Sub-Clause 13.7 provides the consequences of legal risks, i.e. the change in the laws of the country, Sub-Clause 4.12 addresses the allocation of risks concerning unforeseeable physical conditions, and Sub-Clause 8.4 deals with the extension of time for completion, especially in cases concerning exceptionally adverse climate conditions and unforeseeable shortages in the availability of personnel or goods caused by epidemics or governmental actions. For more about risk allocation see Klee (2015, 294–298). What is common for all these provisions is that they grant an extension of time and/or the payment of costs to the contractor who suffered the delay and/or incurred cost, or if that is going to be the likely outcome in the event of certain specific impediments. None of these state that the party should be prevented from fulfilling the obligation. Therefore, it seems that the FIDIC forms strive to protect the contractor whose performance has become merely more difficult and ensure that it will finish the works without suffering negative consequences due to those impediments. Of course, all the circumstances that are mentioned in these clauses could still potentially qualify as an exceptional event in terms of Clause 19 if they fulfil the requirements listed therein. Their special position within the FIDIC was never meant to prevent contractors from relying on Force Majeure, but merely to provide them with a more accessible solution as the threshold for proving these situations is clearly lower than the one required for Clause 19.

least with variations thereof.[13] Therefore, it can be said the FIDIC forms offer a traditional definition of force majeure events/circumstances that can be found within the civil law family. Nevertheless, an emphasis on the exceptionality of an event (or a circumstance) hints that the FIDIC drafters wanted to make sure that only truly most adverse causes are included in this clause. Moreover, some authors with common law background emphasise the specificities of the FIDIC clause, and pinpoint that unforeseeability – the usual prerequisite for existence of force majeure – is not explicitly mentioned by the FIDIC. In their opinion, this further means that the FIDIC forms do not know of this requirement (Corbett & Co 2016, 2).[14] Foreseeability might have been left out as a relic of the past,[15] but that is not necessarily correct. Clause 19 requires that a party could not have reasonably provided against an event or a circumstance prior to entering into the contract. This wording can be understood to encompass unforeseeability, as it may be argued that if a party could have reasonably provided against something, then it would have been foreseeable in the first place.

At this point, a useful reference can be made to the notion of force majeure contained in different instruments of uniform law. The FIDIC commentaries explicitly recognise that this clause largely resembles the one contained in Article 7.1.7. of the PICC (Seppälä 2023, 1065).[16] The PICC condition that a party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract is similar to the FIDIC forms' wording. In fact, the PICC leading commentary uses the term 'foreseeable' when referring to this condition. Simply put, a party cannot rely on the impediment if that impediment, or rather its consequences on the contract, were foreseeable by the obligor of the given obligation (Pichonnaz 2015, 876–878). The same goes for Article 79(1) CISG, which contains the almost identical wording as this paragraph of Article 7.1.7 PICC,

[13] When discussing general principles of contract law, Brunner (2009, 75) notes that force majeure provisions of different instruments of uniform law, i.e. the PICC, CISG, Principles of European Contract Law (PECL), and International Chamber of Commerce (ICC) Force Majeure Clause 2003, are 'substantially the same'.

[14] Conversely, Klee (2015, 370) claims that, under the FIDIC forms, force majeure must therefore be an exceptional event, whether foreseeable or not.

[15] The idea that nowadays hardly anything is unforeseeable, given the rapid technological development, is not a new one and was recognised in Yugoslav contract theory. See Krulj 1980, 351.

[16] Art. 7.1.7. para. 1 PICC states that non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences.

even though it does not use the term 'force majeure'. Authors commenting on this provision also argue that the impediment must be unforeseeable to excuse the party from performance (Milutinović 2005, 449).

Furthermore, Sub-Clause 19.1 para. 2 should also be taken into account in defining force majeure under the FIDIC. This paragraph states that Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied: (i) war, hostilities (whether war is declared or not), invasion, act of foreign enemies, (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, (iii) riot, commotion, disorder, strike or lockout by persons other than the contractor's personnel and other employees of the contractor and subcontractors, (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the contractor's use of such munitions, explosives, radiation or radio-activity, and (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity. As the wording suggests, this paragraph lists the events and circumstances which *may* constitute Force Majeure under the FIDIC.[17] The list goes beyond events that usually represent 'Acts of God', that have their roots in natural causes and include human-made events such as war (Chern 2020, 144).[18] However, unlike earlier versions of the FIDIC forms, this paragraph provides that events and circumstances listed therein represent 'Force Majure' *only* if they qualify as exceptional event or circumstance in accordance with the criteria from previous paragraph (Burr 2016, 109–111).

On the other hand, Force Majeure is not limited to the events and circumstances listed in this paragraph. If an event or circumstance meets all the previously mentioned requirements, it constitutes Force Majeure. As stated above, the drafters did not want to exclude liability just because a certain type of event or circumstance occurred. The purpose of these examples is indicative, i.e. they help the parties to detect force majeure easier and to identify the range an event or circumstance should fall into in

[17] Interestingly, some authors criticised the wording of item (iv) because the items described therein do not constitute an event nor circumstance, but merely a potential cause of events or circumstances that might later be considered force majeure. See Corbett & Co 2016, 7.

[18] This list has slightly been amended in the 2017 version of the *Red Book*. The new Clause 18 separates events from item (iii), i.e. riot, commotion, disorder and strike and lockout in two separate items, while it adds tsunami to the natural catastrophes. Seppälä (2023, 1065–1066) even suggests further expansion of the clause, which would include additional illustrative events, e.g. threat of war and epidemics.

order to truly be considered exceptional (Seppälä 2023, 1064). Therefore, no matter how exceptional an event or circumstance may be, it does not have to amount to force majeure in two different situations. For instance, the COVID-19 pandemic may qualify as an exceptional event, but not in every case. It can be said that the contractor who concluded a contract in late January 2020 probably could reasonably have provided against the pandemic, while the one who entered a contract in April 2019 could not have. As it can be seen, Sub-Clause 19.1 takes into account the disturbance that the event created and how fair would it be to let the consequences fall onto the debtor of the obligation; it does not merely focus on the type of the event or circumstance. In any case, the purpose of this definition is to ensure that Force Majeure is determined on a case-by-case basis.

Furthermore, the Force Majeure clause ensures the contractor does not claim relief available to its subcontractors based on a broader definition or different understanding of force majeure (under the subcontract or by virtue of law applicable to the subcontract), even if its subcontractors are entitled to such relief. In that regard, Sub-Clause 19.5 provides that if any subcontractor is entitled, under any contract or agreement relating to the works, to relief from force majeure *on terms additional to or broader* than those specified in the Force Majeure clause, such additional or broader force majeure events or circumstances shall not excuse the contractor's non-performance or entitle it to relief provided under the Force Majeure clause.

2.2. Consequences of the FIDIC Force Majeure

The purpose of including a force majeure clause in a FIDIC contract in fact lies in the mechanisms provided in Force Majeure Sub-Clauses 19.4, 19.6 and 19.7, since they provide the consequences and the options at the parties' disposal when dealing with a Force Majeure.

It should be noted that these three provisions deal with different scenarios and accordingly offer different defences to the affected party. In fact, these 'scenarios' might be considered as three different classes of inability to perform the obligation. In other words, the more severe the impact of Force Majeure on the party's performance, the more drastic the tool it has at its disposal. The FIDIC Force Majeure is specific in the sense that it deals with contractual liability for late performance and with impossibility in one clause, which is not always the case in civil law jurisdictions (including Serbian contract law). The way the FIDIC Force Majeure is drafted helps

the parties to eliminate any doubt as to the concrete consequences of force majeure, which might arise when the rules are scattered through different provisions of the contract or a statute.

The effects of the three mentioned classes will be presented and analysed in the following subsections. However, before turning to these effects, the previously discussed condition – that the event or circumstance amounts to Force Majeure only if the party cannot prevent or overcome it – should be discussed. In light of that, the abovementioned consequences are subject to two important duties of the party whose performance has been affected: the duty to notify the other party of Force Majeure, and the duty to minimise the delay.

The first duty – the duty to notify the other party – stems from Sub-Clause 19.2 which states that if a party is or will be prevented from performing any of its obligations under the contract by Force Majeure, then it notifies the other party of the event or circumstances constituting the Force Majeure, specifying the obligations the performance of which is or will be prevented. The notice must be given within 14 days of the party becoming aware, or of when it should have become aware, of the relevant event or circumstance constituting Force Majeure. The clause does not further state what would be the effect of the failure to provide timely notice.[19] Some authors argue that an event that might otherwise constitute force majeure will not be Force Majeure unless the notice procedure is correctly followed (Corbett & Co 2016, 8) and this position seems correct, unless a pre-emptive provision of the law governing the contract automatically releases the parties from further performance in accordance with Sub-Clause 19.7.[20]

The second duty is laid down in Sub-Clause 19.3, which states that each party will at all times use all reasonable endeavours to minimise any delay in the performance of the contract as a result of Force Majeure. In addition, it required the party to give notice to the other party when it ceases to be affected by the Force Majeure. This clause is closely related to the well-known duty to minimise damages in case the contract realisation is jeopardised.

[19] The 2017 edition of the *Red Book* elaborates on the effect of timeliness of this notice. Namely, Sub-Clause 18.2 contained therein provides that if a party does not send the Force Majeure notice in time, i.e. within 14 days, but at a later time, then it shall be excused from performance of the prevented obligations as of the date on which this notice is received by the other party. Seppälä (2023, 1070) argues that denying relief based on the party's failure to provide a timely notice would be too harsh.

[20] However, even in this case, the party that fails to provide the other party with timely notification might be liable for damages.

Both these duties ensure that only the party who did not contribute to the adverse effect of Force Majeure and which managed the situation properly is excused and spared of negative consequences.

2.2.1. Excusing the Prevented Party from Performance

As mentioned, Sub-Clause 19.2 starts by instructing the party prevented from performing any of its obligations to provide the other party with a notice describing the impediment and its impact on its contractual obligations. If the party does so, it is excused performance of such obligations for as long as such Force Majeure prevents it from performing them. In other words, the party affected by the impediment is not be liable if the impediment amounts to Force Majeure.

Interestingly, Sub-Clause 19.2 excuses the party which is prevented from performing *any* of its obligations, but in its last paragraph it provides that notwithstanding any other provision of the Force Majeure clause, application of Force Majeure is excluded in the case of one of the parties being prevented from making payments to the other party under the contract, and therefore significantly limiting the scope of this clause. This means that the parties cannot rely on financial hurdles when they want to seek the Force Majeure related protection. However, the 'notwithstanding any other provision' part of the clause suggests that this rule does not pre-empt any other provision from Clause 19 that provides otherwise. This might be of further importance for the application of Sub-Clause 19.7, which will be discussed later in this paper.

When it comes to the obligations of the contractor, who is affected more often than the employer,[21] the wording of Sub-Clause 19.4 suggests that this provision should be read together with Sub-Clause 19.2 (Corbett & Co 2016, 8–9). Namely, Sub-Clause 19.4 stipulates that the contractor affected by Force Majeure is entitled to the extension of time and payment of eventual costs (but note that reimbursement of costs is not available in all cases).[22] However, the rights from this Sub-Clause are subject to initiating the FIDIC

[21] It is important to note that Sub-Clause 19.2 para. 3 provides that notwithstanding any other provision of that clause, Force Majeure does not apply to the obligations of either party to make payments to the other party under the contract.

[22] The last paragraph of Sub-Clause 19.4 provides that after receiving the notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 dealing with determinations, to agree or determine these matters.

claim procedure from Sub-Clause 20.1,[23] but some authors suggest that the contractor will have met these obligations by giving the notice referred to in Sub-Clause 19.2 (Corbett & Co 2016, 8–9).

The first remark is that the FIDIC forms merely require that a party has been prevented from performing its obligations by virtue of force majeure. This ensures that the affected party is excused even in cases where performance did not become impossible (after all, the consequences of impossibility are addressed in a separate provision which will be discussed later). However, it does not further specify what 'prevented' means in terms of the FIDIC forms. Some authors argue that events or circumstances that merely make it more difficult for the party to perform its obligations, do not constitute Force Majeure under the FIDIC forms, as Clause 19 does not represent a general risk allocation provision (Corbett & Co 2016, 8). Considering the general purpose of force majeure clauses, this interpretation seems correct. The idea is not to make an excuse for a party that is perfectly capable of performing its obligation, but to protect the future of the contract by facilitating the performance to the affected party which would otherwise suffer adverse consequences.

Subclause 19.2 might also be helpful in determining what is meant under the wording 'prevented'. As mentioned, this provision provides that the party, having given notice, is excused performance of such obligations *for so long as* such Force Majeure prevents it from performing them. 'For so long as' clarifies that the agency of force majeure event/circumstance should be temporary. Thus, this Sub-Clause refers primarily to cases of temporary impossibility where a party objectively cannot do anything in order to perform its obligation, but that impossibility is not permanent. After all, the FIDIC forms contain special provisions for some cases where the performance has become merely more difficult.[24] This means that the FIDIC forms deal with 'lighter' obstacles separately and that the Force Majeure clause is reserved for more detrimental outcomes.

In any case, the purpose of these two Sub-Clauses is to discourage the creditor from terminating the contract straight away (but it does not prevent it), which is considered unjust in cases where the contractor is temporarily

[23] This procedure has been deemed controversial in civil law systems and has initiated much discussion about its validity. Namely, this provision provides that the party will be precluded from submitting its claim after expiry of a specific time limit, the legal nature of which and its consequences may be irreconcilable with the mandatory provisions of the LOO. For different approaches see Nikčević 2021 and Babić, Pelicarić 2019.

[24] They are briefly presented in subsection 3.3. of this paper.

prevented from performance (Jankovec 1993, 77). The idea is to suspend the contractor's obligations by excusing it from the performance and granting it some extra time. This provision might especially be useful where applicable law does not explicitly provide for suspension of performance where temporary impossibility occurs, which is the case with Serbia's LOO, as discussed later in this paper.

But the FIDIC goes beyond suspending the performance, it also entitles the contractor to payment of costs in some cases of Force Majeure. As explained in Sub-Clause 19.4 item (b), the party can ask for payment of costs in cases of human-induced force majeure, but not where it is the result of natural catastrophe. Even in those cases the contractor is restricted by an additional requirement – the event or circumstance preventing it from performing the obligation must occur in the country where the work is taking place, except in the case of war, hostilities, invasion, or act of foreign enemies. The latter ones always justify the request for payment of costs.

2.2.2. Optional Termination

As previously mentioned, the parties usually do not want to terminate the contract where performance of some obligation has merely been prevented. That position is reflected in FIDIC Sub-Clause 19.6, which justifies termination *only* in the case of the performance being suspended for a certain period.

According to the FIDIC forms, a party is allowed to terminate the contract only if 1) execution of *substantially all the works in progress is prevented* and 2) where that suspension in performance due to Force Majeure *lasts for a certain period or is repeated frequently*. In this case, it is more likely that the contract will become useless for one or both parties, which is why termination is justified. If only part of the works is affected, allowing termination would seem radical and would create uncertainty for both parties.

Specifically, Sub-Clause 19.6 reads that should the prevention last for a continuous period of 84 days or for multiple periods totalling more than 140 days, due to the same notified Force Majeure, then either party may give the other party a notice of termination of the contract. The termination takes effect seven days after the notice is given, and the contractor proceeds in accordance with Sub-Clause 16.3 dealing with cessation of work and removal of equipment. Therefore, the notice is a requirement in case of Force Majeure related termination, i.e. it is not automatic.

Of course, the employer is always allowed to terminate the contract for convenience,[25] but this special force majeure inspired ground for termination allows the contractor to terminate the contract under equal terms (which is not the case when terminating for convenience) and to ensure that the consequences of this termination are the same as those when the employer terminates for convenience, since in both cases the contractor is not to blame for termination.[26]

With this provision, the FIDIC acknowledges that when performance is suspended for a time period of a certain length, it brings the parties' relationship closer to that of permanent impossibility, which deserves special attention.

2.2.3. Discharging the Parties from Performance

The FIDIC standard forms also deal with the worst-case scenario for the parties' – the impossibility to perform the obligation. In this case the FIDIC provides what national legal systems usually do – it discharges the parties from further performance.

The application of Sub-Clause 19.7 is broader than the application of the previously discussed clauses as it states that the parties are discharged from further performance of their obligations in the case that *any* event or circumstance outside the control of the parties (including, but not limited to those that fall within the definition of Force Majeure from Sub-Clause 19.1) induces such an impossibility. The same effect is accorded to any event or

[25] This ground for termination is found in Clause 15.5 (Employer's Entitlement to Termination) of the 1999 *Red Book*. For specifics of the FIDIC standard forms' termination reasons and their comparison with the LOO regime in Bosnia and Herzegovina see Gagula, Meškić 2020.

[26] Sub-Clause 19.6 para. 2 provides that upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include: (a) the amounts payable for any work carried out for which a price is stated in the Contract; (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal; (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works; (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in its country (or to any other destination at no greater cost); and (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination. The same is provided in Clause 15.5.

circumstance outside of parties' control that makes performance unlawful, or which under the law applicable to the contract entitles the parties to be released from further performance of the contract.

The FIDIC forms, thus, distinguish between factual and legal impossibility, as they require that the event or the circumstance beyond the parties' control make performance *impossible or unlawful*. In civil legal systems such distinction is unnecessary because impossibility is a broader notion, encompassing both mentioned impossibilities. It may, however, be dubious in different legal systems whether the term impossibility encompasses only physical impossibility or commercial impossibility as well. For example, common law regimes place great emphasis on the actual wording of the clauses (Bunni 2005, 499–500), which might also explain why the FIDIC Force Majeure clause makes the abovementioned difference between impossibility and unlawfulness. In any case, paying close attention to the wording further means that if a clause does not state explicitly that impossibility is physical, a lawyer with a background in common law might argue that commercial or economical impossibilities are also covered by the contract (Corbett & Co 2016, 18). These commentators argue that since financial impossibility is not excluded from the clause, it falls within the scope of Sub-Clause 19.7 and that the contractor might be released from performance if "the costs of continuing the contract are so far above the price it has agreed to perform for that it is unable to raise enough finance to continue" (Corbett & Co 2016, 21). Conversely, lawyers with a background in civil law will resist the idea of economic impossibility and will stick to the dichotomy of legal and factual impossibility understood from an objective point of view (Jankovec 1993, 62–65). This means that the confusion as to the real meaning of this term is possible and the unravelling of this dilemma has important practical implications since the party wanting to rely on this provision will be discharged from performance. In that regard, it is worth mentioning that the newest FIDIC commentary lists only physical impossibilities when discussing impossibility to perform. Therein Seppälä mentions two examples from case law that explain what might constitute impossibility according to the FIDIC: first one being the situation where the construction site was washed away in a flood, rendering performance of the contract impossible, and the second one stating that there was impossibility when construction was prevented by a rebellious army (Seppälä 2023, 1084–1085). Some other authors even straightforwardly state that 'impossible or unlawful' in this Sub-Clause 'essentially covers legal and physical impossibility' (Baker *et al*. 2009, 503). Moreover, even the commentators who argue that the notion of impossibility goes beyond the physical impossibility admit that it might be argued that anything that can be changed by a variation order cannot be considered impossible (Corbett & Co 2016, 21). Newer versions of the clause dealing with

consequences of impossibility, Sub-Clause 18.6 in the 2017 FIDIC edition, condition discharging the parties from further performance with previous attempts to modify the contract, if such modification is possible. Specifically, the Sub-Clause provides that the parties are discharged from performance upon one party's notice to the other only if the parties are unable to agree on an amendment to the contract that would permit the continued performance of the contract. This means that the parties should enable the contract to continue where that is *still possible* (Seppälä 2023, 1084). In the context of 1999 Sub-Clause 19.7, the previous provision may only be used to clarify that FIDIC forms do not intend to accept the notion of absolute impossibility, but rather a more flexible and practical understanding.

In any case, the previous discussion demonstrates that it is not quite clear what is meant by 'impossibility' under this clause, and it would be preferable if parties would further elaborate in their contract on it meaning, to avoid any doubts as the FIDIC attaches serious consequences to cases of impossibility.

Moreover, Sub-Clause 19.7 provides that the parties may be discharged from performance not only where the performance became impossible or unlawful, but also in cases where *applicable law releases the party from performance* due to certain events/circumstances beyond the parties' control. This addition shows that the FIDIC forms were never intended to limit the parties' options in cases where their contract is influenced by an external event, nor to impose a restrictive understanding of impossibility. The FIDIC merely ensure that impossibility discharges the parties from further performance, but also instructs them that it does not preclude them from relying on other available defences or doctrines releasing them from performance under the applicable law (Baker *et al.* 2009, 498, 503).

Finally, as in all other cases discussed in this section, the party seeking the release must notify the other party of the event or circumstance from this Sub-Clause. The discharge is of an immediate effect (Baker *et al*. 2009, 503).

3. INTERPLAY BETWEEN FIDIC AND LOO CONCEPTS OF FORCE MAJEURE

As mentioned, the FIDIC forms are rooted in common law, yet the endeavours to attract parties from different legal systems led to the need to adapt to different conceptual understandings. For instance, the FIDIC abandoned the common law concept of frustration of the contract and replaced it with a more civil law-like force majeure clause (Bunni 2005,

530). Nevertheless, lawyers with a non-common law background should nevertheless carefully assess the meaning of this clause and how it relates to the concepts laid down in their domestic legal systems, as their application may be pre-empted by the FIDIC forms, or the Force Majeure clause may be invalidated in whole or in part by operation of the otherwise applicable law.

For this reason, this section aims to present the interplay between Serbia's contract law and the FIDIC forms. Of course, all these conclusions operate on the presumption that Serbian law is applicable law under the contract.

3.1. Importance of Determining the Legal Nature of the LOO Provisions

When dealing with force majeure under the LOO, the starting point should be locating all relevant rules concerning their consequences. It quickly becomes clear that the LOO does not deal with force majeure (or *vis major* as it is usually referred to in local legal circles) within a single provision like the FIDIC forms do, nor does it use the said terms in describing this legal institute. Rather, the LOO contains different institutes dispersed in different provisions which deal with events of vis major in a different manner.[27]

Before analysing all these rules separately, one crucial remark to the nature of the LOO provisions should be made: they are dispositive in nature. This means that parties are free to stipulate their contractual relationship as they please and to derogate from default rules, which is today embodied in the principle of party autonomy across most legal systems. However, party autonomy as provided in the LOO is not without its limits. Article 10 LOO states that parties must stay within the limits of compulsory legislation, public policy, and good faith. This somewhat limited understanding of contractual freedom helps establish a dichotomy between mandatory and non-mandatory statutory provisions under Serbian contract law. In other words, some rules are compulsory and cannot be changed at the whim of the parties, while on the other hand, some rules are dispositive in nature and can be altered by the parties in their contract.

[27] There are general rules on contractual liability stipulating what is the impact of force majeure on the party's liability. In a different section, the LOO regulates situations where force majeure made it impossible for the party to fulfil its obligation. Lastly, the Law contains special rules when performance of the obligation has not become impossible, but more onerous, or the purpose of the contract was frustrated due to the operation of force majeure.

In any case, the entire LOO operates under the presumption that the parties can derogate from default rules as provided in Article 20 LOO (Hiber 2022, 455).[28] This broad and general limitation of the party autonomy requires determining compatibility of the agreed terms with this limitation in each specific case (Hiber 2022, 459). However, if a rule is compulsory, the LOO provision might (and it often does) expressly state that the parties may not derogate from it,[29] while in other cases, this will stem from the nature of the provision.[30] Hiber emphasises that specific limitations in the LOO are usually drafted in a manner that either prohibits or orders the parties not to derogate from them (Hiber 2022, 459–460). On the other hand, he argues that in light of the presumption that the parties are allowed to derogate from the LOO provisions, expressly stating in a non-mandatory provision that it will be applicable "unless provided otherwise in the contract" is redundant and creates unnecessary dilemma in practice as to whether the provisions not containing this or similar wording can be considered non-mandatory at all (Hiber 2022, 460).

However, this does not mean that dispositive rules do not have the same significance as the parties. They are still legally binding, and parties must abide by them if they did not choose to alter them. The only way to avoid the application of these rules is to derogate their application. Therefore, the meaning of 'non-mandatory' is that the parties did not use their right to modify their contract. This logic applies to all rules equally, including those related to the consequences of force majeure.

The discussion above may be useful when assessing the validity of a particular contractual term. It is even more important when dealing with bespoke forms that are influenced by different legal systems and thus require careful scrutiny, since what is valid under one country's law, does

[28] Parties may regulate their obligation relations in a way that is different than the one specified within the law, unless something else follows from a specific provision, or from its general meaning.

[29] For example, Art. 364 expressly states that parties cannot alter, i.e. establish a longer or shorter period of unenforceability due to the statute of limitations than the one set forth by statute, nor they can suspend unenforceability for a given period.

[30] A useful example is the analysis of effectiveness of waiver of claim clauses under domestic and akin legal systems in Živković (2020, 92). Waivers represent one method of deviating from default rules and the finding is that they may be ineffective and invalid not only where their ineffectiveness is expressly regulated by the statute, but also in other instances, as is the case with other contractual terms. Živković further proposes a useful two-step test for establishing so-called waivability of a claim which might be used in general when determining the nature of a provision. For more on this test see Živković 2020, 92–94.

not have to be valid under another's. The same applies to the FIDIC forms, regardless of how useful or practical their solutions might be. For instance, validity of provisions providing a special time bar for submitting the claim under the FIDIC claim procedure has been closely examined from the LOO perspective as the answer is not that straightforward (Nikčević 2021; Babić, Pelicarić 2019). Therefore, a proper understanding of the nature of the LOO provisions that correspond to concepts contained in the FIDIC forms is a necessary first step.

3.2. FIDIC's Attempt to Elaborate on the LOO's Provisions on Contractual Liability

Returning to the regime of force majeure under the domestic LCT regime, the general rule is found in Article 263 LCT which deals with contractual liability. According to this provision, the debtor is released from liability for loss provided that it proves its inability to perform the obligation, or that the delay in performing its obligation was due to circumstances that occurred after the conclusion of the contract and which it was unable to prevent, avoid or overcome – which is traditionally been understood as vis major in domestic legal literature (Jankovec 1993, 98; Karanikić Mirić 2019, 46).[31] The LOO is explicit as to the parties' ability to amend this rule. The parties are free to change the default standard and consequently extend or limit and exclude the liability in accordance with Articles 264 and 265 LOO. However, this freedom is not without its boundaries: in both extremes (extension and exclusion of liability), the parties are limited by certain standards and principles. Therefore, the parties wanting to exclude their liability cannot do so in the case of intention or gross negligence, nor can they extend the liability if that would be in contravention with the principle of good faith and integrity.[32]

[31] In *Skica*, an older draft document that influenced the LOO, created by Mihailo Konstantinović, Art. 208 merely states that the debtor will be released from liability in the case of vis major or another external cause for which it is not responsible, without going into further definition of what qualities or traits the cause should have. See Konstantinović 1996, 102.

[32] Article 264 para. 2 provides that the creditor cannot rely on the provision excluding liability contrary to the good faith principle, but it does not state that that clause is invalid. It is possible that the drafters did not intend to make these clauses invalid, but rather to give the court an option to avoid their application. In the latter case, the court must assess the 'fairness' of the application of such clause in every

It has already been discussed in legal doctrine that the force majeure clauses represent a typical form of excluding liability (Jankovec 1993, 367). Of course, a clause that is named 'force majeure' can also have the opposite effect and extend the liability of the party. For instance, Jankovec (1993, 367) explains that by operation of default rules the manufacturer would be liable if a fire occurs within its factory since that is not an external event, but that the parties are free to exclude its liability in such cases. The parties are equally free to provide that the debtor will be liable in cases where it is liberated by default rules – in this case by providing that all cases of fire will not represent a vis major and therefore will not be the reason for exclusion of liability (because, perhaps, the area is susceptible to fires and the parties wants the debtor to take that fact into account).

In any case, when it comes to the FIDIC forms' Force Majeure clause, one thing is clear – it replaces the definition of vis major from Article 263 LOO. However, the Clause 19 definition of force majeure does not seem drastically different from the one required by the LOO. Indeed, the FIDIC forms require that the exceptional event or circumstance could not have been reasonably provided against before concluding the Contract, and the domestic LOO does not. The LOO does not mention the foreseeability of a circumstance whatsoever. However, this still does not mean that a party will always be released from liability when they could have foreseen a circumstance.[33] Parties are still required to act in accordance with specific standards of care,[34] in addition to their general obligation to act in accordance with the principle of good faith.[35] Therefore, Article 263 LOO can be interpreted in a way that does not allow a party to rely on a circumstance that was foreseeable at the time of the conclusion of the contract.[36] If the party acts in accordance with the required standard of care, it may be able to anticipate the adverse event, prepare for its effects and take appropriate measures to prevent it from affecting the contractual obligation. Therefore, it can be argued that unforeseeability is implicitly required by the general principles of contract law.

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particular case. If this provision were to lead to an outcome that is unfair, the court will simply not apply the clause (but it will not declare it void and the creditor may rely on it in another case).

[33] Unlike the FIDIC forms' Force Majeure, the LOO is confined to the term circumstance without mentioning the event. However, this does not constitute a change or deviation since, as noted by some authors, the term circumstance is broader and might encompass the term event. See Krulj 1980, 648.

[34] Art. 18 LOO.

[35] Art. 12 LOO.

[36] But there are opposing views. See Krulj 1980, 649; Jankovec 1993, 122–123.

Furthermore, it is notable that Article 263 LOO requires that the debtor could not have prevented the occurrence of the given circumstance, overcome its effects, or avoided negative the consequences it creates (Jankovec 1993, 116–120), while the FIDIC forms merely require that the party could not reasonably have avoided or overcome Force Majeure. Nevertheless, the purpose of both sets of rules is the same – the party must take reasonable measures to mitigate the influence and try to surmount it. Furthermore, the fact that the circumstances could not have been prevented means that they were beyond the party's control, which is the explicit FIDIC requirement as already discussed above.

Finally, the remaining condition – that Force Majeure must not be substantially attributable to the other party – is encompassed by the civil law understanding of vis major as something outside the sphere of the parties' agency in general (Konstantinović 1996, 102).

In any case, due to these reasons, I believe that the Force Majeure definition does not constitute a deviation from the domestic notion of vis major that would have a different outcome in practice. This position is further supported by the fact that the way that both the FIDIC Force Majeure and the LOO define force majeure implies that it should always be determined on a case-by-case basis, in accordance with all the particularities of the case.

Yet, the true improvement that the FIDIC forms' Force Majeure brings to the domestic LOO lies elsewhere. Its significance is demonstrated in the legal consequences that the clause attaches to the agency of these events.

3.3. Suspension as Primary Solution to Temporary Inability to Perform

The FIDIC Force Majeure provides that the party whose obligation (any obligation) is affected by force majeure shall be excused from performance of such an obligation, *for so long as such force majeure prevents the party from performing it*, provided that the party gives notice, describing in detail force majeure and its impact on specific contractual obligations. On the other hand, Article 263 LOO merely states that the party shall be released from liability for loss in case of vis major. This is a crucial difference between the two regimes and an important contribution of the FIDIC Forms.

The difference is that the L is phrased rather broadly, without considering certain specific situations that might be of practical relevance. It seems that this provision deals with situations where a vis major event occurs at

the time when the deadline for performing the obligation lapses.[37] Article 263 LOO is also usually considered alongside provisions dealing with permanent impossibility, and not in other cases (Jankovec 1993, 75), but the major oversight of the LOO is that it does not prescribe what happens when impossibility occurs during the performance of the contract but stops before the lapse of deadline. Will the party be 'excused' if it did not fulfil its obligation in time but because of an adverse situation that lasted for only a while during the performance?

Attaching adequate legal consequences to temporary impossibility to perform might be crucial for construction contracts, which often suffer due to various external causes preventing contractors from performing the work. Merely stating that the contractor will be released from liability is not sufficient in cases where performance of the obligation has a more permanent character – which is precisely the case with construction contracts. Jankovec (1993, 72) criticised this approach and advocated the introduction of specific rules *de lege ferenda*, finding that cases of temporary impossibilities must be equipped with extending the time for performing the obligations, since the primary need should be to preserve the contract, not to terminate it, which would be the case with permanent impossibility. According to him, a time extension should be granted regardless of the debtor's responsibility for the impossibility, while liability for damages is a separate issue from the party ensuring successful implementation of the contract.

What the FIDIC forms provide is the suspension of the contract for the duration of the impediment and providing the contractor with additional time when it is the affected party suffering the delay.[38] The idea is to ensure that the contract stays in place and that the affected party does not suffer

[37] It may be argued that this is Jankovec's position as well, but not stated as straightforwardly. He discusses that in case of a temporary impossibility, the creditor has Art. 126 para. 2 at its disposal, stating that the creditor may terminate the contract because the debtor did not fulfil its obligation in time but after giving the latter subsequent time for performance. For more details see Jankovec 1983, 74–76.

[38] The FIDIC forms are not the only rules used in the construction industry that recognize the need to allow time extension in cases of external impediments. The construction business is largely dependent on practices in the industry, and it requires that contractual terms go hand in hand with these practices. Domestic practices were codified in 1970s in Special Usages on Construction (Posebne uzanse o građenju, *Official Gazette of the SFRY* No. 18/77) which expressly stipulated that the contractor is entitled to request an extension of the deadline in cases where it was prevented from performing the works due to changed circumstances (Usage 42). The legal nature of these usages is similar to that of the FIDIC forms, and if parties want them to be applied, they must include them in their contract, as stated in Art. 21 para. 2 of Serbian LOO.

any negative consequences in the event of Force Majeure. That is precisely what the LOO lacks (or at least does not offer as a straightforward solution). Clause 19 of the FIDIC does not refer to temporary impossibility explicitly, it only states that the party should be prevented from performance, but as already explained above, this term should be interpreted restrictively since the idea is to provide the party with adequate remedies only in truly exceptional cases, which undoubtedly includes situations of temporary impossibility.

Interestingly, the FIDIC Force Majeure clause goes even further when allowing the contractor to request payment of costs incurred due to a force majeure event in cases where that request would be appropriate (which is not a usual consequence, but having in mind the rationale of facilitating the performance of the contract, it represents a useful contribution of FIDIC forms.

3.4. Termination as Alternative Possibility

Another important contribution of the FIDIC forms concerns the specific grounds for terminating the contract due to reasons of force majeure; the FIDIC regime defines how long the parties are expected to tolerate suspension of performance.

Namely, when the inability to perform is temporary, it is not justified to terminate the contract right away. However, it would not be reasonable to expect from the parties to put up with the given inability for an indefinite period (even when it is certain that inability is temporary). For that reason, the FIDIC forms provide that both parties can terminate the contract after a certain period of time. After that time lapses, the FIDIC forms consider that the force majeure's impact on the contract had become more severe and that the parties deserve a remedy that is more rigorous – the right to terminate.

Still, the contract cannot be terminated in all cases where the contractor would be granted an extension of time and/or payment of costs, e.g. when delay/costs occurred because the contractor was prevented from performing *any* of its obligations. Unlike Sub-Clause 19.2, Sub-Clause 19.6 allows termination only where execution of *substantially all the works* in progress is prevented. This rule is in line with the rationale from Article 131 of the Serbian LOO which forbids termination in cases where a minor part of obligation has not been performed.

Since neither of the parties is responsible for force majeure, FIDIC allows both parties to terminate the contract in such cases, but the employer still must pay certain expenses incurred by the contractor, which are listed in Sub-Clause 19.6 para. 2.

On the other hand, the general rule of the LOO is that the creditor is allowed to terminate the contract when the debtor fails to fulfil its obligation by the date stipulated in the contract.[39] Where the deadline was an essential term of the contract, termination is automatic upon lapse of time for performance.[40] If the deadline is not an essential term, then the creditor must provide the other party with subsequent time to perform its obligation. If it fails to do so, the contract is terminated automatically. Of course, the employer is always allowed to terminate the contract where the contractor did not execute the work, but also, it could terminate for convenience in accordance with Article 629.[41]

The FIDIC forms, in fact, closely regulate the possibility of terminating the contract in case of temporary prevention where the time for performance still has not lapsed.

Notwithstanding previous reasons for termination, the FIDIC also allows termination for convenience and, just like domestic law, it gives this possibility only to the employer. As this is exclusively the employer's privilege, and if it terminates for convenience, it will have to pay for the same expenses as in the case of termination due to Force Majeure.

3.5. Impossibility to Perform: FIDIC vs. LOO

Under Serbian law, impossibility to perform is one of the ways of cessation of all obligations in general, not only contractual ones. In the LOO, the consequences of impossibility to perform are contained in Article 354

[39] Art. 125 para. 1 LOO.

[40] Art. 126 LOO.

[41] In the event that the employer decides to terminate for convenience, Art. 629 LOO provides that it is supposed to pay to the contractor the stipulated fee, reduced by the amount of costs not incurred by the contractor, which would otherwise have been incurred if the contract remained in effect, along with the earnings received by the contractor elsewhere, or which it intentionally passed up.

LOO. According to this provision, in the event that the impossibility occurred for reasons for which the debtor is not responsible,[42] the obligation ceases to exist in any case.[43]

However, where impossibility affects the performance of an obligation stemming from a reciprocal contract (which construction contracts undoubted are) the contract in whole is affected.[44] In fact, Article 137 para. 1 LOO states that the obligation of the other party's obligation ceases as well, provided that neither of the parties are responsible for the impossibility.

The rationale for the position that the impossible obligation ceases to exist leads to the conclusion that it is mandatory and cannot be amended. When performance of an obligation becomes impossible, there is no logical reason to maintain that party's obligation in force, as it simply cannot be performed. Therefore, it appears that including provisions providing for a different legal destiny of the obligation in the event of a subsequent impossibility to perform is not permitted. When it comes to FIDIC Sub-Clause 19.7, which stipulates that the parties are discharged from their obligations in the event that their performance becomes illegal or impossible, or when parties are released from performance by operation of the governing law, its existence in the contract might seem may appear futile as it does not add to the LOO's position but only confirms its position.

However, the Serbian law does not merely state that the contract ceases to exist, it also explains what the other consequences of subsequent impossibility are. Namely, the subsequent impossibility does not render the contract invalid. Legal theory states that the contract is either automatically terminated (Karanikić Mirić 2020b, 31), or that it continues to exist as a legal fact despite the fact that obligations contained therein ceased to exist (Jankovec 1982, 79).

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[42] Jankovec (1982, 75) claims that the obligation should cease to exist even when one of the parties is responsible for it.

[43] Legal doctrine and case law have addressed on various occasions what kind of impossibility, and it is presently accepted that impossibility should be subsequent, total, and permanent, while it can be both legal and factual in nature. For more details see Krulj 1980, 356–357; Jankovec 1993, 51–81; Karanikić Mirić 2020b, 43–49. Apart from that, an obligation must be individual and not generic since performance of the latter remains possible.

[44] The LOO uses the term 'bilateral contracts' in the heading of Section 5. This section actually deals with contracts where the purpose lies in reciprocity, i.e. in the exchange of mutual obligations. As stated in Radišić (2008, 125), one party undertakes to perform its obligation only because the other party promises to perform its obligation.

Regardless of which position one might deem justified, this divergence may be used to explain why the LOO provides specific rules dealing with consequences of impossibility to perform. The first one can be found in Article 137 LOO which stipulates that if the performance of the obligation of the other party from the reciprocal contract is still possible and if it fulfils that obligation in part, then it is entitled to restitution. On the other hand, Article 356 LOO stipulates that the debtor whose obligation ceased to exist is still required to transfer to the creditor any right it would have against a third person responsible for such impossibility. Read together, these two rules imply that restitution is not possible in all cases. In the scenario from Article 356, the creditor receives something in return which further means it should not be put in a better position than the debtor and hence should not be entitled to full restitution in that case.

Moreover, legal doctrine emphasises that the LOO rule providing restitution in case of termination is not adapted to the specifics of construction contracts where restitution is simply not possible (Vukmir 2009, 503). Precisely for that reason authors argue that termination of contracts with long-term obligations termination takes effect *ex nunc* (from that moment on), while everything that has already been done remains valid because it cannot be simply erased (Milošević 1980, 345–346; Radišić 2008, 168; Jankovec 1982, 166). This position suggests that neither situation should justify enrichment at the expense of the other party and the same applied to the impossibility to perform.

Finally, if we take Jankovec's (1982, 79–80) position that the rule providing that the other party's obligation ceases due to its debtor's impossibility to perform is dispositive in nature, then the parties may freely allocate the risk of such an impossibility and it does not matter whether the contract is terminated or not.

Returning to the FIDIC Force Majeure clause, items (a) and (b) of Sub-Clause 19.7 explain that the release from performance does not affect the rights of either party regarding any previous breach of the contract and provides that the contractor is entitled to payment of the same costs and sums as in case where the contract is terminated due to reasons of Force Majeure. By doing this, the FIDIC forms go beyond the position that the contractor should be paid for any work carried out and shifts some other costs to the employer.[45]

[45] I was referring to the costs provided in items (b) to (e) of Sub-Clause 19.6 para. 2.

4. CONCLUSION

This paper attempted to demonstrate that despite different conceptual understandings of force majeure under the FIDIC forms (in particular, the 1999 version of the *Red Book*) and the LOO, the FIDIC Force Majeure is convenient when concluding construction contracts for complex projects. Its validity from the perspective of domestic law does not seem disputed and its common law origins should not create any greater confusion when contracting under these forms.

Namely, it has been shown that the notion of force majeure under the FIDIC showcases endeavours to make these forms closer to civil law systems as its broad definition, providing qualities of force majeure rather than listing specific impediments, resembles the understanding of continental legal systems, including the one contained in Serbian law.

Moreover, the way that the FIDIC Force Majeure deals with consequences seems rather simple as it focuses on the real impact of the force majeure impediment and makes the difference according to its severity when attaching legal consequences. First, the FIDIC forms merely state that a party shall be excused when it is prevented from performing any of its obligations by reasons of force majeure (i.e. Force Majeure, as previously defined). For contractors this is of particular importance as they are entitled to a time extension when in delay, and to payments if they incur certain specific costs. Second, if the inability to perform substantially all works lasts for a certain time or reappears for the same reason, both parties are allowed to terminate the contract. And finally, if the performance of parties' contractual obligations becomes impossible or unlawful, or if the parties are released from further performance by virtue of governing law, the FIDIC forms discharge the parties from further performance.

However, the FIDIC forms, as a means of allocating certain risks, do not always require impediment to constitute Force Majeure in order to provide the contractor with a time extension and payment of costs. There are other terms dispersed across the forms that grant the contractor that right.

Finally, through the lenses of the LOO, the FIDIC forms' Force Majeure brings many contributions. Namely, by excusing the party and providing contractors a time extension, it solves the question of what happens with temporary inabilities to perform the contract, which represents a gap in the domestic regime. Accordingly, it can be deduced that under FIDIC forms, termination represents an alternative means in case of agency of force majeure, which should be used only when justified, which has been argued as necessary in domestic literature. Moreover, it seems that the FIDIC

Force Majeure-induced impossibility to perform does not diverge from the LOO's position significantly, providing that the contractors are entitled to certain costs it incurred in relation to the works, in addition to the usual reimbursement for the works already performed, as dictated by the rules on unjust enrichment.

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PROŠIRENA SRBIJA: PRILOG RAZMIŠLJANJU O ALTERNATIVNOM DRŽAVOTVORNOM REŠENJU IZ 1918. GODINE[**]

Cilj rada je da ex post *istraži državotvorne alternative ujedinjenju jugoslovenskih naroda iz 1918. godine i da razmotri da li bi one mogle da budu uspešnije od Jugoslavije sa stanovišta interesa srpskog naroda, čime rad u potpunosti spada u retroaktivnu hipotetičku analizu. Teorijsku osnovu za razmatranja alternativnih državotvornih rešenja čini ekonomska teorija optimalne veličine države, koja je identifikovala pogodnosti i troškove uvećanja države, pre svega one troškove koji su posledica povećanja kulturne heterogenosti usled uvećane jezičke, etničke i konfesionalne heterogenosti stanovništva. Identifikovano je pet državotvornih alternativa: proširenih Srbija sa različitim stepenom teritorijalnog proširenja i obuhvata stanovništva. Korišćenjem rezultata popisa stanovništva iz 1921. godine, empirijski se pokazalo da bi one državotvorne alternative koje bi značile veće proširenje srpske države, pa bi stoga omogućile veći obuhvat srpskog stanovništva u matičnoj*

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zemlji, neminovno uticale na uvećanje kulturne heterogenosti stanovništva te države. Identifikovano je optimalno državotvorno rešenje, koje nudi kompromis između pogodnosti i troškova.

Ključne reči: *Srbija. – Jugoslavija. – Optimalna veličina države. – Retroaktivna hipotetička analiza. – Kulturna heterogenost.*

„ – Kad jeste tako. Jedina mrlja na našem srpskom obrazu je to zlosrećno ujedinjenje. A ni tu se nismo pitali, nego su velike sile odlučile umesto nas.

– Dobro Borojeviću – javlja se Počuča. – Nije baš da Aleksandar nije želeo SHS.

– Ama nije, Vojo, ucenili su ga! Jesi ti uopšte pročitao moj roman

'Ovaploćenje demonskih nakota'?

– Jesam.

– E, pa nisi! Da jesi znao bi da je britanska obaveštajna služba ucenila Karađorđeviće i da su nas prosto ugurali u tu jamu, u tog etničkog, pa i kulturološkog Frankenštajna od države."

Tripković (2022, 76)

1. UVOD

Pokazalo se da Jugoslavija – nezavisno od njenog zvaničnog imena – država formirana 1. decembra 1918. godine, nije bila održiva na dugi rok posmatrano, nezavisno od svih transformacija kroz koje je prolazila tokom svoje istorije i bez obzira na to što je obnovljena posle kraja Drugog svetskog rata. Raspad te države 1991. godine i način na koji se raspala (uz napomenu da takav način nikako nije bio neizbežan), uz činjenicu da u zemljama naslednicama ne postoji nikakva želja za njenim obnavljanjem, upućuju na to da je reč o neuspešnom političkom poduhvatu i da postoje izuzetno duboki koreni takvog ishoda.

Imajući sve to u vidu, cilj rada je da *ex post* istraži državotvorne alternative ujedinjenju jugoslovenskih naroda iz 1918. godine i da razmotri da li bi te alternative mogle da budu uspešnije od Jugoslavije sa stanovišta interesa srpskog naroda. Interesi drugih jugoslovenskih naroda ne razmatraju se u radu. Time rad u potpunosti ulazi u oblast retroaktivne hipotetičke analize (engl. *counterfactual analysis*), to jest rad se ne bavi činjenicama, već se,

naprotiv, u njemu razmatra ono što se nije dogodilo i istražuju posledice upravo toga što se nije dogodilo. Opredeljenje za tu vrstu analize zasniva se na uverenju o relevantnosti njenih rezultata za današnji istoriografski pogled, kao i za nalaze ostalih društveno-humanističkih nauka o političkom poduhvatu jugoslovenskog ujedinjenja iz 1918. godine, naročito njegovom vrednovanju posle više od jednog veka od kako se odigralo.[1]

Analiza alternativnih državotvornih rešenja zasniva se na radnoj pretpostavci da je kulturna heterogenost stanovništva, zasnovana na etničkoj, jezičkoj i konfesionalnoj heterogenosti, bila osnovni izvor problema funkcionisanja svake Jugoslavije, ma kakvo bilo njeno uređenje, i da je ta heterogenost osnovni razlog njenog neuspeha kao političkog projekta. Stoga se državotvorne alternative ujedinjenju iz 1918. godine razmatraju pre svega sa stanovišta hipotetičkog nivoa kulturne heterogenosti stanovništva koje bi one stvorile da su bile primenjene. Osim toga, razmatraju se veličina države i obuhvat srpskog stanovništva u njoj. Osnovna hipoteza rada jeste da bi one državotvorne alternative koje bi značile uvećanje države, pa bi stoga omogućile veći obuhvat Srba u istoj državi, neminovno uslovile uvećanje kulturne heterogenosti te države. Potvrđivanje te hipoteze stvara osnovu za traženje optimalnog državotvornog rešenja.

Teorijsku osnovu za razmatranja alternativnih državotvornih rešenja čini ekonomska teorija optimalne veličine države (Alesina, Spolaore 2003), koja je jasno identifikovala pogodnosti i troškove koje donosi širenje države na veću teritoriju, to jest obuhvatanje sve većeg broja stanovnika do kakvog takvo širenje neminovno dovodi. U radu se dosledno primenjuje metodologija ekonomske nauke, donose se zaključci na način na koji se do njih dolazi u toj nauci, a ne u istoriografiji, ali dobijene nalaze mogu da koriste i tumače istoriografija i druge društveno-humanističke nauke.

Cilj ovog rada i teorijski pristup njegovom postizanju uslovili su i njegovu strukturu. Prvo će se razmotriti osnovni nalazi teorijskog modela optimalne veličine države, i to razdvojeno pogodnosti od uvećanja države i troškovi tog uvećanja. Slede analiza ujedinjenja iz 1918. godine i razmatranje uslova za primenu alternativnih državotvornih rešenja. Zatim će se precizno (u onoj meri u kojoj se to može učiniti) definisati alternativna državotvorna rešenja sa stanovišta državne granice. Iza toga sledi centralni deo rada: kvantitativna

[1] Kako se navodi u istoriografskoj metodološkoj literaturi (Schrag 2021, 330), cilj retroaktivne hipotetičke analize nije samo da se uživimo u ulogu onih koji su donosili odluke u uslovima neizvesnosti („ne znajući šta ih sledeće čeka“) već da razumemo posledice tih njihovih odluka. Više o tom analitičkom postupku videti u: Levy (2015), Sunstein (2016) i u ostalim radovima objavljenim u tematskom broju (3/2016) časopisa *Journal of the Philosophy of History*.

analiza alternativnih državotvornih rešenja, to jest simulacija koja treba da pokaže kako bi se menjala heterogenost stanovništva sa promenom državnih granica, to jest sa primenom različitih alternativnih državotvornih rešenja. Na osnovu tih rezultata izabraće se optimalno rešenje. Potom će se ponuditi neke naznake političke panorame koja bi nastala prilikom hipotetičke realizacije alternativnih državotvornih rešenja. Sledi zaključak, uz smernice za dalja istraživanja.

2. TEORIJSKI MODEL: OPTIMALNA VELIČINA DRŽAVE

Ekonomska teorija optimalne veličine države pod tom veličinom posmatra isključivo broj njenih stanovnika, nikako površinu njene teritorije.[2] Uvećanje države,[3] dakle, predstavlja uvećanje broja njenog stanovništva. Naravno, promenom državnih granica neminovno se menja teritorija, pa uvećanje države pretpostavlja širenje njene teritorije, ali koliko će zaista biti uvećanje države, to jest uvećanje njenog stanovništva, zavisi od gustine naseljenosti novoprisajedinjenih teritorija. Kada se razmatra veličina privrede jedne države, značajna zbog veličine domaćeg tržišta, koristi se bruto domaći proizvod (BDP), kao izvor kupovne moći stanovništva te zemlje.

Postoje opravdani razlozi zbog kojih se površina teritorije države ne koristi kao pokazatelj u teorijskom modelu njene optimalne veličine. Prvo, iako ta površina može da bude aproksimacija izdašnosti prirodnih resursa kojima raspolaže jedna država, budući da sa uvećanjem teritorije raste verovatnoća da posmatrana država ima više prirodnih resursa, reč je o

[2] Ponekad, usled nejednake gustine naseljenosti, razlika između te dve veličine može biti značajna. Na primer, iako je Rusija po površini teritorije najveća zemlja sveta, tek je na 9. mestu po broju stanovnika. Slično je sa Kanadom: po površini je 4. zemlja sveta, a rangirana je tek na 37. mestu po broju stanovnika. Po pravilu, zemlje sa veoma velikim stanovništvom imaju i veliku teritoriju, budući da postoje vrednosti gustine naseljenosti koje se ne mogu prevazići, dok obrnuto ne važi, budući da postoje zemlje sa relativnom malim brojem stanovnika i velikom teritorijom, što implicira niske gustine naseljenosti, poput Mongolije, zemlje sa najnižom zabeleženom gustinom te vrste (dva stanovnika po kvadratnom kilometru).

[3] Pod državom se u ovom radu posmatra isključivo zemlja, u smislu nezavisne, suverene i međunarodno priznate zajednice. U tom smislu, prihvata se definicija da je „jedna zajednica državna ako lica koja toj zajednici pripadaju žive na izvesnoj teritoriji pod nezavisnom i efektivnom vladom“ (Ljušić 2011, 9). Teritorije, odnosno zajednice koje se označavaju kao države, a koje nemaju te atribute (poput američkih saveznih država, na primer), nisu predmet ovog rada. U radu se, stoga, reči „država“ i „zemlja“ posmatraju kao sinonimi. Takođe, u ovom radu reč „država“ *ne* podrazumeva državni, administrativni aparat, tako da izraz „uvećanje države“ *ne* označava uvećanje državnog aparata i državne intervencije.

veoma lošoj aproksimaciji. Pustinjske države velike površine teritorije, na primer, ne raspolažu poljoprivrednim zemljištem. Niti je, na primer, izvesno da država velike površine teritorije neminovno mora da poseduje bogata nalazišta nafte ili nekog skupocenog minerala. A teritorijalno relativno male države mogu da poseduju bogata nalazišta nafte ili, na primer, prirodne lepote, pogodnost veoma važnu za razvoj turizma. Drugo, prirodni resursi u bilo kom obliku, sami za sebe, nisu presudan činilac nivoa privredne aktivnosti, još manje privrednog rasta jedne zemlje, koji se zasniva na akumulaciji kapitala (fizičkog i ljudskog) i na tehnološkom napretku. U ekstremnim slučajevima, doduše, prirodna bogatstva mogu zemlji da donesu visok nivo dohotka *per capita*, poput Saudijske Arabije, ali to su ipak izuzeci od opšteg pravila. Shodno tome, površina teritorije države nije i ne treba da bude merilo njene veličine.[4]

Pošto su definisani pokazatelji veličine države, razmatranje može da se usredsredi na pogodnosti i troškove uvećanja države.

2.1. Pogodnosti od uvećanja države

Osnovna pogodnost od uvećanja države je ekonomija obima u pogledu pružanja javnog dobra (Alesina, Spolaore 2003). Nekoliko napomena uz ovu tvrdnju. Prvo, ekonomija obima označava situaciju u kojoj povećanjem veličine (u ovom slučaju države) opadaju prosečni troškovi, to jest (u slučaju države) troškovi *per capita*. Ekonomija obima je posledica postojanja fiksnih troškova, koji se ne menjaju sa obimom proizvodnje, odnosno (u slučaju države) brojem stanovnika – ti troškovi na određenom nivou postoje nezavisno od tog broja. Pod javnim dobrom se, za potrebe ovog rada, podrazumeva sve ono što se finansira iz poreza i drugih javnih prihoda (u daljem tekstu – poreza), odnosno sve ono što pruža država. Samim tim, da bi nešto za potrebe ovog razmatranja bilo javno dobro, ne mora neminovno da bude javno dobro u užem smislu reči, to jest čisto javno dobro.[5] Drugim

[4] Izlaz na more jedne države nedvosmisleno predstavlja njenu geografsku prednost, budući da, kako se pokazalo (Faye, Macarthur, Sachs, Snow 2004; Collier 2007; Paudel 2012), obara transportne troškove, olakšava spoljnu trgovinu i omogućava dublje uključivanje te države u međunarodnu podelu rada. Izlaz na more, međutim, nije u funkciji veličine teritorije države, već njene lokacije. Postoje teritorijalno male države sa izlazom na more, poput Singapura ili Malte, na primer, a postoje teritorijalno veoma velike države bez izlaza na more, poput Kazahstana ili Čada.

[5] Koncepcija čistog javnog doba podrazumeva da dodatni korisnik iste jedinice javnog dobra ne stvara nikakve dodatne troškove postojećim korisnicima i da se korisnik koji odbija da plati korišćenje jedinice javnog dobra ne može isključiti

rečima, pod javnim dobrom se, budući da ono obuhvata sve ono što se finansira iz poreza, pa time sve ono čije pružanje zavisi od državnih politika, podrazumeva sve ono o čijoj se ponudi i potrošnji odlučuje u javnoj sferi, pa je stoga reč o kolektivnim, a ne pojedinačnim odlukama stanovnika jedne zemlje.

Tipični i za funkcionisanje države najznačajniji primeri javnog dobra jesu nacionalna bezbednost (bezbednost od agresije strane države, što uključuje oružane snage), javna bezbednost (bezbednost od kriminala, što uključuje policiju i kaznene ustanove), vladavina prava (što uključuje sve ustanove koje je omogućavaju), monetarne i finansijske institucije (što uključuje i odgovarajuće politike), javno zdravlje, obrazovanje, osnovna infrastruktura za saobraćaj i komunikacije i sve tome slično. Postojanje ekonomije obima, to jest fiksnih troškova pružanja tih javnih dobara, lako je razumljivo. Na primer, bez obzira na to koliko su velike oružane snage jedne zemlje, dovoljan im je jedan generalštab i jedna vojna doktrina, bez obzira na to koliko ima osnovnih škola u jednoj zemlji, postoji samo jedno ministarstvo obrazovanja i pravi se samo jedan školski program, i bez obzira na to koliko se vodi sudskih procesa, postoji samo jedno zakonodavno telo i jedan vrhovni sud. Empirijska (ekonometrijska) istraživanja na uzorku velikog broja zemalja potvrdila su tu regularnost – povećanjem veličine zemlje umanjuju se *per capita* troškovi pružanja javnog dobra (Alesina, Wacziarg 1998).[6]

Ponekad se u literaturi (Alesina, Spolaore 2003) izdvaja nacionalna bezbednost kao najznačajnije javno dobro, upućujući na to da veće države, i po veličini stanovništva i po BDP-u, raspolažu uvećanim potencijalom za odbranu zemlje, usled mogućnosti za stvaranje snažnijih oružanih snaga, koje bi uspešnije odvraćale agresivno ponašanje drugih zemalja.[7] U osnovi, taj argument se svodi na argument ekonomije obima u pružanju specifičnog javnog dobra – nacionalne bezbednosti, odnosno odbrane zemlje. Upravo

iz njegove potrošnje. O detaljima koncepcije javnog dobra i njene transformacije tokom istorije videti u: Begović (2021a).

[6] Pokazatelj tih troškova su javni (budžetski) rashodi, mereni kao učešće u BDP-u, koji su korišćeni u regresionom modelima u ovom istraživanju. Metodološki problem sa dobijenim rezultatima leži u tome što u javne rashode ne spadaju samo troškovi pružanja javnog dobra već i transferi, kojima se vrši preraspodela dohotka. Svesni tog problema, autori nude uverljivo objašnjenje relevantnosti dobijenih rezultata. Bez obzira na to koliko je učešće transfera u javnim rashodima, u njihovom slučaju ne postoji ekonomija obima, oni su proporcionalni veličini zemlje, tako da se može zaključiti da je pad učešća javnih rashoda u BDP-u sa uvećanjem zemlje isključivo posledica ekonomije obima u pružanju javnog dobra.

[7] Sveobuhvatan pregled rezultata empirijskih istraživanja (Hartley, Sadler 1995) potvrđuje ovaj teorijski nalaz.

zbog toga, postojanje nadnacionalnih vojnih saveza nudi značajne pogodnosti malim zemljama, budući da pristupanjem takvim savezima one mogu da prevaziđu problem visokih *per capita* troškova nacionalne odbrane. Naravno, to se postiže samo ukoliko postoji čvrsta obaveza svih država članica saveza da se vojno angažuju u odbrani svake napadnute članice.[8]

Osim toga što se uvećanjem države umanjuju troškovi javnog dobra *per capita*, takvo uvećanje omogućava i efikasnije oporezivanje – primenu, kako je pokazano u literaturi (Easterly, Rebelo 1993), boljih mehanizama oporezivanja i bolje izgrađenu, delotvorniju poresku administraciju. To znači da je za datu količinu pruženog javnog dobra potrebno manje poresko opterećenje građana zemlje, čime se uvećava njihov raspoloživi dohodak, pa time i njihovo blagostanje, (kako u sadašnjosti, tako, pospešivanjem privrednog rasta, i u budućnosti), što je dodatna pogodnost od uvećanja države.

Sledeća pogodnost uvećanja države jeste povećanje domaćeg tržišta. Što je veće domaće tržište, veća je mogućnost realizacije ekonomije obima, uvećava se prostor za društvenu podelu rada i na njoj zasnovanu specijalizaciju proizvođača, i jača međusobni konkurentski pritisak na tržištu, što podstiče proizvodnu efikasnost i inovacije. Sve to utiče na rast produktivnosti rada, pa stoga i na uvećanje bogatstva zemlje i njenih stanovnika mereno BDP *per capita*, odnosno raspoloživim dohotkom po stanovniku. Taj nesporan argument u prilog uvećanja države treba posmatrati u svetlu dva uvida. Prvi je da je u tom slučaju relevantan pokazatelj veličine države ukupan BDP koji se na njenoj teritoriji stvara, budući da on određuje ukupnu kupovnu moć, pa time i veličinu tržišta, a ne broj stanovnika. Drugi uvid je daleko bitniji: privrednim otvaranjem zemlje, slobodnom trgovinom i globalizacijom, svetsko tržište, a ne domaće, postaje relevantno za proizvođače u posmatranoj državi. U tom smislu, ukoliko se zemlja privredno otvori i uključi u međunarodnu podelu rada, veličina države postaje irelevantna. Empirijska istraživanja pokazuju da je upravo otvorenost privrede ključna za privredni rast i nivo produktivnosti rada, pa time i raspoloživog dohotka *per capita*

[8] Tipičan primer takvog saveza je NATO, čijom se Poveljom (član 5) sve članice saveza obavezuje na vojno angažovanje ukoliko je napadnuta bilo koja članica. NATO pokazuje da, osim ekonomije obima, pogodnosti postoje i u podeli rada između članica saveza, tako da se neke od njih, zavisno od geografskog položaja zemlje i njene vojne tradicije, specijalizuju samo za neke operacije, koje onda obavljaju i za druge članice saveza. Podela rada i specijalizacija uvećavaju ekonomsku efikasnost i u toj oblasti, pa time umanjuju troškove po jedinici pružene usluge.

(Alesina, Spolaore, Wacziarg 2000).[9] Male države mogu da iskoriste pogodnosti velikog (svetskog) tržišta otvorenošću svojih privreda i da na taj način kompenzuju ograničenje sopstvene veličine.[10]

Još jedna pogodnost uvećanja države leži u širenju mogućnosti za transfere koji mogu da imaju blagotvorne efekte. Interregionalni transferi su bitni zbog toga što različiti regioni jedne države, zbog toga što imaju različitu privrednu strukturu – što se u njima nalaze različite privredne grane – mogu da snose bitno različite posledice eksternih šokova. Na primer, regioni u kojima dominira poljoprivreda kao delatnost, u uslovima suše ili pada cena poljoprivrednih proizvoda na svetskom tržištu, mogu u takvim slučajevima da primaju transfere sredstava prikupljenih porezima od ostalih regiona te države, pa se takva vrsta transfera u literaturi naziva regionalno „osiguranje" (Alesina, Spolaore 2003, 4). Ukoliko, nasuprot tome, dođe do naglog skoka cena poljoprivrednih proizvoda na svetskom tržištu, pa time i povećanja poreskih prihoda u poljoprivrednim regionima, poreski obveznici iz tih regiona mogu da finansiraju transfere drugim regionima te zemlje. Iako, teorijski posmatrano, nije sporno da takvo osiguranje može da bude od koristi državi, odnosno njenoj privredi i stanovnicima, treba imati u vidu da stalni interregionalni transferi u jednom smeru, od bogatijih (razvijenijih) ka siromašnijim (manje razvijenim) regionima, mogu biti kontraproduktivni, kako u ekonomskom, tako i u političkom smislu, naročito u uslovima niskog nivoa solidarnosti u jednoj zemlji.

Isti nalazi o transferima, odnosno preraspodeli dohotka važe i u slučaju interpersonalnih transfera (posredstvom budžeta) od bogatih ka siromašnima. Uvećanjem države povećava se i potencijal za takvu vrstu transfera (Alesina, Spolaore 2003, 4). Ne sporeći taj argument, pitanje je u kojoj meri je ovde reč o pogodnosti i zbog čega bi, načelno posmatrano, umanjena interpersonalna

[9] Upravo su to rezultati regresionih modela u kojima su i veličina države i otvorenost njene privrede bili objašnjavajuće promenljive. Uz obe promenljive zabeležene su pozitivne i statistički značajne ocene parametara, što znači da uvećanje države i povećanje stepena otvorenosti njene privrede deluju u istom smeru – povećavaju nivo dohotka *per capita* i ubrzavaju privredni rast.

[10] Toj tvrdnji može da se uputi zamerka da ona važi isključivo za tzv. razmenljive proizvode, to jest one koji podležu spoljnoj trgovini. Određeni broj proizvoda, zbog visokih transportnih ili transakcionih troškova u odnosu na vrednost proizvoda, nije razmenljiv u međunarodnim razmerama već isključivo na domećem tržištu, pa otvorenost privrede za te proizvode nije od značaja. Međutim, treba imati u vidu da upravo iz navedenih razloga (transportni i transakcioni troškovi) mnogi proizvodi nisu razmenljivi na nacionalnom nego isključivo na lokalnom tržištu – jezikom ekonomske analize prava konkurencije rečeno, relevantno geografsko tržište im je usko – pa je za tu vrstu proizvoda i veličina države irelevantna. U nekim slučajevima, relevantno geografsko tržište se meri krugom prečnika od nekoliko stotina metara.

ekonomska nejednakost do koje bi takvi transferi doveli, ukoliko su prisilni, bila dobra sa stanovišta društvenog blagostanja. Štaviše, visoko oporezivanje bogatih, kako bi prikupljena sredstva omogućila transfere siromašnim, i sami bezuslovni transferi koji se tako finansiraju, stvaraju loše podsticaje, i sa jedne i sa druge strane – podsticaje koji umanjuju produktivnosti i jednih (bogatih) i drugih (siromašnih). Iskazivanje solidarnosti između građana, solidarnosti bogatih sa siromašnim pojedincima, ukoliko je prisilno, ima svoje granice. Stoga i ovaj argument u prilog uvećanja države, možda još u većoj meri nego prethodni, treba prihvatiti sa rezervom.

Kada se sagledaju svi argumenti u prilog uvećanja države, čini se da su najuverljiviji oni koji je odnose na ekonomiju obima u pružanju javnog dobra. To je, po svemu sudeći, najvažniji argument u prilog uvećanja države sa stanovišta ekonomskog modela njene optimalne veličine.

2.2. Troškovi uvećanja države

Ukoliko bi uvećanje države donosilo samo pogodnosti, onda bi svaka država imala ekonomske podsticaje da neprestano uvećava svoju veličinu. Ravnotežna veličina države bila bi, tada, najveća moguća i, u tom slučaju, optimalno bi bilo da je ceo svet sadržan samo u jednoj jedinoj državi.

Očigledno je, međutim, da takvo ravnotežno rešenje nije zabeleženo, niti je na vidiku. Naprotiv, u poslednjih stotinak godina, neprestano se uvećava broj država, što znači da se, dinamički posmatrano, umanjuje njihova veličina. Očigledno je da postoje valjani razlozi za takvo umanjenje, mada nije neminovno da su ekonomski razlozi bili presudni.[11] Stoga se postavlja pitanje koji su to činioci čije dejstvo povećava troškove uvećanja države.

Kao i slučaju preduzeća, uvećanje države povećava troškove koordinacije, to jest, u slučaju države, administrativne troškove upravljanja celinom. Taj nalaz nije sporan, ali nije najvažniji, a za analizu veličine države gotovo da je trivijalan. Daleko je važnije to što povećanjem države veoma verovatno, u najvećem broju slučajeva, raste heterogenost njenog stanovništva, i to kulturna

[11] Uvećanje broja država, odnosno umanjenje njihove veličine u HH veku bilo je u najvećoj meri posledica procesa dekolonizacije, a ekonomski razlozi, bolje rečeno motivi, nisu bili presudni za taj proces, kako se pokazalo u literaturi (Tignor 1998). Raspadi carstava uvek su u istoriji bili praćeni nastankom novih država, naravno manje veličine od raspadnutog carstva.

heterogenost, kao posledica etničke, jezičke i konfesionalne heterogenosti.[12] Kulturna heterogenost neminovno usklovljava različite preferencije stanovnika države u pogledu pružanja javnog dobra. Uvećanjem te heterogenosti povećavaju se razlike u preferencijama pojedinaca u pogledu poželjne količine, strukture i prirode ponude javnog dobra (Alesina, Spolaore 2003, 18). Prvo, preferencije se razlikuju u pogledu odgovarajućeg nivoa javnog dobra koje država treba da pruži. Dok se neki zalažu za visok nivo te ponude, u krajnjoj liniji za visok stepen državne intervencije, drugi žele niži nivo, pa time i niži stepen te intervencije. Čak i da se svi slože o količini ponude javnog dobra, ne moraju da se slože o njenoj strukturi. Dok je za neke, na primer, bitna nacionalna odbrana, kao javno dobro, za druge je prioritet javna bezbednost, dok treći smatraju da najveći deo budžeta treba da bude alociran u školstvo. Konačno, čak i da se svi slože da je, na primer, najvažnije školstvo, da se slože i koliki deo budžeta treba asocirati u pružanje tog javnog dobra, ostaje otvoreno pitanje razlika u preferencijama u pogledu školskih programa. Dok su, na primer, neki za to da verska nastava ne treba da bude u školskom programu, drugi to dopuštaju, dok za treće ona treba da bude obavezna.[13] A odluka o svim tim pitanjima neminovno je politička – u pitanju je kolektivni izbor – pa heterogene preferencije za javnim dobrom otežavaju donošenje kolektivnih odluka, što uslovljava dva nepovoljna ishoda. Prvi je nedovoljna ponuda javnog dobra.[14] Drugi nepovoljan ishod je politička nestabilnost koju izaziva poremećen kolektivni izbor u

[12] Što se definisanja kulture tiče, u ovom radu se pod tim pojmom podrazumeva „skup uverenja, vrednosnih sudova i preferencija, koji može da utiče na [ljudsko] ponašanje, koji se prenosi socijalno (ne genetski) i koji kao zajednički deli neki podskup unutar društva“ (Mokyr, 2017, 8). Isti autor je bliže odredio sva tri pomenuta elementa kulture. Uverenja su vrednosno neutralne (pozitivne) tvrdnje koje se odnose na svet oko pojedinca, što uključuje prirodno i metafizičko okruženje, kao i društvene odnose. Nadalje, vrednosni sudovi su normativni sudovi o društvu i društvenim odnosima (najčešće u formi morala ili ideologije), a preferencije su normativni sudovi o stvarima pojedinca, poput potrošnje ili drugih ličnih stvari. Dakle, kulturna heterogenost podrazumeva heterogenost uverenja, vrednosnih sudova i preferencija. Ova poslednja vrsta heterogenosti – heterogenost preferencija – posebno je značajna za ovo istraživanje.

[13] Dimić (2020) uverljivo pokazuje koliko su duboka bila neslaganja u pogledu prosvetne politike u jugoslovenskoj kraljevini, a najveća kontroverza je zabeležena u pogledu školskih programa. Upravo se u značajnoj konfesionalnoj heterogenosti stanovništva te zemlje nalazilo poreklo tih neslaganja.

[14] Posredna empirijska potvrda tog nalaza može se naći u rezultatima ponude javnog dobra na nivou američkih gradova, odnosno opština, pri čemu je u pitanju (različita) rasna, pa time i kulturna heterogenost lokalnih zajednica u SAD (Alesina, Baqir, Easterly 1999).

pogledu pružanja javnog dobra, pa time i uvećani politički troškovi zemlje. Umesto da se društvo bavi pitanjima svog sveobuhvatnog napretka, resurse ulaže na pokrivanje tih troškova.[15]

No, ti politički troškovi ne zavise samo od kulturne heterogenosti stanovništva, to jest od heterogenosti preferencija za javnim dobrima. Pitanje je i koliko su međusobno udaljene te preferencije – preferencije pojedinaca koji pripadaju različitim jezičkim, etničkim i konfesionalnim zajednicama. Polarizacija društva proporcionalna je toj udaljenosti – što su preferencije udaljenije (šire posmatrano, što su kulturni obrasci sa svim svojim sadržajima udaljeniji), društvo je polarizovanije. Visok nivo kulturne heterogenosti (zasnovane na etničkoj, jezičkoj ili konfesionalnoj heterogenosti) ne mora da stvara velike političke troškove ukoliko su preferencije, iako različite, bliske – ukoliko je nizak stepen polarizacije. Nasuprot tome, visok stepen polarizacije, čak i u uslovima ne toliko velike heterogenosti, može da izazove visoke političke troškove. U razmatranjima optimalne veličine države, u ovom slučaju razmatranjima troškova uvećanja države, stepen polarizacije se posmatra kao egzogen, budući da se on, načelno posmatrano, ne menja sa promenom veličine države, odnosno ne zavisi od te promene.[16]

[15] Nasuprot tome, heterogenost preferencija pojedinaca u pogledu privatnih dobara ne stvara nikakve političke troškove, budući da se privatna dobra pribavljaju na tržištu, slobodnim odlukama prodavaca i kupaca, pa stoga nema političkih (kolektivnih) odluka – svako je slobodan da kupi ono što želi. Konfesionalna heterogenost, na primer, stvara razlike u preferencijama domaćinstava u pogledu prehrambenih proizvoda, ali to nema nikakve političke posledice, budući da je reč o privatnim odlukama potrošača i proizvođača i slobodnom ugovaranju transakcija na tržištu. Međutim, u literaturi se pojavljuje teza da homogenost preferencija pojačava sukobe u pogledu privatnih dobara budući da postoji rivalitet u potrošnji (Spolaore, Wacziarg 2017). Ne sporeći taj nalaz, treba ukazati na to da je on irelevantan za razmatranje optimalne veličine države jer se taj sukob svodi na uvećanju tražnju za istim proizvodima i ne razrešava se u političkim procesu već slobodnim odlukama pojedinaca na tržištu, kako na strani tražnje, tako da strani ponude, budući da proizvođači reaguju na povećanje tražnje (i ravnotežne cene) povećanjem ponude.

[16] To, naravno, ne znači da se prilikom razmatranja konkretnih situacija ne može spekulisati o promeni stepena polarizacije pri različitim pravcima širenja određene države. Onda se dolazi do problema merenja stepena polarizacije. Direktno merenje treba da se zasniva na ispitivanju javnog mnjenja i to upitnicima u kojima se nalaze veoma precizno definisana specifična pitanja o preferencijama u pogledu pružanja javnog dobra. Takvi upitnici ne postoje nego se, i to odskora, koriste samo generalni upitnici o vrednostima koje pojedinci, pripadnici određene zajednice prihvataju, poput ankete *World Value Survey*, koja je započela 1981. godine. Iako je u literaturi (Fearon 2003) predložena udaljenost jezika kao posredni pokazatelj polarizovanosti različitih zajednica, teško je videti uverljivu osnovu za takav pokazatelj.

Na teorijskom planu, zanimljivo je pitanje heterogenosti preferencija pojedinaca koji pripadaju istoj etničkoj, jezičkoj ili konfesionalnoj zajednici.[17] Teorija optimalne veličine države zasniva se na pretpostavci da su te grupe potpuno homogene sa stanovišta preferencija u pogledu javnog dobra. Iako ta pretpostavka, naravno, predstavlja odstupanje od stvarnosti,[18] to nije relevantno sa stanovišta samog modela optimalne veličine države, budući da puka promena veličine države ne dovodi do promene stepene heterogenosti u okviru pojedinačne etničke, jezičke ili konfesionalne zajednice – ta heterogenost je egzogena.[19]

Visoki politički troškovi donošenja kolektivnih odluka u pogledu javnog dobra u uslovima velike heterogenosti iskazuju se i, kako je već napomenuto, kao stalna politička nestabilnost te države, ponekad na ivici građanskog rata – u nekim slučajevima se ta ivica i pređe – što stvara nepovoljno poslovno okruženje za investiranje budući da se umanjuju očekivani prinosi od ulaganja. Pošto su investicije jedan od osnovnih izvora privrednog rasta, ovim je identifikovan prvi mehanizam kojim uvećanje heterogenosti koje se dešava sa povećanjem države uzrokuje usporavanje privrednog rasta. Isti mehanizam važi i za inovacije – uvećana neizvesnost u poslovnom okruženju, budući da umanjuje očekivane prinose, umanjuje i podsticaje za

[17] Lako je ustanoviti da li neko pripada istoj konfesionalnoj zajednici, ali je nešto teže, zbog razlika u razvijenosti osećaja nacionalne pripadnosti između različitih zajednica, odrediti kojoj etničkoj zajednici neko pripada (Fearon, 2003), dok se najveći problemi te vrste javljaju kada treba ustanoviti ko pripada kojoj jezičkoj zajednici, budući da postoje veoma srodni jezici, između ostalog, zbog toga što se često isti jezik iz političkih razloga različito naziva, tako da se postavlja pitanje da li je kriterijum lingvističke diferencijacije pojedinačni jezik ili porodica jezika (Desmet, Ortuño-Ortín, Wacziarg 2017). Naravno, ključno pitanje je da li se oni koji pripadaju dvema jezičkim zajednicama bez većih problema razumeju između sebe, to jest lako komuniciraju. Ukoliko je to tako, onda pripadaju istoj jezičkoj zajednici. No, za odgovor na to pitanje potrebno je detaljno istraživanje svakog pojedinačnog slučaja, što pri postojećem broju jezika u svetu nije realistična opcija.

[18] To potvrđuju i empirijska istraživanja (Desmet, Ortuño-Ortín, Wacziarg, 2017) zasnovana na podacima iz anketa ljudi koji pripadaju različitim jezičkim, etničkim i konfesionalnim zajednicama u 76 zemalja, ali je zaključak tog empirijskog istraživanja da pripadnosti specifičnoj zajednici u velikoj meri ipak određuje kulturni obrazac pojedinca, odnosno njegove preferencije u pogledu pružanja javnog dobra.

[19] Ta tvrdnja se odnosi na kratak rok, odnosno na alternativne državne granice posmatrane u jednom trenutku. Rečnikom ekonomske nauke, u pitanju je komparativna statika. Na veoma dugi rok posmatrano, međutim, treba dopustiti mogućnost da su preferencije endogene i da se one u određenoj meri menjaju u vremenu. Preferencije se grade/menjaju u jednom društvu, odnosno državi, u međusobnoj interakciji između različitih etničkih, jezičkih ili konfesionalnih zajednica, u okviru jedinstvenih (formalnih) institucija, pa stoga ne treba isključiti mogućnost njihove konvergencije na dugi rok, makar u određenoj meri.

inovacije, to jest za rasprostranjeno prihvatanje nove tehnologije, još jedan izvor privrednog rasta. Ostali mehanizmi koji utiču na takvo usporavanje privrednog rasta, ponekad i njegovo zaustavljanje ili nazadovanje, vezani su za državne politike, koje, u stvari, predstavljaju javno dobro i ukoliko postoji velika heterogenost preferencija, traženje kompromisnog rešenja ili, još gore, rešenja državnih politika koja se zasnivaju na traganju za rentom, to jest na preraspodeli ka samo jednoj etničkoj, jezičkoj ili konfesionalnoj zajednici, na tom planu može da dovede do državnih politika koje ne pogoduju efikasnim ekonomskim ishodima i potkopavaju privredni rast zemlje. Zbog toga se, na primeru afričkih zemalja, empirijski pokazalo (Easterly, Levine 1997) da zemlje u kojima postoji velika kulturna heterogenost znatno zaostaju za relativno homogenim zemljama u dinamici privrednog rasta, to jest da su im stope privrednog rasta niže nego što bi bile da je manja kulturna heterogenost. To nije, pokazalo se, posledica njihovog geografskog položaja već loših državnih politika, koje ne obezbeđuju dobro školstvo (pa time ni odgovarajući nivo ljudskog kapitala), dobro razvijen i svima pristupačan finansijski sistem, kojim bi se omogućilo finansiranje investicionih (poslovnih) poduhvata, nameću ograničenja u spoljnoj trgovini i posedovanju strane valute, uz administrativnu kontrolu deviznog kursa, a uz to i ne pružaju dovoljne javne investicije u izgradnju i odgovarajuće održavanje infrastrukture. Sve to, uz sadejstvo drugih činilaca, uzrokuje privrednu stagnaciju i nazadovanje afričkih država, barem većine njih, u odnosu na ostale zemlje sveta.[20]

Tome treba dodati i pitanje transfera između pojedinaca, kojima se iskazuje solidarnost. Uobičajeno je da najjači osećaj solidarnosti postoji između onih koji pripadaju istoj zajednici, bez obzira na to da li je ta zajednica etnička, jezička ili konfesionalna. Njihova spremnost za prihvatanje transfera u okviru iste zajednice daleko je veća nego između različitih zajednica. Dok su obavezujući, državni transferi uređeni preko budžeta, ukoliko su u okviru iste zajednice u skladu su sa iskazivanjem solidarnost, bratstva, a ukoliko su između različitih zajednica, percipiraju se kao eksploatacija, pljačka i tome

[20] Osnovni uzrok takvih državnih politika jeste njihova usmerenost za traganje za rentom, radi preraspodele u korist one jezičke, etničke ili konfesionalne zajednice koja je na vlasti, odnosno koja odlučujuće utiče na formulisanje državnih politika, a na štetu ostalih zajednica (Easterly, Levine 1997). Na primer, samo oni koji pripadaju vladajućoj zajednici mogu da se bave spoljnom trgovinom ili imaju pristup stranoj valuti po povlašćenom kursu. Takvom političkom konstelacijom potkopava se i kvalitet državnih ustanova, nadležnih za sprovođenje politika – tzv. loša vladavina (engl. *poor governance*) – što uslovljava visok nivo korupcije. Empirijski se pokazalo u slučaju afričkih zemalja (Mauro, 1995) da se povećanjem kulturne heterogenosti uvećava nivo korupcije, pa time i usporava privredni rast. Više o uzročno-posledičnoj vezi korupcije i privrednog rasta videti u: Begović (2007).

sličnim kategorijama. A svi građani jedne države su ravnopravni, tako da u političkom procesu treba doneti jednoznačne odluke o metodima transfera i kriterijuma koji neminovno treba da važe za sve, nezavisno od toga kojoj etničkoj, jezičkoj ili konfesionalnoj zajednici pripadaju. Sve to stvara nove poteškoće za donošenje kolektivnih odluka u političkom procesu, pa uvećava političke troškove – troškove funkcionisanja države.[21]

Imajući u vidu da se javni prihodi u osnovi svode na finansiranje ponude javnog dobra i na transfere, uvećana heterogenost preferencija stanovništva vezanih za ponudu javnog dobra (sve uočene komponente razlika između preferencija) i za transfere neminovno uzrokuje povećanje raznolikosti preferencija u pogledu oporezivanja. Dok su jedni za više poreske stope, drugi su za niže, pa se i u tom pogledu u političkom procesu mučno traži kompromisno rešenje.[22]

Sve navedeno pokazuje da su politički i ekonomski troškovi kulturne heterogenosti značajni i da ih treba uzeti u obzir u razmatranju, makar samo akademskom, širenja granica jedne države, čime se neminovno uvećava njeno stanovništvo. Što je veća heterogenost stanovništva, to su viši politički troškovi pružanja javnog dobra, kao i politički troškovi transfera, a upravo su to centralne teme političkog života u svakoj zemlji, u kome se traže konkretni odgovori na konkretna pitanja o nivou oporezovanja, nivou, strukturi i načinu pružanja javnog dobra i pitanja o obimu i karakteru transfer u okviru države.

Nije sporno da je Jugoslavija od samog svog stvaranja bila kulturno veoma heterogena država (Petranović 1988, 31). Teško da se može uspešno protivrečiti tezi da je ta heterogenost bila u osnovi uzrok ako ne svih onda

[21] Pojedini teorijski modeli (Bolton, Roland, 1997) upravo u visokim političkim troškovima preraspodele između pojedinaca koji pripadaju različitim jezičkim, etničkim i konfesionalnim zajednicama sagledavaju razloge separatizma, odnosno raspada heterogenih država. Ne čudi nalaz modela da nestaje bilo kakav podsticaj za separatizam ukoliko postoji savršena mobilnost svih proizvodnih faktora. Poenta je upravo u tome što postojanje heterogenosti, odnosno kulturno raznolikih zajednica, ne samo da onemogućava savršenu mobilnost makar jednog proizvodnog faktora (radna snaga) nego stvara barijere koju takvu mobilnost odvode veoma daleko od savršene.

[22] Samo za sebe posmatrano, svaki poreski obveznik preferira niže poreske stope, tako da bi, posmatrano izolovano od javne potrošnje, idealna poreska stopa bila jednaka nuli. Međutim, poreski obveznici donose svoju odluku o optimalnoj poreskoj stopi na osnovu poželjne količine ponude javnog dobra, poželjnih nivoa transfera i veličine sopstvene granične korisnosti novca (bogatstva). Ovo poslednje, s obzirom na dominaciju fenomena opadajuće granične korisnosti novca, zavisi od nivoa dohotka pojedinačnog poreskog obveznika, a ne od njegove pripadnosti nekoj etničkoj, jezičkoj ili konfesionalnoj zajednici. Stoga se ta poslednja vrsta heterogenosti – heterogenost u bogatstvu – neće više uzimati u obzir u ovom radu.

makar većine političkih nedaća koju su potresali tu državu i da je ona na kraju izazvala njen raspad. No, može se postaviti pitanje da li je uočena kulturna heterogenost posledica isključivo etničke, jezičke i konfesionalne heterogenosti ili postoji još neki činilac.

Pokazalo se da, i to baš u slučaju Habzburške monarhije, institucije utiču na kulturu (Becker *et al.* 2016), to jest da različito institucionalno nasleđe jednog naroda podeljenog između država sa različitim institucionalnim okvirima, pre svega formalnim institucijama, uslovljava razlike u kulturi, iako je reč o istoj jezičkoj, etničkoj i konfesionalnoj zajednici. Ekonomskim rečnikom iskazano, pokazalo se da kultura nije egzogena već da na nju utiče institucionalno okruženje i da raskol u političkim, ekonomskim i pravnim institucijama između dve zemlje utiče na kulturne razlike u istoj jezičkoj, etničkoj i konfesionalnoj zajednici nastanjenoj u tim zemljama.[23] Stoga uvid da je kultura Srba iz Srbije, tzv. Srbijanaca u rečniku bečke administracije krajem XIX i početkom XX veka, koji su dugo živeli u Osmanskom carstvu, i prečanskih Srba, koji su živeli u Austrougarskoj (prečanski krajevi), različita nije bez osnove, budući da su Srbi vekovima bili podeljeni između dva carstva, bitno različitog institucionalnog uređenja, kako u pogledu i formalnih, tako i neformalnih institucija. Međutim, taj uvid nije od većeg značaja za ovaj rad. Prvo, pokazalo se (Putnam 1993; Bauernschuster *et al.* 2012; Becker *et al.* 2016) da institucionalni raskol, nezavisno od toga koja je njegova priroda i na koji se istorijski period odnosi,[24] uslovljava prevashodno razlike u verovanjima o ponašanju drugih ljudi, kao sastavnom elementu kulture, ali ne i u značajnoj meri razlike u preferencijama, koje su najbitnije sa stanovišta istraživanja troškova uvećanja države. Drugo, svi alternativni državotvorni projekti koji se razmatraju u ovom radu podrazumevaju, makar u određenom stepenu, integraciju tzv. Srbijanaca i prečanskih Srba, pa je ovaj vid heterogenosti neizbežan u svim državotvornim rešenjima koja podrazumevaju širenje teritorije Kraljevine Srbije iz 1914. godine na zapad i na sever.[25] Ne sporeći nalaz da su Srbi kao narod vekovima bili podeljeni

[23] Upravo je u ranim radovima o odnosu institucija i kulture ukazivano na dvosmernost njihove veze i endogenost kulture (Bowles 1998; Alesina, Giulinano 2015). Begović (2021b) razmatra fenomen endogenosti kulture i međusobne povratne veze institucija i kulture u kontekstu njihovog značaja za izučavanje ekonomske istorije.

[24] Tri navedena empirijska istraživanja sa gotovo istovetnim nalazima o uticaju institucija na kulturu odnose se na srednjovekovnu Italiju, Habzburšku monarhiju i podeljenu Nemačku (u XX veku). Očigledna je postojanost endogenosti kulture u (istorijskom) vremenu.

[25] Time se samo uvećava heterogenost u jednoj etničkoj zajednici – srpskoj – u onoj meri u kojoj se uvećava, a ta vrsta heterogenosti, kako je već ranije iskazano u ovom radu, nije relevantna za njegove rezultate.

između dva carstva, da su dugo živeli u svetu sasvim različitih institucija, taj uvid jednostavno nije relevantan za ovo istraživanje, budući da bi i jedni u drugi Srbi neminovno zajedno živeli kao stanovnici svake zemlje čije su granice pomerene na zapad i na sever u odnosu na granice Srbije iz 1914. godine.

2.3. Optimizacija veličine države

Budući da porast veličine države istovremeno dovodi do promene i pogodnosti i troškova, otvara se mogućnost za definisanje optimalne veličine države – one koja će maksimizovati neto pogodnosti. Tu ideju je, u novinskom članku, prvi put izneo jedan od vodećih ekonomista današnjice (Barro 1991).

Teorijski model optimalne države zasniva se na nekoliko pretpostavki.

- Egzogenost kulturnih obrazaca, pa time i kulturne heterogenosti sa stanovišta veličine države: ma kolika je veličina države, kulturni obrasci etničkih, jezičkih i konfesionalnih zajednica se ne menjaju.
- Polarizacija preferencija različitih etničkih, jezičkih i konfesionalnih zajednica ne menja se sa promenom veličine države.
- Postoji puna kulturna homogenost, uključujući preferencije pojedinaca u pogledu javnog dobra, u okviru istih etničkih, jezičkih i konfesionalnih zajednica.
- Zanemaruju se razlike između zemalja u pogledu mogućnosti prilagođavanja kulturnoj heterogenosti, odnosno osposobljenosti zemalja da, odgovarajućim političkim institucijama i kulturom političke elite i biračkog tela, ublaže nepovoljna dejstva te heterogenosti.

U modelu zasnovanom na tim pretpostavkama, optimalna veličina države, veličina pri kojoj su maksimizovane neto pogodnosti, definiše kao ona veličina pri kojoj su izjednačeni granične koristi (pogodnosti) od porasta države usled dejstva ekonomije obima i granični troškovi tog porasta usled uvećanja kulturne heterogenosti. Potreban i dovoljan uslov za postojanje optimuma je konvergencija (opadajućih) graničnih pogodnosti i (rastućih) graničnih troškova, koja omogućava da se pri određenoj veličini države te dve vrednosti izjednače.

Teorijski model optimalne veličine države pogodnosti i troškove njene veličine razmatra sa stanovišta društvenog blagostanja zemlje, to jest sume individualnog blagostanja stanovnika te države.[26] Shodno tome, optimalna veličina države je ona kojom se maksimizuje društveno blagostanje, shvaćeno kao suma individualnih blagostanja svakog stanovnika države. Pri tome, politički troškovi, shvaćeni kao oportunitetni troškovi, ulaze u kalkulaciju kao stavka koja umanjuje društveno blagostanje. Jasno je da je teorijski model optimalne veličine države normativni model, to jest model koji pokazuje kolika veličina države treba da bude, a *nije* model kojim se objašnjava stvarnost, to jest *ne može* da odgovori na pitanje zbog čega je neka država onolika kolika jeste. Još manje je taj model teorijska konstrukcija kojom se objašnjava državotvorni proces. Štaviše, ekonomska teorija takav model nije ponudila.

No, na obodima tog normativnog teorijskog modela mogu se formulisati neki elementi kojima bi se objašnjavala stvarnost, u stvari postavile određene teorijske hipoteze. Načelno posmatrano, upravo je veličina države kojom se maksimizuje društveno blagostanje, to jest optimalna veličina države, ona njena veličina koja bi se postigla u demokratskom procesu. Odstupanja od takve veličine bila bi posledica nesavršenosti samog procesa donošenja kolektivnih odluka i nesavršene informisanosti onih koji u njemu učestvuju.

Nasuprot tome, diktatora *ne* interesuje društveno blagostanje, to jest blagostanje podanika, već samo sopstveno, a njegova maksimizacija se svodi na maksimizaciju rente koju diktator može da se prisvoji. Što je veća država, što je veći broj stanovnika i njihovo bogatstvo, to je veća renta koju on može da se prisvoji. Dakle, načelno posmatrano, u njegovom je najboljem interesu da država kojom vlada bude što veća. Ostaje nejasno da li i na koji način (u kojoj funkcionalnoj formi) porastom države rastu i troškovi prisvajanja rente i da li diktator snosi te troškove. Ti troškovi svakako postoje, u krajnjoj liniji uvek ih snosi onaj koji prisvaja rentu (umanjuje se renta), pa se stoga može govoriti da diktator prisvaja neto rentu. U svakom slučaju, nezavisno od oskudnosti informacija o tim mehanizmima, razborito je pretpostaviti da je optimalna veličina zemlje sa stanovišta društvenog blagostanja značajno manja od optimalne veličine zemlje sa stanovišta prisvajanja rente, to jest sa stanovišta diktatora. Samim tim, ukoliko se odluke o granicama zemlje donose demokratski, one će se razlikovati od autokratski donetih odluka.

[26] Striktno posmatrano, prema mikroekonomskoj teoriji, odnosno terminologiji ekonomike blagostanja, društveno blagostanje je suma blagostanja potrošača (agregatni potrošačev višak) i suma blagostanja proizvođača (agregatni proizvođačev višak). Jednostavnosti radi, u ovoj analizi se zanemaruje blagostanje proizvođača, budući da ne zavisi od državotvornih odluka, niti proizvođači na njih mogu da utiču.

Na osnovu navedenih teorijskih nalaza može se postaviti teorijska hipoteza da demokratski donete odluke o veličini države dovode do manjih država u poređenju sa autokratskim odlučivanjem, odnosno do većeg broja država na globalnom nivou.[27]

Imajući sve to u vidu, budući da se prostorna raspodela stanovništva i njegova struktura, odnosno kulturna heterogenost u prostoru, znatno razlikuju od jednog kraja globusa do drugog, neminovno je da optimalna veličina države nije univerzalna. Štaviše, zbog razlika u državotvornim procesima, isto kao i razlika u oblicima vladavine i načinima donošenja odluka o granicama, stvarna, postignuta veličina država nije univerzalna. Zbog toga i postoje države različite veličine, od ogromnih, poput Kine i Indije, čije stanovništvo značajno prelazi jednu milijardu, do minijaturnih, poput pojedinih pacifičkih ostrvskih zemalja.

Osnovni nalazi ekonomske teorije optimalne države omogućavaju traženje *ex post* optimalne veličine države srpskog naroda, imajući u vidu datu kulturnu heterogenost stanovništva koje je živelo na relevantnom geografskom prostoru u vreme izbora državotvornog rešenja 1918. godine. Pre nego što se pristupi toj analizi, treba razmotriti da li su 1918. godine zaista postojala alternativna državotvorna rešenja, a ako jesu postojale alternative ujedinjenju jugoslovenskih naroda, da li su u nekim bitnim parametrima one sa stanovišta srpskog naroda bile inferiorne u odnosu na ono koje je realizovano.

3. UJEDINJENJE JUGOSLAVIJE 1918. GODINE: DA LI JE POSTOJALA ALTERNATIVA?

Savremena srpska istoriografija sa velikom skepsom i izvesnim nipodaštavanjem gleda na državotvorne alternative jugoslovenskom ujedinjenju: „Savremeno lamentiranje nad propuštenom prilikom da nastane Velika Srbija teško je razumljivo iz ondašnje perspektive iz više uzroka“ (Radojević 2019,

[27] Taj nalaz je u skladu sa nalazima formalnog teorijskog modela (Alesina, Spolarore 1997) da demokratizacija izaziva secesiju i uvećanje broja država, to jest umanjenje njihove veličine, i da slobodnija spoljna trgovina, to jest smanjenje barijera ekonomskoj saradnji između država, daje iste rezultate. Nesporno je da je demokratizacija Istočne Evrope u poslednjoj deceniji XX veka dovela do raspada određenog broja višenacionalnih država, što posredno empirijski podržava rezultate navedenog modela, tim pre što je demokratizaciju pratila i slobodnija spoljna trgovina i uključivanje tih zemalja u svetske ekonomske tokove, to jest u međunarodnu podelu rada.

235). Stoga treba preispitati argumente kojima se nipodaštava alternativa koja se naziva Velikom Srbijom (Radojević 2019, 235), mada same granice te države nisu definisane.[28]

1. Izvan Velike Srbije neminovno bi morali da ostanu veći delovi srpskog naroda.
2. Velika Srbija nije odgovarala savezničkoj politici.
3. Jedna prvenstveno srpska država bila bi „uklještena" između ponižene, ali vazda ambiciozne Bugarske, duboko ozlojeđene Mađarske i umanjene Hrvatske koja bi postala lak „plen grabljivih suseda".
4. Svi ratni pobednici nastojali su da što više prošire svoje granice i osiguraju veću teritorijalnu dobit.

Što se prvog argumenta tiče, tvrdnja je uverljiva (nezavisno od neprecizznosti odrednice „veći"), a empirijsko istraživanje koje sledi pokazaće koliki bi deo srpskog naroda ostao izvan granica srpske države da je, umesto stvaranja Jugoslavije, državotvorni poduhvat 1918. godine bio okrenut proširenoj Srbiji. Štaviše, umesto prideva „velika", bez ikakvog preciziranja granica, mogu se *ex post* izneti konkretne kvantifikacije, imajući u vidu alternativno definisane granice proširene Srbije kao državotvornog projekta. Nadalje, na ispitivanje te tvrdnje naslanja se testiranje osnovne hipoteze ovog rada, a to je da se povećanjem veličine države, to jest obuhvata srpskog naroda u matičnoj državi, uvećava etnička, jezička i konfesionalna heterogenost te države, dakle kulturna heterogenost kao osnovni izvor političkih tenzija i rezultujućih troškova. Sprovođenje načela „svi Srbiji u jednoj državi", prema toj hipotezi, ukoliko se potvrdi kao tačna, znači veliku kulturnu heterogenost tako stvorene države. U osnovi, to je bila dilema pred kojom se nalazila politička elita Srbije tog vremena, prihvatala ona to ili ne. „Savremeno lamentiranje" možda ipak može da bude mirna, hladna i trezvena retrospektivna rekonstrukcija propuštenih prilika i ustanovljenje mogućih grešaka koje su tom prilikom počinjene.

[28] Granice Velike Srbije nisu definisane ni u veoma obuhvatnom zborniku radova (Krestić, Nedić 2003) niti u tematskoj monografiji (Popov 2006) upravo sa tim naslovnima. U ovom radu se izbegava termin Velika Srbija jer označava neprecizno definisan politički projekat, odnosno nejasno definisane granice države koja bi bila rezultat ostvarenja tog političkog projekta. Štaviše, termin Velika Srbija nosi kontroverznu političku konotaciju. Imajući u vidu da je ovo akademski, a ne politički tekst, a kako bi ta distinkcija bila jasna, u daljem tekstu upotrebljava se isključivo izraz „proširena Srbija".

Tvrdnju da proširena Srbija, umesto stvaranja Jugoslavije, nije odgovarala savezničkoj politici treba uzeti sa velikom rezervom. Saveznička politika, u onoj meri u kojoj je bila usaglašena, veoma dugo je bila protiv stvaranja jedinstvene države jugoslovenskih naroda. Niko od saveznika nije reagovao na Nišku deklaraciju (donetu 7. decembra 1914. godine), što efektivno znači da je nije podržao. Pažljivim čitanjem „Četrnaest tačaka" – proglasa američkog predsednika Vilsona (*Woodrow Willson*),[29] lako se može uočiti podrška koncepciji proširene Srbije, koja podrazumeva ponovno uspostavljanje Srbije, oslobađanje njene teritorije i obezbeđivanje njenog slobodnog i sigurnog izlaska na more, dok se u istom dokumentu slovenskim i svim drugim narodima u Austrougarskoj, čije se očuvanje implicitno predviđa, nude sveobuhvatne mogućnosti za autonomni razvoj. Dakle, reč je o tome da se tek pri samom kraju rata savezничка politika promenila i da tek tada ona više nije predviđala opstanak Austrougarske, što je bio potreban uslov za stvaranje zajedničke države jugoslovenskih naroda, pa da je tek tada prihvaćeno stvaranje Jugoslavije, koje je srpska politička elita neprestano, još od Niške deklaracije, naturala saveznicima.[30] Otvoreno je pitanje, međutim, kako bi saveznici reagovali da nije bilo takvog entuzijazma na srpskoj strani, ali je izvesno da su oni nisu primoravali srpsku političku elitu da se opredeli za Jugoslaviju, odnosno da se odrekne proširene Srbije, kako bi se moglo zaključiti na osnovu tvrdnje jednog od učesnika grotesknog fiktivnog dijaloga navedenog kao moto ovog članka.

Tačna je tvrdnja da bi proširena Srbija bila uklještena između ponižene, „ali vazda ambiciozne Bugarske, duboko ozlojeđene Mađarske i umanjene Hrvatske", ali je Jugoslavija isto tako bila uklještena između prve dve zemlje, koje su bile nezadovoljne državnom granicom prema Jugoslaviji isto onoliko koliko bi bile nezadovoljne granicom prema proširenoj Srbiji. Što se hipotetičke nezavisne hrvatske države tiče i spekulacije da bi ona postala „lak plen grabljivih suseda", ma šta to značilo, to bi se od suseda svelo na Italiju, pošto ni Austrija ni Mađarska, posle poraza u Prvom svetskom ratu,

[29] Američki predsednik Vilson je 8. januara 1918. godine taj proglas obnarodovao pred Kongresom SAD. *https://avalon.law.yale.edu/20th_century/wilson14.asp*, poslednji pristup 3. avgusta 2023.

[30] Živojinović (1983) detaljno analizira promene u britanskoj politici prema stvaranju Jugoslavije tokom Prvog svetskog rata, pri čemu, na osnovu dokumenata britanske diplomatije, jasno pokazuje da Velika Britanija nikada nije zagovarala stvaranje Jugoslavije, a tek je deklaracijom od 3. juna 1918. godine samo „izrazila saglasnost" sa idejom o ujedinjenju Srba, Hrvata i Slovenaca, dakle dopustila da Jugoslavija ipak može da se formira.

nisu bile u prilici da budu grabljive.[31] Onda se isto tako spekulativno može zaključiti da bi zadovoljenjem italijanskih ambicija na istočnom Jadranu u većoj meri, (proširena) Srbija i Italija daleko lakše našle zajednički jezik o međusobnoj granici nego što su to bile u prilici da učine Jugoslavija i Italija.[32]

Konačno, tvrdnja da su „svi ratni pobednici nastojali [...] da što više prošire svoje granice i osiguraju veću teritorijalnu dobit" kao argument u prilog stvaranja Jugoslavije predstavlja upotrebu pozitivnog, vrednosno neutralnog suda, onog kojim se utvrđuju činjenice (nezavisno od toga da li je on tačan ili ne), kao normativnog suda. Implicitno se čitalac upućuje na sledeći stav: budući da su svi ostali radili to i to, isto to je trebalo da radi i sprska politička elita. Ne samo da se ima razumevanja za to što su drugi (navodno) činili nego se i opravdava to što je srpska politička elita činila to isto. Logički, međutim, taj argument nije prihvatljiv. Teritorijalna dobit sama po sebi nije presudna već broj stanovnika, i to sa stanovišta autokratskog vladara i njegove političke elite kojim se maksimizuje potencijalna renta koja se dâ prisvojiti.[33] Štaviše, teritorijalno širenje bilo koje države u Evropi najverovatnije znači uvećanje kulturne heterogenosti njenog stanovništva (ukoliko širenje nije praćeno iseljavanjem „neodgovarajućeg" stanovništva). To je najbolje osetila Poljska posle Prvog svetskog i Poljsko-ruskog rata, koja je, Riškim mirovnim ugovorom zaključenim 18. marta 1921. godine, dobila velike teritorije na istoku. Povećanje kulturne heterogenosti stanovništva te zemlje izazvalo je visoke političke troškove, tako da je međuratna Poljska završila kao diktatura, budući da je to bila najrazboritija opcija za minimizaciju naraslih političkih nestabilnosti i pratećih troškova (Connelly 2020). Slična, mada ne istovetna stvar dogodila se sa Italijom, koja je prisajedinjenjem Južnog Tirola u svoje stanovništvo uključila veliku i teritorijalno homogenu

[31] Otvoreno pitanje je, međutim, kako bi se hrvatska politička elita koja bi vodila takvu hrvatsku državu odnosila prema proširenoj Srbiji kao susedu. Zavisno od granica takve Srbije, bile bi u određenoj meri narušene ambicije u pogledu ostvarenja hrvatskog državnog prava, što bi vodilo suprotstavljenim teritorijalnim interesima dveju zemalja i mogućem nezadovoljstvu hrvatske političke elite, iako bi ostvarivanje proširene Srbije i raspadom Austrougarske bio otvoren put za stvaranje hrvatske (suverene) države. To je, čini se, mogao da bude veći rizik po uspostavljanje dobrosusedskih odnosa nego spekulacija da bi Hrvatska postala „lak plen suseda".

[32] Istraživanje italijansko-jugoslovenskih odnosa posle Prvog svetskog rata (Ristović, 2021b) nudi neke elemente za takvu spekulaciju u pojedinim izjavama onih koju su spadali u tadašnju italijansku političku elitu, pre svega Musolinija (*Benito Mussolioni*) i D'Anuncija (*Gabriele d'Annunzio*).

[33] Širenje granica zemlje radi dobijanja izlaska na more sasvim je opravdano sa stanovišta nalaza ekonomske nauke, što je već napomenuto u ovom radu, budući da se takvim izlazom (uz odgovarajuću obalu i priobalje) olakšava spoljna trgovina i pospešuje uključivanje zemlje u međunarodnu podelu rada.

nemačku manjinu. Nesuglasice, pa time i politički troškovi, povodom statusa nemačke manjine u Italiji trajale su sve do 1971. godine, kada je postignuto kompromisno rešenje.[34] Dakle, načelo 'zagrabi koliko možeš' ne mora uvek da bude razborit pristup određivanju državnih granica.

Verovatno je da najviše kontroverzi u pogledu alternativnih državotvornih rešenja izaziva tumačenje značaja Londonskog sporazuma (zvanično: Sporazum između Francuske, Rusije, Velike Britanije i Italije), potpisanog u tom gradu 26. aprila 1915. godine,[35] čijim je navodnim neprihvatanjem propuštena prilika za stvaranje proširene Srbije (Marušić, 2018), a čije se ponovno razmatranje ponekad omalovažava i u akademskoj[36] i u široj javnosti.[37] Za razliku od jednostranih, emotivnih tekstova sa nepromišljenim zaključcima, Radivojević (2020) nudi sveobuhvatnu, smirenu i uravnoteženu analizu Londonskog sporazuma i njegovih posledica.[38]

Kada se iz razmatranja isključi sve ono što ne pripada akademskoj raspravi, dâ se, za potrebe analize u ovom članku, o Londonskom sporazumu zaključiti sledeće.

Prvo, nezavisno od motiva potpisnica i toka pregovora, Londonski sporazum nije predstavljao nikakvu međunarodnu pravnu obavezu zemalja potpisnica prema Srbiji i njenim posleratnim granicama. U krajnjoj liniji, Londonski sporazum je poništen na Pariskoj mirovnoj konferenciji 1919.

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[34] Ovim se, da ne bi bilo zabune, ne tvrdi da je problem nemačke manjine u Italiji uzrok uspona fašizma i uspostavljanja fašističke diktature u toj zemlji.

[35] Puni tekst Londonskog sporazuma na engleskom jeziku u izvornoj formi videti na: *https://archive.org/details/agreementbetween00franrich/mode/2up*, poslednji pristup 3. jula 2023.

[36] Primera radi, u prikazu knjige Milana Ristovića o italijansko-jugoslovenskim odnosima (Ristović, 2021b) ocenjuje se da on „ne žali, kao što to čini veliki deo korozivne srpske istoriografije, za neostvarenim Londonskim ugovorom iz 1915..." (Kuljić 2022, 319).

[37] Kao primer takvog omalovažavanja može se navesti nepotpisan tekst na sajtu „Srbija danas" postavljen 28. oktobra 2014. godine, koji je još uvek dostupan na: *https://www.sd.rs/clanak/mit-o-londonskom-ugovoru-da-li-nam-je-nudena-velika-srbija-28-10-2014*, poslednji pristup 3. jula 2023.

[38] Zanimljivo je da Londonski sporazum bio, između ostalog, predmet žučne rasprave o predlogu ustavnih amandmana na Pravnom fakultetu Univerziteta u Beogradu krajem marta 1971. godine. Posledica te rasprave, preciznije njenog sadržaja, bila je sudska zabrana tematskog broja časopisa *Anali Pravnog fakulteta u Beogradu* koji je sadržao autorizovana izlaganja učesnika skupa. Izlaganja koja su se bavila Londonskim sporazumom mogu se pronaći u naknadno objavljenom zabranjenom broju časopisa (Đurić 1971; Janković 1971; Stojanović 1971). Mihailo Đurić je 1973. godine, zbog onog što je izrekao u toj raspravi, pravnosnažno osuđen na devet meseci zatvora i upućen na izdržavanje kazne.

godine i granice Italije – prema mirovnim sporazumima potpisanim na toj konferenciji i kasnijim bilateralnim sporazumom sa Kraljevinom SHS, potpisanim u Rapalu – razlikovale su se od onih koje su njime bile utvrđene. No, veliki deo italijanskog teritorijalnog širenja na račun (tada još uvek postojeće) Austrougarske bio je ostvaren na Pariskoj mirovnoj konferenciji, u skladu sa odredbama Londonskog sporazuma. Na primer, potpuno je ostvareno širenje Italije na Južni Tirol i Istru. Dakle, iako taj sporazum nije bio pravno obavezujući, ispostavilo se čak ni prema Italiji, on je svakako dao određeni politički ton posleratnom određivanju granica na Pariskoj mirovnoj konferenciji.

Drugo, Londonskim sporazumom se definišu samo granice na istočnoj obali Jadrana i u njegovom neposrednom zaleđu, a ne u dubini Balkanskog poluostrva. Međutim, u definisanju jadranskih granica, izričito, osim Italije, taj sporazum kao primorske zemlje pominje Hrvatsku, Srbiju i Crnu Goru i izričito ostavlja delove jadranske obale koji treba da pripadnu tim zemljama, pri čemu je odvojeno tretiran severni deo obale (što se odnosilo na Hrvatsku), s jedne strane, i centralni i južni deo obale (pri čemu su vidu bile Srbija i Crna Gora), s druge strane.[39] Prema tome, Italija se tim sporazumom obavezala prema Srbiji i Crnoj Gori, iako te dve države nisu bile potpisnice sporazuma, da *neće* prisvajati određene, sporazumom precizno definisane delove istočne jadranske obale. Isto tako, potpisnice sporazuma nisu se opredeljivale o posleratnoj granici između Srbije i njenih suseda na zapadu u dubini teritorije. Zbog toga, jednostavno, Londonski sporazum ne treba projektovati na celokupne zapadne granice proširene Srbije već samo na one koje su na obali Jadranskog mora i u njenom neposrednom zaleđu.

Treće, savezničku ponudu Srbiji iz avgusta 1915. godine (Antić 2012, 156–160), kojom joj se nudi da napusti deo (nikako celu) Makedonije (tadašnje Južne Srbije, a današnje Severne Makedonije) i posle rata to područje prepusti Bugarskoj, u zamenu za teritoriju Bosne i Hercegovine, Srema, Bačke, Baranje i Slavonije, kao i dela Dalmacije, treba posmatrati u svetlu savezničkih napora da Bugarsku, poput Italije, uvuku u rat na strani Antante, barem da je spreče da u rat uđe na protivničkoj strani, a sve to inspirisano bugarskim teritorijalnim pretenzijama prema Makedoniji. Ne samo da je Srbija tu savezničku ponudu odbila, ne samo da nikada nije

[39] Zanimljivo je pominjanje Hrvatske u tekstu sporazuma. Iz toga ne treba zaključiti da je njime bila predviđena nezavisnost Hrvatske već da se samo upućivalo na Hrvatsku kao na mogući deo neke državne zajednice ili kao na nezavisnu državu koja će nastati posle završetka rata. Treba voditi računa o tome da u vreme zaključivanja Londonskog sporazuma nije postojala rešenost zemalja Antante za razbijanjem Austrougarske, kako je već navedeno u ovom radu, i da je taj sporazum, u stvari, najvećim svojim delom, garancija italijanskih granica prema Austrougarskoj.

potpisan međunarodni sporazum te vrste, nego je mala verovatnoća da bi posle rata koji je, na strani centralnih sila, Bugarska katastrofalno izgubila,[40] ona mogla da računa na proširenje svoje teritorije. No, takvom ponudom vlasti savezničkih zemalja su poslale jasan signal, ako ništa drugo, da uvažavaju teritorijalne pretenzije Srbije na Vojvodinu i Bosnu i želju za izlazak na more, kada bude došlo vreme za posleratnu promenu granica.[41]

Konačno i verovatno najbitnije: državotvorna pitanja rešavana su na Pariskoj (posleratnoj) mirovnoj konferenciji, na osnovu ishoda rata, to jest vojnih rezultata/uspeha koji su postignuti. U tom smislu, ključnu zaslugu za širenje granice zemlje na zapad i sever od granica Kraljevine Srbije imali su vojni uspesi srpske vojske 1918. godine (Opačić, 1983; Bjelajac, 2020). Zapadne granice Kraljevine SHS koje su utvrđene na Pariskoj mirovnoj konferenciji bez tih uspeha ne bi bile dostupne. Retroaktivno, dâ se zaključiti da su ti uspesi mogli da budu osnova za određivanje odgovarajuće zapadne i severne granice proširene Srbije da srpska politička elita nije insistirala na formiranju Jugoslavije, to jest na ujedinjenju sa ostalim jugoslovenskim narodima kao državotvornom rešenju, već se usredsredila na širenje granica Kraljevine Srbije.

Stoga se može postaviti pitanje da li je postojala obaveza bilo koje vrste srpske političke elite da se opredeli za stvaranje zajedničke države. Niko nije prisilio srpsku političku elitu da se Niškom deklaracijom, nedugo posle početka rata, obaveže na stvaranje jedinstvene jugoslovenske države, još manje da Krfskom deklaracijom sebe obaveže na stvaranje zajedničke države jugoslovenskih naroda. Za sopstvene zablude ne treba optuživati druge. A istorija je pokazala da je srpska politička elita umela da odstupi od obaveza koje je preuzela takvim dokumentima kada joj je to bilo u neposrednom interesu, kao što je napustila Krfskom deklaracijom definisanu obavezujuću kvalifikovanu većinu prilikom donošenja ustava zajedničke države (Marinković, 2020).

Takođe se može postaviti pitanje da li je načelo samoopredeljenja, jedno od načela na kojima se zasnivalo donošenje odluka na Pariskoj mirovnoj konferenciji (Sharp 2018), na bilo kakav način ometalo stvaranje proširene Srbije. Bitno je uočiti da je to načelo efektivno važilo za narode zemalja pobednica, a ne za poražene narode. Mađari su, na primer, ostali rasejani (i danas su) u nekoliko susednih zemalja, a isto se odnosi i na Nemce,

[40] Bugarska je prva od centralnih sila koja je zatražila primirje, efektivno kapitulirala u Prvom svetskom ratu.

[41] Više o toj ponudi i evoluciji stavova britanske diplomatije posle njenog odbijanja videti u Živadinović (1983).

uključujući i Austrijance.[42] Srbija je nesporno bila zemlja pobednica i načelo samoopredeljenja srpskog naroda svakako bi bilo primenjeno na način koji je bio u skladu sa onim što je tražila srpska politička elita. A ona je tražila zajedničku državu – Jugoslaviju.

Imajući sve to u vidu, radna pretpostavka na kojoj se zasniva analiza koja sledi jeste da ujedinjenje jugoslovenskih naroda nije bila neminovnost 1918. godine i da retrospektivnom hipotetičkom analizom (engl. *counterfactual analysis*) treba razmotriti alternativna državotvorna rešenja – a to su različite varijante proširene Srbije – i njihove posledice. Za početak te analize treba definisati takva alternativna državotvorna rešenja.

4. DEFINISANJE ALTERNATIVNIH DRŽAVOTVORNIH REŠENJA

Identifikovano je nekoliko alternativnih državotvornih rešenja i njima su pridružena još tri rešenja: Kraljevina Srbija pre početka Prvog balkanskog rata, potom Kraljevina Srbija pre početka Prvog svetskog rata i ostvareno državotvorno rešenje: Kraljevina Srba, Hrvata i Slovenaca. Stoga se u empirijskoj analizi koja sledi koriste sledeća državotvorna rešenja:

- Kraljevina Srbija pre balkanskih ratova: Srbija iz 1912. godine (pretkumanovska Srbija);
- Kraljevina Srbija posle balkanskih ratova: Srbija iz 1914. godine (postkumanovska Srbija);
- proširena Srbija *I*: Kraljevini Srbiji pridodata su područja koja su se sama prisajedinila u novembru 1918. godine (Crna Gora, Banat, Bačka i Baranja – prisajedinjeni krajevi);
- proširena Srbija *II*: proširenoj Srbiji *I* pridodata je cela Bosna i Hercegovina (prisajedinjeni krajevi, uz njih i cela Bosna);
- proširena Srbija *III*: proširenoj Srbiji *II* pridodate su teritorije koje su mogle da joj pripadnu na osnovu Londonskog sporazuma iz 1915. godine (londonska Srbija);

[42] Versajski mirovni sporazum efektivno zabranjuje ujedinjenje Nemačke i Austrije, budući da je članom 80 tog sporazuma predviđeno da za takvo ujedinjenje saglasnost moraju da daju sve zemlje potpisnice tog sporazuma. Osim toga, značajna nemačka manjina ostala je da živi u Poljskoj, Čehoslovačkoj i Italiji, naslonjena na nemačku, odnosno austrijsku granicu.

- proširena Srbija *IV*: teritorija Srbije na osnovu amputacione linije koju je kralj Aleksandar *I* predložio u leto 1928. godine (amputaciona linija);
- proširena Srbija *V*: teritorija Srbije prema granici koja je predložena u proglasu Stevana Moljevića iz juna 1941. godine, a koja je početkom raspada Jugoslavije 1991. godine zloupotrebljena u propagandne svrhe kao linija Karlobag – Ogulin – Karlovac – Virovitica (Moljevićeva linija);
- Jugoslavija iz 1918. godine: Kraljevina Srba, Hrvata i Slovenaca (Kraljevina SHS).[43]

Kraljevina Srbija pre Balkanskih ratova, iako nije bila državotvorna alternativa 1918. godine, u analizu ulazi kao referentna tačka, kako bi se alternativna državotvorna rešenja mogla porediti sa stanjem u doba pre nego što se srpska politička elita upustila u poduhvat ujedinjenja srpskog naroda. Za potrebe popisa stanovništva 1921. godine, teritorija te države označena je kao područje „Severna Srbija".

Kraljevina Srbija posle balkanskih ratova je *de facto* Kraljevina Srbija iz 1914. godine, to jest na kraju Prvog svetskog rata, dakle polazna tačka iz koje se krenulo u državotvorno rešenje i jedno od mogućih rešenja – nulto rešenje: Kraljevina Srbija nepromenjenih granica – neproširena Srbija. Za potrebe popisa stanovništva 1921. godine, teritorija te države nije označena kao specifično područje već je ona dobijena sumiranjem područja „Severna Srbija" sa područjem „Južna Srbija", iz koga su, prema granici iz 1914. godine, izuzete pokrajina Metohija i izabrani srezovi.[44]

Proširena Srbija *I* je sledeće državotvorno rešenje koje se razmatra. Ona obuhvata teritoriju Kraljevine Srbije iz 1914. godine uvećanu za ona područja koja su joj se direktno prisajedinila: područje Banata, Bačke i Baranje, odlukom Velike narodne skupštine Srba, Bunjevaca i ostalih Slovena u Banatu, Bačkoj i Baranji, održane u Novom Sadu 25. novembra 1918. godine, i područje Crne Gore, odlukom Velike narodne skupštine u Podgorici (poznatije kao Podgorička skupština), održane 26. novembra 1918. godine. Drugim rečima, ujedinjenje Jugoslavije od 1. decembra 1918. godine bilo je ujedinjenje Države Slovenaca, Hrvata i Srba (bez Banata, Bačke i Baranje) sa proširenom Srbijom *I*. Za potrebe popisa stanovništva 1921. godine,

[43] Za svaki slučaj, kako bi se izbegao bilo kakav mogući nesporazum, treba napomenuti da ovde definisane granice alternativnih državotvornih rešenja iz 1918. godine ne predstavljaju nikakav poziv za promene današnjih granica između država naslednica Jugoslavije.

[44] Reč je o tome da su pokrajina (u popisnom smislu) Metohija i izabrani srezovi popisnog područja „Južna Srbija" 1914. godine pripadali Kraljevini Crnoj Gori. To su srezovi: Berane, Bijelo Polje i Plevlje (*sic*).

prisajedinjene teritorije označene su kao pokrajine „Crna Gora“ i „Banat, Bačka i Baranja“. Tim teritorijama su dodate i one teritorije koje su pripadale Kraljevini Crnoj Gori 1914. godine, a koje nisu bile obuhvaćene statističkom pokrajinom „Crnom Gorom“.

Proširena Srbija *II* je država u kojoj je proširenoj Srbiji *I* pridodata Bosna i Hercegovina, prema njenim granicama određenim na Berlinskom kongresu 1878. godine na kome je kao protektorat dodeljena Austrougarskoj. Za potrebe popisa stanovništva 1921. godine, tako pridodata teritorija označena je kao pokrajina „Bosna i Hercegovina“.[45]

Proširena Srbija *III* je država u kojoj su proširenoj Srbiji *II* pridodate one teritorije koje su Srbiji i Crnoj Gori (već uključenima u proširenu Srbiju *II*) mogle da pripadnu na osnovu Londonskog sporazuma. Granica teritorija uz Jadransko more, ma koliko bila spekulativna, može se povući precizno, budući da je tačka razgraničenja Italije sa Srbijom rt Ploče (ital. *Planca*), dok su srednjodalmatinska i južnodalmatinska ostrva precizno i jednoznačno raspodeljena. Ta granica deli pokrajinu „Dalmacija“, onako kako je ona definisana za potrebe popisa stanovništva 1921. godine, i to tako da bi proširenoj Srbiji bili prisajedinjeni srezovi: Dubrovnik, Imotski, Kotor, Makarska, Metković, Sinj, Split i Brač. Što se tiče teritorija severno od reke Save, granice proširene Srbije *III* krajnje su spekulativne. Za potrebe ovog istraživanja pretpostavljano je da bi one bile uspostavljenje tako da bi proširenoj Srbiji *II* u celini bile pridodate županije: Zemun – grad, Srijem (*sic*),[46] Osijek – grad i deo županije Virovitica: samo kotar Osijek koji se nalazi u okolini okruga Osijek – grad.[47]

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[45] Po svojoj teritoriji, nikada ostvareni poduhvat Banovina Srbija, reakcija intelektualaca okupljenih oko Srpskog kulturnog kluba na formiranje Banovine Hrvatske, ležao bi negde između proširene Srbije *I* i proširene Srbije *II* budući da ne bi obuhvatao značajne delove Bosne i Hercegovine. Imajući u vidu da su granice Banovine Srbije bile iznuđene granicama Banovine Hrvatske, s jedne strane, i procenu da se dodavanjem te alternativne proširene Srbije ne bi ništa značajno dobilo na analitičkom planu, odluka je bila da se ta teritorijalna opcije ne uključi u istraživanje. Više o aktivnostima Srpskog kulturnog kluba na formiranju Banovine Srbije videti u: Dimić (2001) i Marinković (2022).

[46] Županija Srijem, osim onih područja koja danas pripadaju Republici Srbiji, obuhvatala je 1921. godine i još četiri kotara: Županja, Ilok, Vukovar i Vinkovci, zajedno sa istoimenim gradovima.

[47] Testiranja modela radi, uključivani su u teritoriju proširene Srbije *III* još neki kotari županija Virovitica i Požega. Ta variranja, međutim, dovodila su do zanemarljivih, gotovo ni do kakvih promena rezultata modela. Uzgred, zapadna granica proširene Srbije *III* poklapa se, u osnovnim potezima, sa linijom razgraničenja vojnih jedinica definisanom sporazumom o primirju između Srbije i Mađarske, zaključenim 13. novembra 1918. godine (Antić, Marković, Matejić 2022, 190).

Proširena Srbija *IV* ja država čija je granica definisana tzv. amputacionom linijom koja se u političkim previranjima pojavila u leto 1928. godine posle atentata u Skupštini, u vreme kada je Stjepan Radić, žrtva atentata, još uvek bio živ. Ideju o amputaciji Hrvatske i Slovenije od Kraljevine SHS, praktično Srbije, kralj Aleksandar *I* je 7. jula 1928. godine saopštio Svetozaru Pribićeviću, prvaku Samostalne demokratske stranke (SDS), u tom trenutku vodećem članu Seljačko-demokratske koalicije (SDK, koalicija SDS sa Radićevom Hrvatskom seljačkom strankom) i jednom od najznačajnijih pripadnika hrvatske političke elite. Na tom razgovoru je predočena i linija razgraničenja, tzv. amputaciona linija, koja bi *de facto* postala zapadna granica Srbije. Ta linija je verovatno trebalo da bude „Barč–Virovitica–Daruvar–Pakrac–Novska–Dubica–Bosanski Novi te uz Unu na Knin i Šibenik".[48] Za potrebe ovog rada nije relevantno da li je ideja o amputaciji Hrvatske (i Slovenije) bila stvarna ili je bila samo deo političkog manevrisanja monarha posle atentata u Skupštini, možda kao deo zastrašivanja hrvatske političke elite u nadi da će se od nje dobiti određene političke koncesije.[49] Veći analitički problem sa stanovišta ovog istraživanja je nepreciznost tako definisane linije razgraničenja, odnosno granice proširene Srbije *IV*. Za potrebe ovog istraživanja pretpostavlja se da svi gradovi koji čine tu liniju pripadaju proširenoj Srbiji, što se svodi na dodavanje celokupnih popisnih okruga, odnosno županija Zemun – grad, Srijem, Dalmacija, Virovitica i Požega, na teritoriju proširene Srbije *II*.[50]

Proširena Srbija *V* je Srbija sa granicama objavljenim u proglasu Stevana Moljevića, koji je obnarodovan 30. juna 1941. godine, posle kapitulacije Kraljevine Jugoslavije (Moljević, 1941). Važno je napomenuti da ta granica predstavlja granicu Srbije u okviru Jugoslavije, koja bi bila okvir za tri teritorijalne jedinice: Srbiju, Hrvatsku i Sloveniju. Prema tome, Moljevićev program *ne* predstavlja osnovu za nezavisnu, proširenu Srbiju. Političko-

[48] Jedini dostupan izvor u kome se nalazi eksplicitno definisana amputaciona linija je Hrvatska enciklopedija (2021). Iako sveobuhvatno razmatra politička previranja posle atentata u Skupštini i opisuje sastanak kralja Aleksandra *I* i Svetozara Pribićevića, između ostalog na osnovu beleške iz Pribićevićevih memoara, Gligorjević (2001, 315–321) ne pominje samu liniju razgraničenja. Preštampana je, doduše, u toj knjizi (Gligorijević, 317) karta Kraljevine SHS u koju je britanski poslanik u Beogradu za potrebe Forin ofisa u Londonu rukom ucrtao liniju amputacije koja se razlikuje (nešto je istočnije) od ove navedene u tekstu.

[49] Samardžić (2023) detaljno opisuje to vreme i tadašnja politička previranja u zemlji, koja nisu dovela do novog državotvornog rešenja nego do promene prirode vlasti u zemlji i uvođenja diktature.

[50] Proširena Srbija *II* se koristi za formiranje proširene Srbije *IV*, a ne proširena Srbija *III*, zbog toga što potonja u sebi sadrži već neke srezove/kotare pokrajina, odnosno županija koji se u celini prisajedinjuju proširenoj Srbiji *IV*.

-propagandnom zloupotrebom Moljovićevog proglasa 1991. godine, obelodanjena je granična linija Karlobag – Ogulin – Karlovac – Virovitica. Moljevićev proglas sadrži veoma precizna uputstva za definisanje te linije, tako da se ta granica, za potrebe ovog rada, može precizno odrediti.[51] Teritorija proširene Srbije *V* je teritorija proširene Srbije *IV* uvećana za jedan kotar županije Bjelovar, nekoliko nepotpunih (samo izabrane opštine) kotara županije Karlovac, nekoliko nepotpunih kotara (samo izabrane opštine) županije Rijeka i celu županiju Lika Krbava, umanjenu za nekoliko kotara – nekih u celini, a nekih samo delimično (izabrane opštine). Ta granična linija obuhvata Karlobag, ne obuhvata Ogulin (mada se nalazi relativno blizu), prilično je daleko od Karlovca na istok i obuhvata Viroviticu.

Naravno, razmatra se i ostvareno državotvorno rešenje: Kraljevina SHS, i to prema mirovnim sporazumima sa Austrijom i Mađarskom zaključenim na Pariskoj mirovnoj konferenciji i Rapalskom sporazumu Kraljevine Italije i Kraljevine SHS. U tom slučaju su obuhvaćene sve pokrajine zajedničke države, kako su definisane prema konačnim rezultatima popisa stanovništva iz 1921. godine, sa ukupno 11.984.911 stanovnika.

5. ANALIZA EFEKATA ALTERNATIVNIH DRŽAVOTVORNIH REŠENJA

Izvor podataka za analizu efekata alternativnih rešenja su podaci dobijeni popisom stanovništva Kraljevine SHS iz 1921. godine, i to podaci o stanovništvu prema veropispovesti i prema maternjem jeziku. Konačni rezultati popisa (Kraljevina Jugoslavija, 1932) sadrže podatke na nivou pokrajina, okruga/županija, srezova/kotara i opština. Shodno tome, raspoloživi su podaci na nivou najmanje popisne jedinice, što omogućava preciznost analize.

Postoji nekoliko uverljivih razloga za korišćenje rezultata upravo tog popisa. Prvo, taj popis (kritičan datum popisa, onaj na koji se odnosilo popisano stanje, bio je 31. januar 1921. godine) vremenski je najbliži istorijskom trenutku (novembar 1918. godine) u kome je izabrano, odnosno moralo biti izabrano državotvorno rešenje. Drugo, rezultati tog popisa obuhvataju sve ratne gubitke stanovništva, kao i gubitke usled pandemije

[51] Dragoljub Jovanović, koji je sa Stevanom Moljevićem delio zatvorske dane u kaznionici u Sremskoj Mitrovici, opisuje Moljevićevu opsednutost razgraničenjem sa Hrvatima i izuzetno dobro poznavanje etničke i verske strukture stanovništva u skoro svakom kotaru u Hrvatskoj (Jovanović 2008, 298–299). Zahvaljujem Dejanu Popoviću, koji mi je skrenuo pažnju na ovaj detalj.

španske groznice. Treće, rezultati tog popisa ne obuhvataju preseljenja u okviru jedinstvene države (Kraljevine SHS) koja su se dogodila posle popisa, naročito sredinom dvadesetih godina HH veka, koja su znatno promenila konfesionalnu i etničku strukturu pojedinih krajeva novoformirane države. Shodno tome, rezultati tog popisa daju najprikladniju statističku osnovu za kvantitativnu ocenu kulturne heterogenosti stanovništva.

Sa stanovišta merenja kulturne heterogenosti ključna su dva već pomenuta popisna pitanja. Prvo je popisno pitanje o veroispovesti sa devet mogućih odgovora (pravoslavni, katolici itd.), uključujući i odgovor „nepoznato ili bez konfesije". Na osnovu podataka o odgovoru na pitanje o konfesiji direktno se može meriti konfesionalna heterogenost.

Drugo je popisno pitanje o maternjem jeziku. Dakle, popisno pitanje nije bilo o nacionalnoj pripadnosti nego je nacionalna pripadnost u samim rezultatima popisa izvedena iz odgovara o maternjem jeziku, pri čemu su svi oni koji su odgovorili da im je maternji jezik srpski ili hrvatski zajedno klasifikovani kao Srbi ili Hrvati. Shodno tome, u tu grupu su ubrojani i Bošnjaci, dakle bosanski i sandžački muslimani slovenskog porekla koji govore srpsko-hrvatski, i Makedonci, budući da u to vreme makedonski jezik nije bio priznat i svi slovenski pravoslavni žitelji Makedonije (tadašnje Južne Srbije, današnje Severne Makedonije) upisani su kao oni čiji je maternji jezik srpski ili hrvatski, to jest kao Srbi ili Hrvati. Konačno, u tu grupu su ubrojani i oni koji su se to doba osećali kao Crnogorci u etničkom smislu. Shodno svemu navedenom, popis 1921. godine nije dao odgovor o nacionalnoj strukturi stanovništva, pa se njegovi rezultati ne mogu direktno koristiti za merenje etničke heterogenosti.[52]

Imajući to u vidu, u ovom radu se pristupilo modifikaciji podataka iz popisa 1921. godine. Za svako posmatrano područje izračunati su ponderi konfesionalne pripadnosti, i to tako što je sabran broj svih žitelja pravoslavne, katoličke i muslimanske veropispovesti i od njega oduzet broj Slovenaca i Mađara na nivou svih razmatranih popisnih krugova. Taj broj je postao delilac, dok su tri deljenika postali brojevi pravoslavnih, katolika (umanjen za broj Slovenaca i Mađara) i muslimana na nivou istih razmatranih popisnih krugova. Tim ponderom je množen broj stanovnika koji govore srpsko-hrvatski, kako bi se na nivou razmatranih popisnih krugova dobio broj Srba, Hrvata i Bošnjaka. Na taj način nije rešen problem broja onih koji su se osećali kao Makedonci i onih koji su se osećali kao Crnogorci, ali čini se da to za ovaj rad ne stvara veliki problem iz dva razloga. Prvi je taj

[52] Nacionalna pripadnost se pokazala kao nestalna i promenljiva kategorija u popisima stanovništva prve i druge Jugoslavije (Mrđen 2002).

što kulturna heterogenost koja bi proizlazila iz etničke distinkcije Srbi – Crnogorci – Makedonci ne bi bila velika, to jest da polarizacija u tom slučaju ne bi bila značajna, naročito imajući u vidu da konfesionalna distinkcija uopšte ne postoji, što znači da nije bilo velike razlike u preferencijama u pogledu javnog dobra, osnovnog problema sa stanovišta funkcionisanja heterogene države. Drugi razlog je što se razmatranje različitih varijanti proširene Srbije prvenstveno odnosi na širenje njene granice na zapad i na sever, pa se stoga etnička heterogenost te vrste ne bi menjala.[53] Shodno tome, na taj način je procenjena etnička struktura stanovništva na nivou posmatranih teritorijalnih jedinica, što je omogućilo indirektno merenje etničke heterogenosti.

Shodno nalazima teorijskog modela optimalne veličine države, empirijsko istraživanje koje sledi koristi sledeće pokazatelje.

Prvi pokazatelj: veličina države, merena brojem stanovnika, kao pokazatelj pogodnosti usled ekonomije obima u pogledu pružanja javnog dobra. Prema nalazima teorijskog modela, što je veća država, to je veća i ostvarena ekonomija obima u pružanju javnog dobra. Apsolutni broj stanovnika za potrebe ove analize nije relevantan već je to samo relativna promena u odnosu na osnovno državotvorno rešenje.

Drugi pokazatelj: kulturna heterogenost, kao pokazatelj troškova koji nastaju povećanjem države, pa time i uvećane kulturne heterogenosti. Budući da kulturna heterogenost ne može direktno da se meri, kao njena aproksimacija koriste se dve, ranije definisane, vrste heterogenosti – etnička i konfesionalna. Kao mera tih vrsta heterogenosti koristi se Hefrindal–Hiršmanov indeks (*Hiefrindhal-Hirschman Index – HHI*), kao uobičajena mera diverzifikacije. *HHI* se izračunava na osnovu učešća svake pojedinačne grupe koja čini određeni skup, i to na sledeći način:

$$HHI = \sum_{i=1}^{n} s_i^2,$$

pri čemu je *s* učešće pojedinačne grupe, a *n* broj grupa koje čine skup. Vrednosti *HHI* se teorijski kreću između 0 i 1. Ukoliko broj grupa teži neograničeno velikom broju pa stoga učešće pojedinačne grupe koja čini skup

[53] Gligorijević (1986) u potpunosti shvata problem koje donose tako formulisani odgovori na popisno pitanje o maternjem jeziku i spoznaje potrebu transformacija tih podataka kako bi se procenila etnička struktura stanovništva Kraljevine SHS. Iako je sa čitaocima podelio načela te transformacije (Gligorijević 1986, 76), konkretan način na koji je to učinio nije zabeležen u njegovom članku. To upozorenje – da je reč isključivo o transformaciji podataka, a ne o rezultatima popisa – nije, međutim, smetalo drugim autorima da rezultate njegove procene bezrezervno prihvate kao rezultate popisa stanovništva iz 1921. godine o nacionalnoj strukturi (Radojević 2019, 255–256).

neminovno teži nuli, tada i *HHI* teži nuli – skup teži savršenoj heterogenosti. Ukoliko postoji samo jedna grupa, to jest ukoliko je postignuta savršena homogenost skupa, *HHI* je jednak jedinici. Shodno tome, što je niža vrednost *HHI*, veća je heterogenost skupa. Obrnuto, što je viša vrednost *HHI*, manja je heterogenost skupa, odnosno veći je stepen njegove homogenosti. *HHI* se uobičajeno koristi u ekonomskoj analizi tržišnih struktura za potrebe prava konkurencije,[54] ali i za iskazivanje biodiverziteta određenog područja, korišćenjem podataka o učešću pojedinačne vrste u ukupnoj populaciji.[55]

Za potrebe istraživanja jezičke, etničke i konfesionalne heterogenosti u literaturi se koristi (Alesina *et al.* 2003) i indeks frakcionalizacije, koji ne predstavlja ništa drugo nego inverziju *HHI*:

$$FRACT = 1 - \sum_{i=1}^{n} s_i^2.$$

Porast vrednosti tog potpuno simetričnog indeksa, za razliku od HHI, ukazuje na povećanje heterogenosti, a pad njegove vrednosti na povećanje homogenosti – nikakva druga razlika ne postoji. Za potrebe ovog rada koristi se isključivo izvorni *HHI*.

U literaturi se javlja još jedna mera heterogenosti, koja je relevantna sa stanovišta verovatnoće izbijanja građanskog rata. Ta mera se, prema njenoj autorki, naziva Rejnal–Kerolov indeks (Reynal-Querol 2002) i meri heterogenost na specifičan način, tako što meri koliko je konkretna raspodela jezičkih, etničkih ili konfesionalnih grupa udaljena od binarne raspodele – 0,5:0,5 – to jest od situacije u kojoj postoje samo dve jezičke, etničke ili konfesionalne grupe podjednake veličine, pa time i snage. Međutim, ta mera heterogenosti nije relevantna sa stanovišta analize u ovom radu već je usredsređena na analizu verovatnoće izbijanja građanskog rata u posmatranoj jezički, etnički ili konfesionalno heterogenoj zemlji (Montalvo, Reynal-Querol 2005).[56]

[54] U tim slučajevima se taj indeks koristi kao mera tržišne koncentracije, a ne diverzifikacije – ista pojava se posmatra iz drugog ugla. Uobičajeno je da se tržišno učešće svakog preduzeća mereno ukupnim prihodom pomnoži sa 100, pa se stoga vrednosti *HHI* kreću od 0 (teorijski model savršene konkurencije) do 10.000 – monopol, samo jedno preduzeće u grani, odnosno na relevantnom tržištu (Bishop, Wakler 2009).

[55] Iako se taj pokazatelj izračunava na isti način, u biologiji se naziva Simpsonov indeks u čast prvog istraživača koji ga je primenio za iskazivanje biodiverziteta (*Edward H. Simpson*).

[56] Empirijsko (ekonometrijsko) istraživanje sprovedeno u ovom radu pokazalo je da se uvećava verovatnoća građanskog rata u konstelaciji u kojoj postoje dve velike, podjednako snažne suprotstavljanje zajednice, što je u skladu sa rezultatima teorijskog modela (Esteban, Ray 2011).

Polarizacija između etničkih i konfesionalnih zajednica, odnosno udaljenost njihovih preferencija u pogledu javnog dobra, u ovoj analizi se ne koristi kao pokazatelj iz dva razloga. Prvi je što ne postoje podaci o udaljenosti preferencija stanovništva koje pripada različitim etničkim, odnosno konfesionalnim zajednicama već se samo posredno može zaključito koliko je snažna bila polarizacija.[57] Drugi je što je ta polarizacija bila egzogena, to jest nije zavisila od granica države, odnosno stepena heterogenosti njenog stanovništva. Iako polarizacija između različitih zajednica u analizi nije uzeta u obzir, to ne znači da se ne mogu komentarisati određena državotvorna rešenja sa stanovišta te polarizacije, a na osnovu pretpostavke da one zajednice koje ne dele ni jezik, ni etničku pripadnost, ni konfesiju karakteriše veća polarizovanost nego one zajednice koje jesu različite ali imaju bar neku zajedničku crtu, bila ona jezik ili konfesija.

Konačno, iako je napomenuto da je sasvim moguće da postoji značajna kulturna heterogenost u okviru jedne jezičke, etničke ili konfesionalne zajednice, ona se u analizi ne uzima u obzir iz ista dva razloga kao i već pomenuta polarizacija: nedostatak podataka o tome i egzogenost obe promenljive sa stanovišta državotvornog rešenja.

Treći pokazatelj: koeficijent obuhvata, a to je broj Srba koji bi živeo u matičnoj državi u odnosu na ukupan broj Srba na području Kraljevine SHS. Taj koeficijent se iskazuje kao procenat, pri čemu je, sasvim očekivano, procenat za Kraljevinu SHS 100% – svi su Srbi u jednoj državi.[58]

Osnovni rezultati simulacije ishoda različitih državotvornih rešenja korišćenjem ta tri pokazatelja i procenat učešća srpskog stanovništva u ukupnom stanovništvu države prikazani su na sledećoj tabeli.

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[57] Za merenje polarizacije preferencija potrebni su rezultati istraživanja javnog mnjenja, to jest anketnog istraživanja vrednosnih sudova žitelja određenog područja. Upravo se na osnovu takvih istraživanja (Desmet, Ortuño-Ortín, Wacziarg 2017) došlo do zaključka da i pored postojanja heterogenosti u okviru zajednice, pripadnost određenoj jezičkoj, etničkoj i konfesionalnoj zajednici u velikoj meri opredeljuje preferencije pojedinaca. U vremenu na koje se odnosi ova analiza, takva istraživanja nisu sprovođena – počela su da se sprovode tek 1981. godine.

[58] Naravno, ovaj slogan se koristi kao sarkazam, budući da formiranjem Kraljevine SHS nisu svi Srbi živeli u istoj državi, naročito imajući u vidu srpske nacionalne manjine u Mađarskoj i Rumuniji. Ipak, stvaranje zajedničke države jugoslovenskih naroda srpska politička i intelektualna elita shvatila je kao trajno rešenje srpskog nacionalnog pitanja, kao svojevrstan „kraj istorije“, što joj je otupelo politička čula, pa je tek formiranje Srpskog kulturnog kluba 1937. godine označilo svojevrsno buđenje iz letargije u koju je zapala u pogledu nacionalnog pitanja posle ujedinjenja 1918. godine. Zahvaljujem Ljubodragu Dimiću, koji mi se skrenuo pažnju na sindrom „kraja istorije“ u vezi sa percepcijom stvaranja zajedničke države.

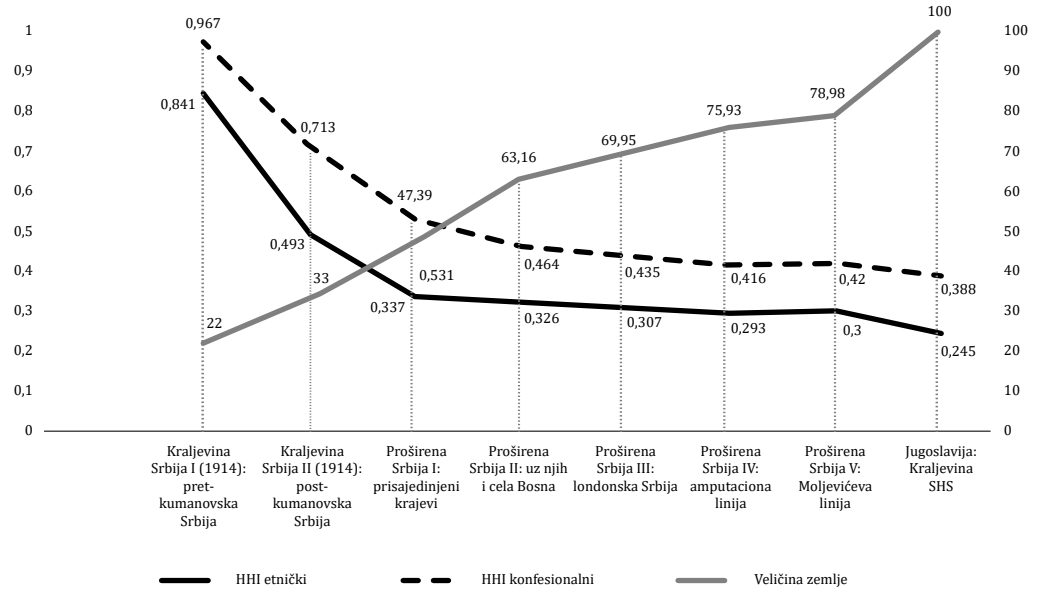
Tabela 1. Osnovni rezultati simulacije ishoda alternativnih državotvornih rešenja: veličina, zemlje, heterogenost stanovništva, obuhvat srpskog življa i učešće srpskog stanovništva

	Veličina zemlje (indeks)	*HHI* konfesionalni	*HHI* etnički	Obuhvat konfesionalni	Obuhvat etnički	Učešće Srba
Kraljevina Srbija (1912): pretkumanovska Srbija	22,17	0,96702	0,84134	46,71%	49,57%	91,54%
Kraljevina Srbija (1914): postkumanovska Srbija	33,10	0,71398	0,49390	58,84%	55,18%	68,25%
Proširena Srbija *I*: prisajedinjeni krajevi	47,39	0,53124	0,33754	71,38%	64,25%	55,50%
Proširena Srbija *II*: uz njih i cela Bosna	63,16	0,46474	0,32672	86,21%	82,72%	53,61%
Proširena Srbija *III*: londonska Srbija	69,95	0,43575	0,30707	90,59%	87,64%	51,29%
Proširena Srbija *IV*: amputaciona linija	75,93	0,41651	0,29395	93,52%	91,19%	49,16%
Proširena Srbija *V*: Moljevićeva linija	78,98	0,42089	0,30081	97,98%	96,18%	49,85%
Jugoslavija: Kraljevina SHS	100,00	0,38814	0,24540	100,00%	100,00%	40,94%

Izvor: sopstvena kalkulacija na osnovu: Kraljevina Jugoslavija (1932)

Sasvim očekivano, povećanjem države raste heterogenost njenog stanovništva, kako konfesionalna, tako i etnička. Ta pravilnost se pokazala u svakom analiziranom državotvornom rešenju. Promene te tri veličine sa posmatranim državotvornim rešenjima, počev od Kraljevine Srbije pre balkanskih ratova do Kraljevine SHS, lako se mogu sagledati na sledećoj slici.

Slika 1.
Veličina zemlje i konfesionalna i etnička heterogenost



Prvo se može primetiti da je Srbija sve do balkanskih ratova bila mala, ali veoma homogena zemlja, što je svakako imalo povoljne posledice na funkcionisanje države i stvaranje uslova za sveobuhvatan napredak.[59] Najveći relativni porast heterogenosti dogodio se posle balkanskih ratova, to jest po prisajedinjenju Stare Srbije i Južne Srbije. Tada se, prema rezultatima popisa 1921. godine, konfesionalna heterogenost uvećala za 35%, a etnička čak za 70%, što je bila posledica uključivanja muslimanskog stanovništva, bez obzira na to da li je reč o muslimanima slovenskog porekla ili Albancima.[60] Slično, mada nešto manje povećanje konfesionalne i etničke heterogenosti odigralo se prisajedinjenjem Vojvodine (bez Srema) i Crne Gore. Dok su na

[59] Više o tom napretku u „zlatno doba" Srbije videti u: Ković (2014).

[60] Uz to je veoma velika verovatnoća da je uključivanje Albanaca u Kraljevinu Srbiju dovelo ne samo do povećanja heterogenosti nego i do značajnog povećanja polarizacije, budući da Srbi i Albanci ne dele ni etničko poreklo, ni jezik, ni konfesiju. Međutim, vrlo je verovatno da je prirast konfesionalne i etničke heterogenosti bio nešto manji u vreme samog prisajedinjenja novooslobođenih krajeva 1912. godine, s obzirom na ogromne gubitke srpskog stanovništva u Prvom svetskog ratu. Milan Ristović je, bez pominjanja podataka, u svom izlaganju na predstavljanju knjige *Gradovi Balkana, gradovi Evrope*, održanom 7. juna 2018. godine u Konaku knjeginje Ljubice, ukazao na drastično povećanje heterogenosti Srbije posle balkanskih ratova i na promenu karaktera zemlje usled toga.

severu u novu državu (proširena Srbija *I*) ušle značajne mađarska i nemačka manjina, prisajedinjenjem Kraljevine Crne Gore u Srbiju su ušli Metohija (sa velikim brojem Albanaca) i crnogorski deo Sandžaka sa velikim brojem Bošnjaka – muslimana slovenskog porekla.

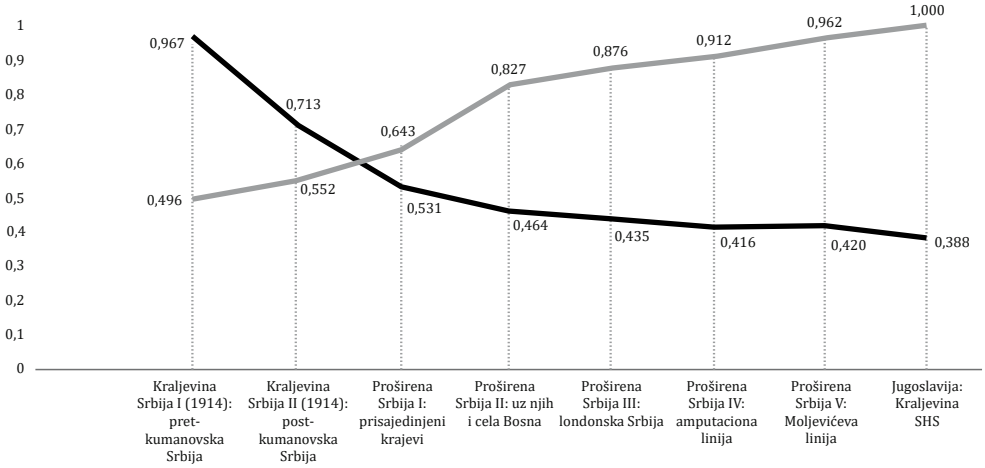
Sva dalja proširenja Srbije (proširena Srbija *II* – proširena Srbija *V*) uslovila su znatno manje relativno povećanje konfesionalne i etničke heterogenosti, ali su dostignuti nivoi te heterogenosti već prilično visoki, pa to svakako, makar delimično, objašnjava pad relativnog povećanja heterogenosti – opadajuću graničnu heterogenost, ekonomskom terminologijom iskazano. Jedino značajno povećanje heterogenosti, naročito etničke, nastaje prelaskom proširene Srbije *V* u ostvareno državotvorno rešenje – Kraljevinu SHS.

Imajući promene sa različitom smerom dejstva u vidu i tempo tih promena, verovatno je da se optimalna veličina države, shodno nalazima njenog ekonomskog modela, nalazi u zoni proširene Srbije *III*: relativno velika država (približno 70% veličine Jugoslavije, a nešto više nego dva puta veća od Kraljevine Srbije iz 1914. godine) uz relativno umerenu heterogenost. I dalje je, međutim, etnička heterogenosti koju nosi ta državotvorna opcija kudikamo veća od heterogenosti Kraljevine Srbije iz 1914. godine (za 60%), ali je ipak etnička heterogenost proširene Srbije *III* znatno manja (za 25%) od heterogenosti koju je donela Jugoslavija.[61] Konačno, jedan nalaz koji nije povezan sa teorijom optimalne veličine, ali je njegov značaj lako razumljiv – Srbija *III* je najveća država od razmatranih u kojoj Srbi čine apsolutnu većinu stanovništva.

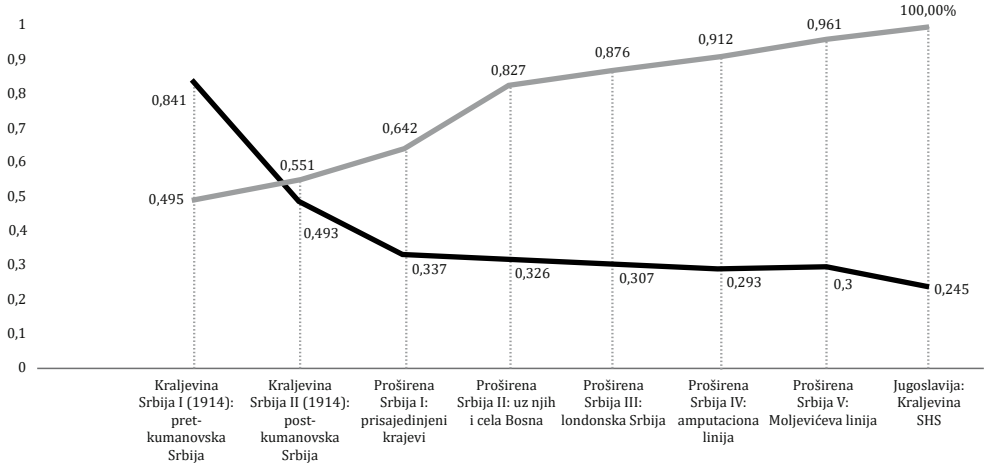
Ukoliko u analizi napustimo ekonomsku teoriju optimalne veličine države i okrenemo se ujedinjenju jugoslovenskih naroda kao sredstvu kojim treba da se ostvari cilj da „svi Srbi žive u jednoj državi“, ili barem da što više Srba živi u svojoj matičnoj državi, onda rezultati simulacije alternativnih državotvornih rešenja pokazuju da svako proširenje obuhvata srpskog naroda u istoj državi neminovno uzrokuje povećanje kulturne heterogenosti stanovništva te države. To se odnosi i na konfesionalnu (slika 2) i na etničku heterogenost (slika 3).

[61] U slučaju konfesionalne heterogenosti, odgovarajući procenti su 64% i 12%.

Slika 2.
Obuhvat srpskog stanovništva i konfesionalna heterogenost



Slika 3.
Obuhvat srpskog stanovništva i etnička heterogenost



Dakle, i u ovom slučaju, pomeranjem granica proširene Srbije dalje od granica Kraljevine Srbije iz 1914. godine, kako bi što veći deo srpskog naroda bio obuhvaćen matičnom državom, neminovno se uvećava kulturna heterogenost (etnička i konfesionalna heterogenost) stanovništva takve

države i svi oni politički i ekonomski troškovi koji proizlaze iz takve heterogenosti. Shodno svim navedenim rezultatima, pokazalo se da bi one državotvorne alternative koje bi značile uvećanje države, pa bi stoga omogućile veći obuhvat Srba u istoj državi, neminovno uslovile uvećanje kulturne heterogenosti te države.

Imajući u vidu protivrečne efekte povećanja države – njenim rastom uvećavaju se pogodnosti u pružanju javnog dobra i obuhvatu srpskog stanovništva, ali se uvećava i heterogenost stanovništva sa svim svojim negativnim posledicama. Vrlo je verovatno da je opet optimalno rešenje proširena Srbija *III*, kojom bi bilo obuhvaćeno 87,6% srpskog stanovništva, uz relativno umerenu heterogenost (12% manja konfesionalna i 25% manja etička heterogenost u odnosu na Jugoslaviju) i uz već napomenuti nalaz da bi Srbi činili apsolutnu većinu stanovništva te države.

6. POLITIČKA PANORAMA PROŠIRENE SRBIJE: ELEMENTI ALTERNATIVNOG SCENARIJA

Opredeljivanje za proširenu Srbiju *III*, „londonsku" Srbiju, kao optimalno državotvorno rešenje, nameće potrebu da se okvirno, drugačije ne bi ni moglo, opiše politička panorama tako definisane države.

Iako bi kulturna heterogenost te države bila znatno manja u odnosu na Jugoslaviju, ona bi i dalje bila prilično heterogena. Srpska politička elita bi se opet, kao i u slučaju Jugoslavije, susrela sa nečim što je za nju bilo nepoznato do 1912. godine.

Kako bi se srpska politička elita snašla u takvim okolnostima? Da li bi bila uspešnija u rešavanju političkih nestabilnosti u odnosu na njen učinak u Kraljevini SHS? Na to pitanje se, naravno, ne može jednoznačno odgovoriti, ali se mogu ponuditi neki elementi za razmišljanje o spekulativnom odgovoru na njega, neki delovi panorame takve hipotetičke države, u poređenju sa Jugoslavijom – ostvarenim državotvornim rešenjem.

Prva bitna razlika u odnosu na Jugoslaviju jeste da bi to državotvorno rešenje omogućavalo da učešće Srba u državi bude iznad 50%, to jest da Srba u toj državi bude više nego svih ostalih etničkih grupa zajedno. To bi srpskoj političkoj eliti dalo nesporno centralni položaj i veću slobodu za delanje nego što je to bio slučaj u Jugoslaviji. Tome treba dodati da bi tim državotvornim rešenjem iz političkog života zemlje bila isključena hrvatska politička elita (ona bi imala svoju zemlju i svoje područje za delanje), koja se pokazala kao odlučan, žilav, sposoban i antagonistički protivnik u političkim borbama u Jugoslaviji. Te dve okolnosti bi se mogle okarakterisati kao mač

sa dve oštrice. S jedne strane, možda bi sve one slabosti srpske političke elite i odlike srpskog političkog života koje su postojale u Kraljevini Srbiji bile samo pojačane osećajem dominacije i nesputanosti, kako zbog (i dalje) centralnog mesta srpskog naroda, tako i zbog nedostatka snažne i dobro organizovane suprotstavljene političke elite, poput hrvatske.

S druge strane, možda bi se u takvim okolnostima u kojima bi centralizovana organizacija države bila neupitna lakše dolazilo do odgovarajućih političkih rešenja i političke odluke bi se donosile uz niže troškove – manji gubitak energije. Možda bi se nastavila ili čak ojačala demokratska crta političkog života u (proširenoj) Srbiji, naročito u pogledu kontrole vlasti monarha.[62] U uslovima u kojima je karakter države neupitan, isto kao i njeno uređenje, u kojoj postoji konsenzus o ključnim državotvornim pitanjima, politički život može da se usmeri na odgovore na pitanja napretka države i na rešavanje problema svakodnevnih problema, politički život bi bio raznovrsniji i slobodniji i ne bi bilo potrebno okupljanje oko nekog autoriteta, poput monaha, da bi se očuvali osnovni državni interesi. Konačno, budući da bi u toj hipotetičkoj državi živelo 88% srpskog stanovništva sa područja Jugoslavije, srpske manjine u susednim državama bile bi relativno male, tako da se verovatno više ne bi postavljalo pitanje okupljanja svih Srba u jednu državu. Postojala bi matična država Srba u kojoj bi živeo veoma veliki deo te etničke zajednice. To bi, verovatno, značilo da bi se takva država okrenula rešavanju drugih brojnih fundamentalnih problema, počev od niskog nivoa obrazovanja stanovništva, siromaštva, niskog nivoa privredne razvijenosti zemlje i tome slično.

Treba dopustiti mogućnost da bi izabrano državotvorno rešenje pospešilo i preispitivanje konvencije, ne toliko duge tradicije, vezivanja srpske etičke pripadnosti za pravoslavnu veropispovest, odnosno pripadnost Srpskoj pravoslavnoj crkvi, čime su „izgubljeni" Srbi katolici i Srbi „muhamedanske" vere (Ljušić 2012). Svakako da bi takvo preispitivanje i eventualno ukidanje veroispovesti kao uslova etničke pripadnosti – nešto što postoji kod Albanaca, na primer – imalo daleko više smisla nego državni, preciznije rečeno monarhov projekat stvaranja jednog „troplemenskog naroda Srba, Hrvata i Slovenaca". Naravno, napuštanje te konvencije ne bi uslovilo umanjenje kulturne heterogenosti usled konfesionalne heterogenosti, ali bi se, verovatno, stvorili pogodniji uslovi za prevazilaženje znatne kulturne

[62] Radojević (2019, 243) s pravom ukazuje na to da su u Jugoslaviji „političari iz Srbije ispoljili iznenađujuću popustljivost i neodlučnost" u odnosu na monarha, naročito u poređenju sa vremenom iz Kneževine ili Kraljevine Srbije, i da su to činili u ime „viših državnih interesa". Nažalost, tu veoma značajnu konstataciju ne prati objašnjenje zbog čega se dogodio takav preokret.

heterogenosti koja bi postojala u izabranom alternativnom državotvornom rešenju proširene Srbije. Da li bi srpska politička elita iskoristila takve uslove ili ne, otvoreno je pitanje. U krajnjoj liniji, ovaj odeljk nije posvećen davalju odgovora već samo pružanju novih tema za razmišljanje o našoj prošlosti.

7. ZAKLJUČAK

Empirijsko istraživanje, zasnovano na rezultatima popisa stanovništva iz 1921. godine, potvrdilo je osnovnu hipotezu rada da bi one državotvorne alternative koje bi značile uvećanje države, pa bi stoga omogućile veći obuhvat Srba u istoj državi, dovele do uvećanja kulturne heterogenosti te države. Pogodnosti od uvećanja države neminovno su praćene troškovima koje stvara povećana kulturna heterogenost.

Istražene su posledice po veličinu države (dakle pogodnosti sa stanovišta pružanja javnog dobra i obuhvata srpskog stanovništva u jednoj državi) i po stepen kulturne heterogenosti svih alternativnih državotvornih rešenja, a ti rezultati su upoređeni sa početnim stanjem stvari (Kraljevina Srbija pre balkanskih ratova) i sa ostvarenim državotvornim rešenjem (Kraljevina Srba, Hrvata i Slovenaca). Sva državotvorna rešenja osim početnog sa sobom nose značajnu kulturnu heterogenost stanovništva, nešto na šta politička kultura političke elite Srbije nije bila navikla.

Poređenjem pogodnosti i troškova različitih državotvornih alternativa, naročito dinamike rasta veličine zemlje i obuhvata srpskog stanovništva, s jedne strane, i povećanja heterogenosti, s druge strane, procenjeno je da bi optimalno rešenje bila proširena Srbija *III*, sa zapadnim granicama u saglasnosti sa Londonskim sporazumom iz 1915. godine. Ukratko je opisana politička panorama kakva bi verovatno postojala ili mogla da postoji u takvoj hipotetičkoj državi, uz sve pogodnosti i opasnosti, naročito u odnosu na ostvareno rešenje – Kraljevinu SHS.

Zanimljivo je pitanje, kao tema za novo istraživanje, da li bi Jugoslavija bila uspostavljena da je proces njenog formiranja bio demokratski. Naime, teorija optimalne veličine države pokazala je da demokratski donete državotvorne odluke, odnosno odluke o državnim celinama i granicama, dovode do manjih država u odnosu na takve nedemokratske odluke. Ne sporeći dokazani demokratski karakter Kraljevine Srbije kao države i demokratski legitimitet njene političke elite, opravdano se može osporiti demokratski legitimitet druge strane, pre svega hrvatskih i slovenačkih predstavnika, uglavnom onih okupljenih oko Jugoslavenskog odbora, koji su u ime tih naroda pregovarali o budućem državotvornom rešenju. Završno rešenje je doneto po ubrzanom

postupku, u kriznim vremenima i dnevnim promenama, izazvanim pre svega raspadom Austrougarske i ubrzanom dinamikom završnih ratnih dejstava (Ristović, 2021a). To, jednostavno, nisu uslovi za demokratsko donošenje odluka. Stoga je opravdano postaviti hipotezu da Jugoslavija ne bi bila formirana da je odluka o tome donošena na demokratski način. Posrednu empirijsku podršku toj hipotezi daje istorijska činjenica da se, uspostavljanjem demokratije i slobodnim donošenjem odluka, Jugoslavija kao država raspala, isto kao i druge višenacionalne države u istočnoj Evropi.

Druga zanimljiva tema za novo istraživanje je sagledavanje današnjih kulturnih razlika između etničkih i konfesionalnih zajednica na prostoru nekadašnje Jugoslavije. U savremeno doba redovno se sprovode istraživanja vrednosti koje prihvataju pripadnici različitih jezičkih, etničkih i konfesionalnih grupa. Iako upitnici koji se koriste nisu usredsređeni na pitanje o preferencijama u pogledu javnog dobra, oni daju obilje materijala o razlikama u vrednosnim sudovima pojedinaca koji čine određene zajednice. Imajući u vidu koliko se sporo menjaju kulturni obrasci, današnji rezultati možda mogu da donesu neku relevantnu informaciju o stepenu polarizacije između različitih jezičkih, etničkih i konfesionalnih grupa na prostorima nekadašnje Jugoslavije.

Ti budući nalazi, zajedno sa nalazima ovog rada, mogu da posluže kao jedan segment osnove za mirno sagledavanje, trezveno vrednovanje i nepristrasnu ocenu političkih odluka iz vremena u kome se srpska politička elita opredelila za ujedinjenje jugoslovenskih naroda. Za spoznaju loših procena i pogrešnih odluka, ukoliko ih je bilo. Za razumevanje razloga koji su do njih doveli. Nije poenta u tome da se o nekom i njegovim postupcima sudi iz stogodišnje, debele hladovine retrospektive, posle svega onog što se dogodilo, i to na osnovu savremenih teorijskih okvira, kakvi nisu postojali u doba donošenja odluke, već je poenta da se sagleda, razume, vrednuje i oceni ono što se dogodilo. Kako se greške ne bi ponavljale. I kako bi se izbegle rasprave, poput one fiktivne, a tako uverljive, koja je iz romana *Klub istinskih stvaralaca* preuzeta kao moto ovog članka.

Nezavisno od predloženih istraživanja i njihovih rezultata, izvesno je da se i današnja Srbija suočava sa znatnom kulturnom, odnosno jezičkom, etničkom i verskom heterogenošću. Posle više od sto godina neuspešnog rešavanja srpskog nacionalnog pitanja, Srbi su kao narod prešli pun krug i vratili se na početnu tačku, teritorijalno blizu državotvornog rešenja iz doba pre balkanskih ratova. Razlika je u tome što današnju Srbiju, za razliku od kulturno homogene Kraljevine Srbije neposredno pred balkanske ratove, odlikuje značajan nivo kulturne heterogenosti. Dakle, izazov za današnju

srpsku političku elitu ostaje isti onaj kakav bi postojao u uslovima proširene Srbije. Kulturna heterogenost sa balkanskih prostora neće nestati, bez obzira na bilo koje državotvorno rešenje. Suočavanje sa njom je neizbežno.

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ENELARGED SERBIA: A CONTRIBUTION TO CONSIDERATION OF ALTERNATIVE STATEHOOD OUTCOME IN 1918

Summary

The paper aims to explore alternative statehood options for Yugoslavia's unification in 1918 and assess their potential success for Serbian interests. It falls within the realm of counterfactual analysis. The study draws on the economic theory of optimal nation size, which examines the pros and cons of larger nations, particularly the challenges posed by cultural diversity resulting from ethnolinguistic and religious differences. Five statehood alternatives have been identified, involving various degrees of Serbia's territorial expansion. Empirical evidence from the 1921 population census demonstrates that options leading to larger nation size would increase population heterogeneity. The research identifies an optimal solution that balances benefits and costs.

Key words: *Serbia*. – *Yugoslavia*. – *Optimal size of nation*. – *Counterfactual analysis*. – *Cultural heterogeneity*.

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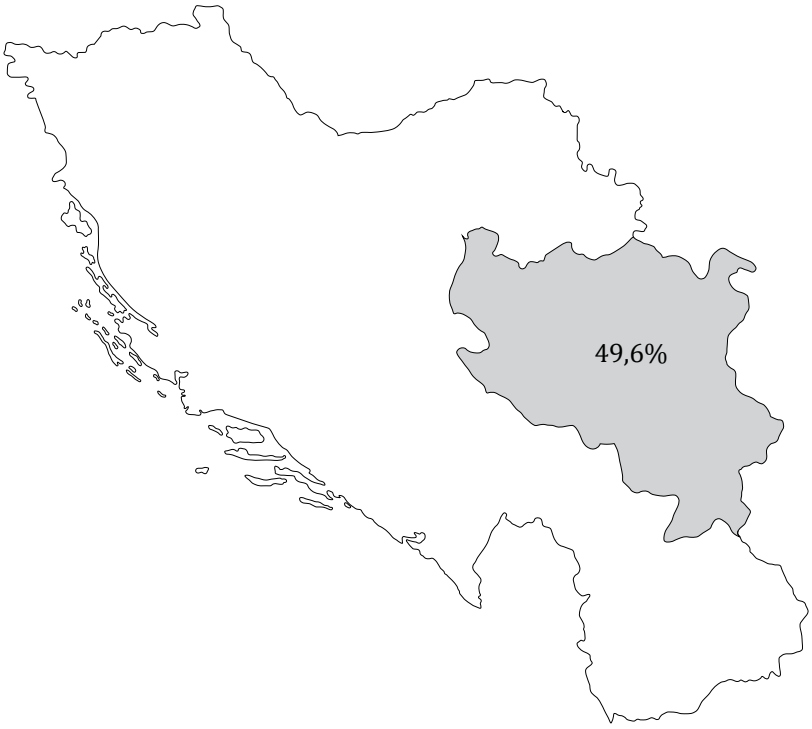
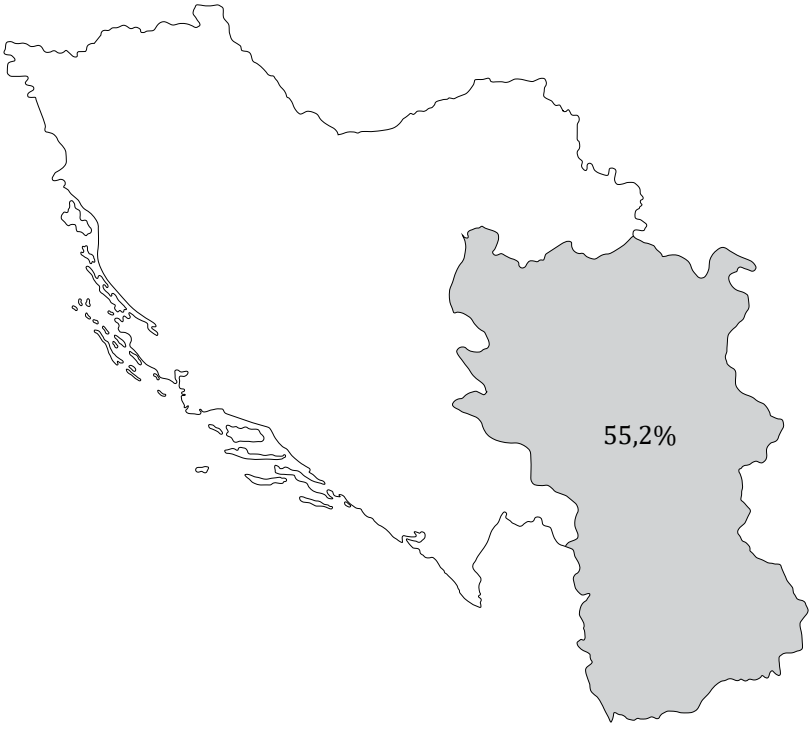
Aneks: karte proširene Srbije (u granicama kraljevine SHS)

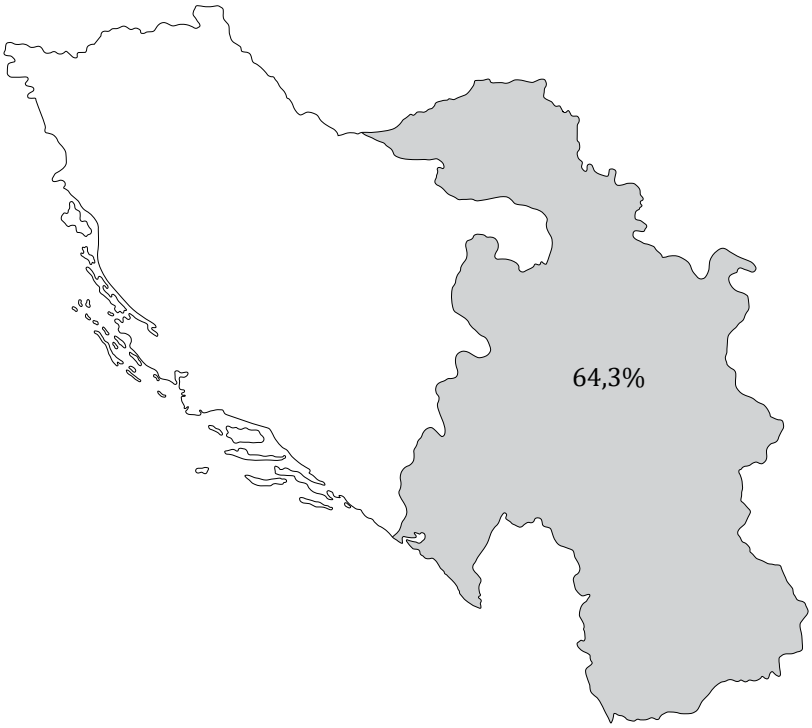
Kraljevina Srbija (1912): pretkumanovska Srbija



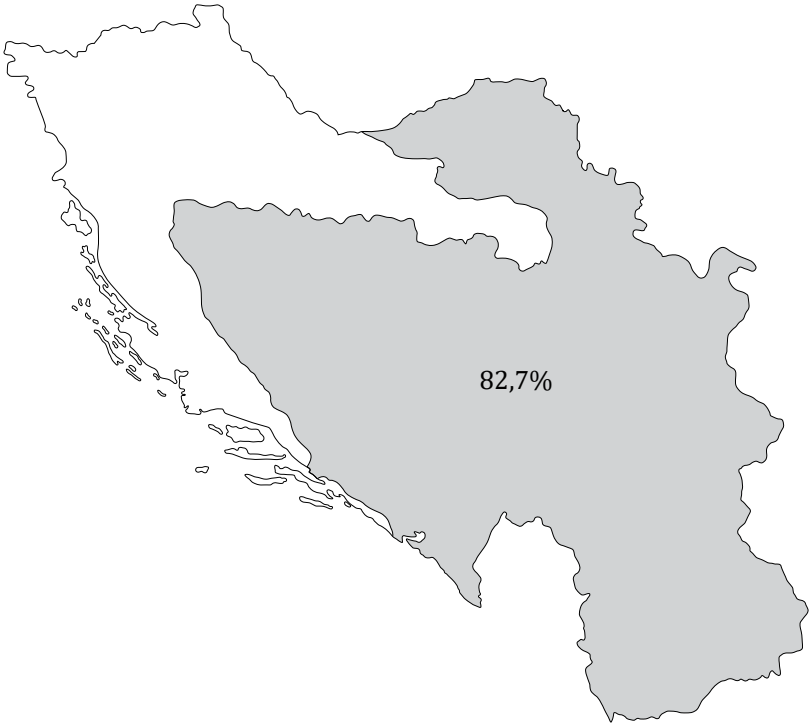
Kraljevina Srbija (1914): postkumanovska Srbija



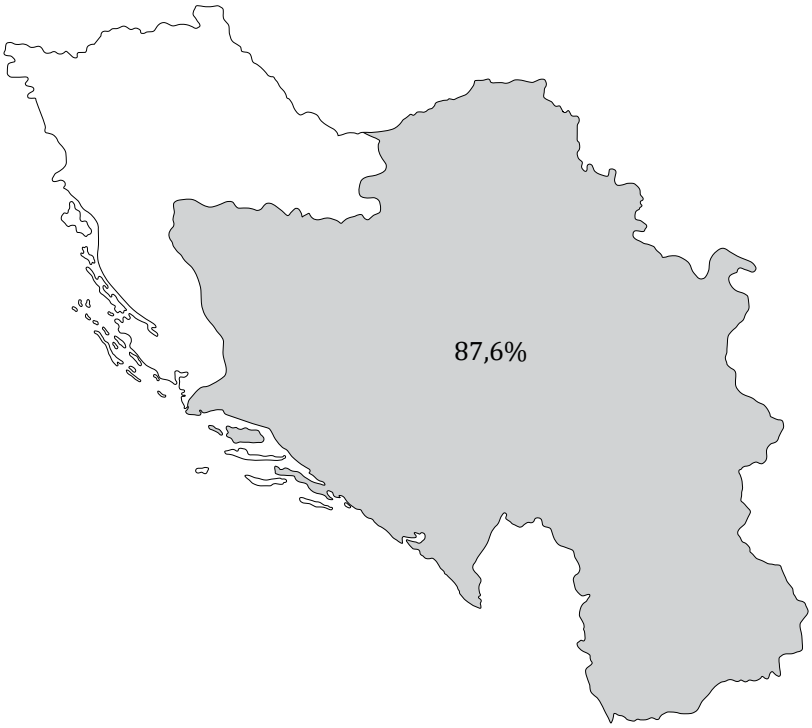
Proširena Srbija *I*: prisajedinjeni krajevi



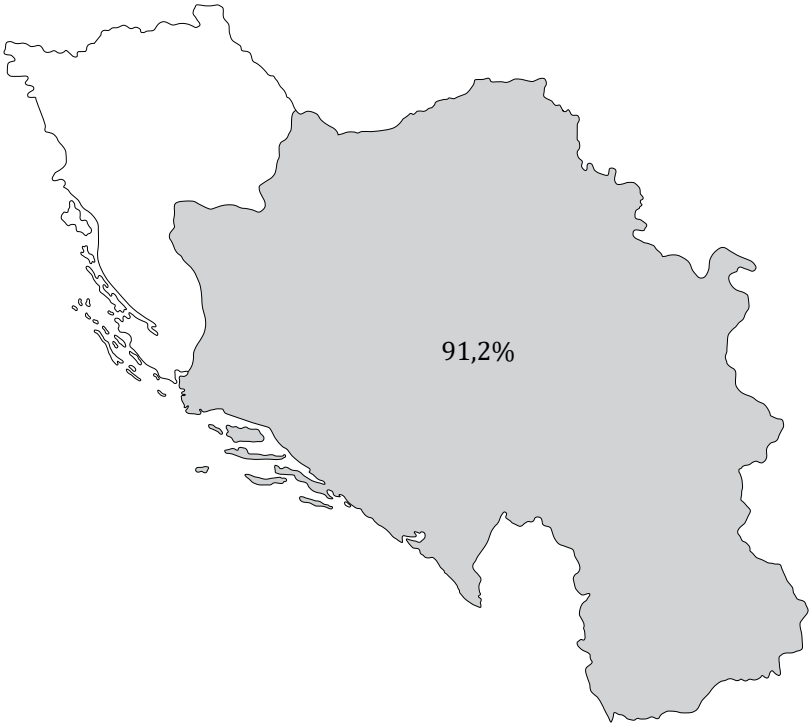
Proširena Srbija *II*: uz njih i cela Bosna



Proširena Srbija *III*: londonska Srbija



Proširena Srbija *IV*: amputaciona linija



Proširena Srbija *V*: Moljevićeva linija

Napomena:

Procenat upisan na teritoriji proširene Srbije iskazuje obuhvat srpskog stanovništva.

UDK 341.981:347.63
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Dr Adis POLJIĆ*

SPORAZUM O IZBORU SUDA PREMA UREDBI BRISEL II TER I NJEGOV UTICAJ NA NADLEŽNOST DRUGIH SUDOVA

Rad je posvećen sporazumu o izboru suda prema Uredbi Vijeća (EU) 2019/1111 od 25. juna 2019. godine o nadležnosti, priznanju i izvršenju odluka u bračnim sporovima i u stvarima povezanima s roditeljskom odgovornošću te o međunarodnoj otmici djece (preinaka) i uticaju sporazuma na nadležnost drugih sudova. Specifičnost tog sporazuma je mogućnost izbora suda u materiji porodičnog prava, što u ranijem periodu nije bilo moguće. Ciljevi istraživanja su analiza formalnih uslova za valjanost sporazuma i njegova realizacija u praksi. Istraživanje je započeto na osnovu deduktivne metode odnosno općih saznanja o nadležnosti u pravu Evropske unije i sporazuma o izboru suda, te su korištene i normativna metoda i metoda sinteze. Na osnovu istraživanja smo došli do saznanja o načinima zaključivanja sporazuma o izboru nadležnog suda i osiguravanja njegovog pravnog djelovanja prema svim sudovima u Evropskoj uniji, odnosno o njegovom uticaju na pravila litispendencije.

Ključne riječi: *Nadležnost. – Pravo Evropske unije. – Porodično pravo. – Sporazum o izboru suda. – Litispendencija.*

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1. UVOD

U procesu globalizacije trgovina i pružanje usluga se odvijaju među subjektima iz najudaljenijih mjesta na Zemlji. Iako državne granice u građanskim i trgovačkim poslovima sve više gube ulogu, nadležnost suda je i dalje bitna za ugovorne stranke. Postojanje prekograničnog elementa utiče na određivanje suda koji će biti nadležan, zbog čega stranke sporazumom o izboru nadležnog suda ugovaraju nadležnost, ne ostavljajući da pozitivni propisi država odrede nadležan sud. To ugovaranje je godinama osporavano u materiji porodičnog prava, koja je u pravilu izuzeta iz međunarodnih instrumenata o nadležnosti, priznanju i izvršenju presuda. Globalizacija, i prohodnost ljudi, u velikoj mjeri su zastupljeni u porodičnom pravu. Potreba za uvažavanjem autonomije volje stranaka stavljena je ispred potpune kontrole propisa država Uredbom Vijeća (EZ) broj 2201/2003 od 27. novembra 2003. godine o nadležnosti, priznanju i izvršenju sudskih odluka u bračnim sporovima i u stvarima povezanim s roditeljskom odgovornošću (Uredba 2201/2003) mogućnošću da bračni drugovi i nosioci roditeljske odgovornosti izričito ili na neki drugi nedvosmislen način prihvate nadležnost sudova u trenutku pokretanja postupka pred sudom te ako je to u interesu djeteta. Tom uredbom nije bilo moguće zaključiti sporazum o izboru kojim bi stranke prije pokretanja postupka ugovorile nadležnost suda. Bilo je očekivano da je sljedeći korak u toj oblasti zaključivanje sporazuma o izboru nadležnog suda, što je omogućeno Uredbom Vijeća (EU) 2019/1111 od 25. juna 2019. o nadležnosti, priznanju i izvršenju odluka u bračnim sporovima i u stvarima povezanima s roditeljskom odgovornošću te o međunarodnoj otmici djece (preinaka) (Uredba Brisel II ter). Za proizvođenje pravnog djelovanja sporazuma nužno je da budu ispunjeni uslovi za njegovu formalnu valjanost i da se onemogući vođenje postupka pred sudom druge države članice, a ti aspekti se analiziraju u ovom radu.

2. NADLEŽNOST U PRAVU EVROPSKE UNIJE

Najznačajniji instrument Evropske unije (EU) za nadležnost je Uredba (EU) broj 1215/2012 Evropskog parlamenta i Vijeća od 12. decembra 2012. o nadležnosti, priznanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima (preinačena)[1] (Uredba 1215/2012) koja je zamijenila Uredbu Vijeća (EZ) broj 44/2001 od 22. decembra 2000. o nadležnosti,

[1] *Službeni list EU* L 351 od 20. decembra 2012.

priznanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima[2] (Uredba 44/2001). Preteča obje uredbe je Konvencija o nadležnosti i izvršenju sudskih odluka u građanskim i trgovačkim stvarima, potpisana je 27. septembra 1968. godine.[3] Značaj tih pravnih instrumenata za Uredbu Brisel II ter se ogleda u praksi Suda pravde EU (Sud EU) koja u određenom dijelu može biti primjenjiva kod primjene Uredbe Brisel II ter.

Razlog normiranja nadležnosti različitim pravnim instrumentima posljedica je nadležnosti EU. Amsterdamskim ugovorom iz 1997. godine „pravosudna saradnja u građanskim predmetima" (član 61–69) iz tzv. trećeg stuba premješta se u tzv. prvi stub EU (Bouček 2011, 1804, 1805). Time je evropsko međunarodno privatno pravo u pravnotehničkom smislu postalo pravo EU koje se u pravilu uređuje evropskim sekundarnim pravom, a glavni unifikacijski instrument postaje uredba (Bouček 2011, 1804, 1805). Lisabonski ugovor o funkcionisanju EU[4] podvodi materiju međunarodnog privatnog prava pod pravo EU u članu 81 i izjednačava je u legislativnoj proceduri i kontroli Suda EU pod opće odredbe, s tim što u pogledu materije međunarodnog porodičnog prava, zbog suzdržanosti država članica da regulisanje tih odnosa povjere legislativi EU, ostaje rezerva (i izuzetak) posebne procedure (Bordaš 2012, 145). Poseban zakonodavni postupak[5] podrazumijeva da o mjerama koje se odnose na porodično pravo s prekograničnim implikacijama Vijeće odlučuje jednoglasno, nakon savjetovanja s Evropskim parlamentom. Vijeće, na prijedlog Komisije, može donijeti odluku kojom se utvrđuju oni aspekti porodičnog prava s prekograničnim implikacijama koji mogu biti predmetom akata donesenih u redovnom zakonodavnom postupku. Vijeće odlučuje jednoglasno, nakon savjetovanja s Evropskim parlamentom. O prijedlogu Komisije obavještavaju se nacionalni parlamenti. Ako se nacionalni parlament usprotivi u roku od šest mjeseci od dana takve obavijesti, odluka se ne donosi. Ako protivljenje izostane, Vijeće može donijeti odluku.

Uredba 44/2001 je donesena na osnovu odredbe člana 65 Ugovora o osnivanju Evropske zajednice kao mjera Zajednice u pravosudnoj saradnji država članica u građanskim predmetima i u sadržajnom smislu predstavlja novelu Briselske konvencije iz 1968. godine (Babić 2006, 74). Nalazimo mišljenja da je Uredba 44/2001 najvažniji instrument EU u sferi

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2 *Službeni list EU* L 12 od 16. januara 2001.

3 *Službeni list EU* L 299 od 31. decembra 1972.

4 Ugovor o EU i Ugovor o funkcionisanju EU, *Službeni list* C 83, 2010 (prečišćen tekst), usvojeni su 13. decembra 2007, a stupili su na snagu 1. decembra 2009. godine.

5 Ugovor o funkcionisanju EU, član 81 stav 3.

međunarodnog privatnog prava (Stone 2010, 6). Timmer smatra da je Uredba 44/2001 generalno veoma uspješan instrument o pravosudnoj saradnji u EU (Timmer 2013, 129). Te uspjehe Uredbe 44/2001 sada je postigla i Uredba 1215/2012.

U bračnim sporovima i u stvarima povezanim s roditeljskom odgovornošću, skoro istovremeno u vrijeme donošenja Uredbe 44/2001, donesena je Uredba (EZ) br. 1347/2000 od 29. maja 2000. o nadležnosti, priznanju i izvršenju sudskih odluka u bračnim sporovima i u stvarima povezanim s roditeljskom odgovornošću[6], koja je stavljena van snage Uredbom Vijeća (EZ) 2201/2003.[7] Posljednja uredba u toj materiji je Uredba Brisel II ter[8], koja je i predmet ovog rada. Uredba Brisel II ter se primjenjuje od 1. avgusta 2022. godine. Uredba 2201/2003 se primjenjivala u oblasti roditeljskog prava, u svim situacijama, bez obzira na to da li su roditelju u braku, razvedeni ili im je brak poništen (Samardžić 2015, 832), a u tim slučajevima se primjenjuje i Uredba Brisel II ter.

Vrijeme početka primjene pokazuje da je potrebno sačekati određeni vremenski period za rezultate njene primjene u praksi.

3. MOGUĆNOST ZAKLJUČENJA SPORAZUMA

Uredbom 2201/2003 nije dozvoljeno zaključivanje sporazuma o nadležnosti suda između bračnih drugova. Ova uredba je omogućavala prorogaciju nadležnosti za sve predmete koji se odnose na roditeljsku odgovornost povezanu s takvim zahtjevom ako barem jedan od bračnih drugova ima roditeljsku odgovornost prema djetetu i ako su bračni drugovi i nosioci roditeljske odgovornosti izričito ili na neki drugi nedvosmislen način prihvatili nadležnost sudova u trenutku pokretanja postupka pred sudom te ako je to u interesu djeteta.[9] Normiranje prorogacije na takav način onemogućavalo je stranke da zaključe sporazum o nadležnosti suda pa je najraniji trenutak usaglašavanja nadležnosti bio u vrijeme pokretanja postupka. Tužilac je svoje mišljenje o nadležnom sudu izražavao podnošenjem tužbe određenom sudu, dok je tuženi mogao izričito dati saglasnost na nadležnost suda odgovorom na tužbu u kojem neće osporiti nadležnost, što bi značilo da je na nedvosmislen način prihvatio nadležnost suda. Tuženi je mogao da ospori nadležnost suda

6 *Službeni list EU* L 160 od 30. juna 2000.

7 *Službeni list EU* L 338/1 od 27. novembra 2003.

8 *Službeni list EU* L 178/1 od 2. jula 2019.

9 Uredba 2201/2003, član 12 stav 1.

pred kojim je postupka pokrenut, a u tom slučaju bi se sud oglasio nenadležnim ukoliko njegova nadležnost nije bila zasnovana na pozitivnom pravu. Jednostavnije, Uredba 2201/2003 sadržavala je dvije odredbe kojima je bio dozvoljen ograničen oblik stranačke autonomije: prvom su utvrđena pravila o prorogaciji suda (član 12), a drugom je bilo dozvoljeno učešće stranaka u mehanizmu *forum non-conveniens*[10] (član 15) (Gray 2022, 52).

Sve više prihvaćena autonomija volje rezultirala je i omogućavanjem zaključenja sporazuma u porodičnom pravu, iako je u ranijem periodu bilo nezamislivo da stranke imaju autonomiju volje u ovoj grani prava. Prilikom donošenja Uredbe 2201/2003 nekoliko glasova bilo je u prilog dozvoljavanju stranačke autonomije u pitanjima razvoda (Fallon, M., Kinsch, P., Kohler, C. eds. Building European Private International Law. Twenty Years' Work by GEDIP, Intersentia, 2011, u: Kruger, Samyn 2016, 143). Izvještaj Evropske komisije također je bio povoljan za takvo uključivanje (Kruger, Samyn 2016, 143). To ne samo da bi uskladilo Uredbu 2201/2003 sa drugom Uredbom EU o građanskim stvarima već je i dopunilo autonomiju koja se daje supružnicima Uredbom Rim III da izaberu pravo koje se primjenjuje na njihov razvod (Kruger, Samyn 2016, 143, 144). Izbor nadležnog suda može, prema riječima Evropske komisije, biti posebno koristan u slučajevima sporazumnog razvoda braka (Kruger, Samyn 2016, 144). Mogućnost zaključivanja sporazuma o nadležnom sudu osigurala bi predvidljivost i pravnu sigurnost – da se riješi njihov spor, i moglo bi pomoći da se spriječi „žurba na sud"[11] (Kruger, Samyn 2016, 145). Upravo zbog tih razloga je omogućeno zaključivanje sporazuma o nadležnosti suda prema novoj Uredbi Brisel II ter. Komisija je u predstavljanju svog Prijedloga uredbe istakla primjerenost uvođenja mogućnosti izbora suda, sa ciljem da se obeshrabri *forum shopping* i da se jurisdikcija u tako osjetljivoj oblasti prava učini predvidljivom (Lupoi 2021, 545). Stranke i dalje imaju (limitiranu) mogućnost sporazumijevanja o nadležnosti suda s kojim dijete ima posebnu vezu, uz uslov da je ta nadležnost u najboljem interesu djeteta (Medić, Sedlar 2022, 52). Sporazum koji u vrijeme pokretanja postupka odražava najbolji

[10] Doktrina *forum non conveniens* daje sudu diskreciono pravo da odbaci slučaj ako smatra da će stranom sudu biti više pogodno ili odgovarajuće da riješi slučaj. Svrha doktrine je da spriječi *forum shopping*, pri čemu tužilac traži najpovoljniji forum, bez obzira na vezu slučaja i tog foruma. Tu doktrinu često primjenjuju sudovi u zemljama anglosaksonskog prava i efikasno blokiraju pristup za oštećene strance, bez obzira na meritum predmeta. Pretpostavka je da će se prikladnije provesti u državi tužioca. Međutim, statistike SAD pokazuju da u gotovo svim slučajevima kada je odbijen *forum non conveniens* američki sudovi nisu pokretali postupak u alternativnom forumu, ostavljajući oštećene bez ikakve naknade štete pred licem pravde (Gerrity 2016, 11).

[11] Eng. *rush to court*.

interes djeteta ne mora, u svakom slučaju, nakon okončanja postupka u pogledu kojeg je postignut sporazum o nadležnosti za vrijeme djetinjstva dotičnog djeteta – i da ostane u njegovom najboljem interesu (Bordaš 2015, 1530, 1531).

Ukinuta je mogućnost konsolidacije spora o roditeljskoj odgovornosti s bračnim sporom, odnosno mogućnost prorogacije nadležnosti u vezi s bračnim sporom (Medić, Sedlar 2022, 52). Dakle, važnu promjenu donosi Uredba Brisel II ter uvođenjem izbora suda nezavisnog od nadležnosti u bračnim stvarima (Bobrzyńska 2021, 601). Nemogućnost ugovaranja nadležnosti u bračnim sporovima proizlazi iz same nomotehnike pisanja Uredbe Brisel II ter. Poglavlje II „Nadležnost u bračnim sporovima i u stvarima povezanima s roditeljskom odgovornošću" sadrži tri odjeljka. Prvi odjeljak je „Razvod, zakonska rastava i poništaj braka", drugi „Roditeljska odgovornost" i treći „Zajedničke odredbe". Prorogacija nadležnosti je u odjeljku „Roditeljska odgovornost", a ne u odjeljku „Zajedničke odredbe", zbog čega se zaključuje da se prorogacija nadležnosti odnosi samo na roditeljsku odgovornosti i da nije moguća u bračnim sporovima. Nalazimo mišljenje da je možda neskladno isključena autonomija volja za bračna pitanja jer se za ugovaranje nadležnosti zahtijeva detaljan skup uslova i zahtjeva (Lupoi 2021, 545).

4. MATERIJALNA VALJANOST SPORAZUMA

Iako je strankama ostavljena autonomija volje za ugovaranje nadležnosti, ona je ograničena potrebom ispunjavanja određenih uslova za zaključivanje sporazuma. Sudovi države članice imaju nadležnost u stvarima povezanima s roditeljskom odgovornošću ako su ispunjeni sljedeći uslovi:

(a) postoji bitna veza djeteta i te države članice, posebno zbog činjenice[12]:

1. da najmanje jedan od nosilaca roditeljske odgovornosti ima uobičajeno boravište u toj državi članici;
2. da je u toj državi članici bilo prethodno uobičajeno boravište djeteta ili
3. da je dijete državljanin te države članice;

(b) stranke i svaki drugi nosilac roditeljske odgovornosti:

[12] Uredba Brisel II ter, član 10 stav 1.

1. svojevoljno su postigli sporazum o nadležnosti, najkasnije u trenutku pokretanja postupka pred sudom, ili
2. izričito su prihvatili nadležnost tokom postupka te je sud osigurao da sve stranke budu obaviještene o svojem pravu da ne prihvate nadležnost i

(v) izvršavanjem nadležnosti štite se interesi djeteta.

Materijalni uslovi za valjanost sporazuma ukazuju na to da je ostavljena veća diskreciona ocjena sudu da li će prihvatiti sporazum stranaka. Riječ je o pravnim standardima „veza djeteta i države članice" i „zaštita interesa djeteta", što omogućava široko tumačenje sudovima. Utvrđivanje interesa djeteta daje sudu ovlasti koje su široke skoro kao u doktrini *forum non conveniens*. Interesi djeteta uključuju mjesto vođenja postupka, odnosno sjedište suda, ali uključuju i mjerodavno pravo za odlučivanje o sporu. Pravo suda pred kojim se vodi parnični postupak je upravo osnova za utvrđivanje mjerodavnog prava na osnovu kojeg će se odlučiti o predmetu spora. Kolizione norme države članice daju odgovor koje će pravo biti mjerodavno za rješavanje spora. Mjerodavno pravo može da utiče na odlučivanje o pravnom osnovu, o tome da li će tužbeni zahtjev biti odbijen ili usvojen, ali i na visinu potraživanja. Na primjer, u državama se dosuđuju različiti iznosi za izdržavanje. Ne može se očekivati od suda da izvrši analizu koje će pravo biti primijenjeno, ali njegovo postupanje sa ciljem da utvrdi koje će pravo biti primijenjeno ne bi bilo protivno Uredbi Brisel II ter.

Stranke mogu zaključiti sporazum i u vezi sa otmicom djeteta (Martiny 2021, 507). Ocjenjujući prirodu odnosa stranaka u slučaju otmice djece, očekuje se mali broj sporazuma u toj oblasti.

Sud EU u nizu predmeta tumačio je primjenu Uredbe 2201/2003, a budući da su brojne odredbe u cijelosti preuzete i u slijednici te Uredbe, tumačenje zauzeto ranije ostaje relevantno (Župan, Kokić 2022, 5). U praksi Suda EU nalazimo mišljenje da kada su roditelji maloljetnog djeteta, koji s njim uobičajeno borave u državi članici, u ime tog djeteta podnijeli zahtjev za odobrenje odricanja od nasljedstva pred sudom druge države članice, član 12 stav 3 tačka b) Uredbe 2201/2003 treba tumačiti na način da na osnovu okolnosti da su se boravište ostavioca u trenutku njegove smrti, njegova imovina, koja je predmet nasljeđivanja, i obaveze na osnovu nasljedstva nalazili u državi članici odabranog suda, u nedostatku čimbenika kojima bi se moglo dokazati da bi prorogacija nadležnosti mogla štetno uticati na djetetov

položaj, treba zaključiti da je takva prorogacija nadležnosti u interesu djeteta.[13] Zaključuje se da se stranke mogu sporazumjeti o nadležnosti suda neke države članice samo ako postoji bitna povezanost djeteta s tom državom, a izvršavanjem nadležnosti štite se interesi djeteta. Može se očekivati da će se nadležnost zasnivati uglavnom samo u onim predmetima u kojima bi ionako postojala nadležnost prorogiranog suda po nekoj drugoj osnovi. Prema tome, prostor za sporazum stranaka o nadležnosti je vrlo sužen.

U Uredbi Brisel II ter ne navodi se prema pravu koje države se određuje materijalna valjanost sporazuma. Prema Uredbi 1215/2012 za ocjenu materijalne valjanosti sporazuma o izboru nadležnog suda mjerodavno je pravo države članice suda ili sudova utvrđenih sporazumom, uključujući pravila o sukobu zakona te države članice.[14] Na taj način se može ukazati na onemogućavanje ostvarivanja ugovorne volje stranaka, ali stranke moraju imati u vidu sve pravne propise, pa tako i propise koji se odnose na rješavanje sukoba zakona. U pravnoj teoriji nalazimo mišljenje da to nije dobro rješenje jer se ne osigurava primjena istog materijalnog prava u EU za supstancijalnu valjanost sporazuma o nadležnosti suda.[15] Za sporazume zaključene prema Uredbi Brisel II ter pitanje prava mjerodavnog za prorogaciju prepušteno je unutrašnjim kolizijskim normama *lex fori*, tako da će stranke morati imati u vidu sve pozitivne pravne propise države članice suda, kao i u slučaju Uredbe 1215/2012.

5. FORMALNA VALJANOST SPORAZUMA

Formalnoj važnosti prorogacionog sporazuma više se pridaje pažnja u kontinentalnom pravu nego u *common law*, u kojem sudovi obično pokušavaju da iza forme otkriju namjeru stranaka i spremni su da priznaju prorogacioni sporazum koji nije sačinjen u pisanoj formi, koji nije potpisan, koji je štampan

[13] Presuda Suda EU od 19. 4. 2018, Alessandro Saponaro, Kalliopi-Chloi Xylina (C-565/16), EU:C:2018:265, para. 40.

[14] Uredba 1215/2012, tačka 20.

[15] Iz tačke 20 Preambule Uredbe 1215/2012 jasno je da se u mjerodavnom pravu države ugovorenog suda podrazumijevaju kolizijskopravna pravila (ili pravila međunarodnog privatnog prava). Takvo rješenje je neprimjereno i jedan je od najznačajnijih nedostataka u tekstu revidirane Uredbe. Upućivanje na kolizijskopravne norme države ugovorenog suda ne predstavlja stvarno ujednačavanje kolizijskog pravila za materijalnopravnu valjanost prorogacijskih klauzula. Iznenađujuće je da se zakonodavac EU odlučio na takvo rješenje, imajući na umu da je u većini privatnopravnih instrumenata EU *renvoi* izričito isključen, a naročito u oblasti obligacionog prava (Lazić 2013, 113, 114).

sitnim slovima ili je sadržan u čisto usmenom ugovoru (Petrović 2009, 98). Sporazum o izboru nadležnog suda je jedna vrsta sporazumnog rješavanja spora (Min 2013, 5). Druge vrste su sporazum o arbitraži i medijacija (Min 2013, 5). Sud je dužan da u konkretnom slučaju tumačenjem klauzule utvrdi doseg stranačkog sporazuma o nadležnosti.

Prema Uredbi Brisel II ter sporazum o izboru suda sastavlja se u pisanom obliku, s datumom i potpisom dotičnih stranaka ili se zaključuje na zapisnik pred sudom u skladu s nacionalnim pravom i postupkom, a sva priopćenja elektronskim sredstvima koja osiguravaju trajan zapis istovjetna su „pisanom obliku".[16]

Prema Uredbi 1215/2012, da bi sporazum o izboru nadležnog suda bio formalno valjan, treba da bude zaključen[17]:

1) u pisanom obliku ili se potvrđuje u pisanom obliku,
2) u obliku koji je u skladu s praksom koja je ustaljena među strankama,
3) u međunarodnoj trgovini, u obliku koji je u skladu s običajima koji su poznati strankama ili bi im morali biti poznati, a koji su općepoznati u međunarodnoj trgovini i redovno ih poštuju stranke ugovora iste vrste u trgovini o kojoj je riječ.

Poređenjem uslova za formalnu valjanost sporazuma o izboru nadležnog suda iz navedenih uredbi, zaključuje se da su stroži uslovi prema Uredbi Brisel II ter, što je svakako očekivano cijeneći područje primjene uredbi. Na primjer, bitno blaži uslovi za zaključivanje sporazuma prema Uredbi 1215/2012 ogledaju se u mogućnosti zaključivanja sporazuma u obliku koji je u skladu s praksom koja je ustaljena među strankama.

U pogledu uslova pod kojima je prorogacioni sporazum valjan, razlikujemo prorogacioni sporazum i prorogacionu klauzulu (Međedović 2014, 124). Prorogacioni sporazum se zaključuje nakon što je spor nastao (Međedović 2014, 124). Prorogaciona klauzula je inkorporirana u pravni posao iz kojeg bi spor mogao da nastane (Međedović 2014, 124). Ugovor o prorogaciji nije parnična radnja stranaka, pa zbog toga parnična punomoć ne sadrži ovlaštenje za zaključenje tog sporazuma (Triva 1965, 219).

Izabrani sud mora bar biti odrediv, ne može se prepustiti neograničena diskrecija strankama. Sporazum prema kojem je izbor nadležnosti u cijelosti prepušten volji jedne od ugovornih strana nije dovoljno određen da bi se

16 Uredba Brisel II ter, član 10 stav 2.

17 Uredbe 1215/2012, član 25 stav 1.

na njemu mogla zasnovati nadležnost (Žalbeni sud [Cour d' appel] u Parizu 5. 7. 1989, Huet, Journal de droit international [1990], str. 151, Zemaljski sud [Landesgericht] u Braunšvajgu [28. 2. 1974], RIW/AWD [1974], 346, u: Babić 2006, 78). U sudskoj praksi nalazimo mišljenje[18], kojim se dodatno ograničava mogućnost zaključivanja sporazuma, da sporazum o prorogaciji nadležnosti mora biti takav da između stranaka postoji saglasnost volje o tome koji će im sud suditi u prvom stepenu umjesto onog koji je mjesno nadležan, bez diskrecije samo za jednu stranku. Tu saglasnost volja stranke mogu postići bilo saglasnim tačnim određivanjem suda (da stranke u sporazumu navedu naziv suda) bilo da one sporazumom odrede kriterije na osnovu kojih se sa sigurnošću može utvrditi koji bi im sud u slučaju spora bio nadležan suditi u prvom stepenu (na primjer, da stranke u sporazumu navedu da je nadležan sud na čijem se području nalazi tužiočevo registrovano sjedište). Međutim, ugovorna odredba da se jednoj stranci prepušta da sama odredi sud koji bi sudio u prvom stepenu ne predstavlja valjan sporazum o prorogaciji nadležnosti. Tim mišljenjem se isključuje mogućnost ugovaranja jednosmjerne klauzule. Ako je ugovoreno da jedna ili obje stranke mogu birati između više određenih sudova, sporazum je valjan iz razloga što su obje stranke postigle saglasnost o sudovima čiji je izbor moguć.

Nisu potrebne nikakve posebne formulacije već samo jasan izraz pristanka u odnosu na izbor određenog suda za rješavanje sporova koji se tiču konkretnog djeteta (Lupoi 2021, 547). Moguće je ugovorit nadležnost na način – saglasni smo, želimo, ugovaramo nadležnost određenog suda i slične formulacije iz kojih se jasno vidi da postoji saglasnost stranaka za ugovaranje nadležnosti.

Osim izričitog zaključenja sporazuma, moguće je ugovaranje nadležnosti i konkludentnim radnjama stranaka. Osobe koje postanu stranke u postupku nakon što je pred sudom pokrenut postupak mogu izraziti svoju saglasnost nakon što je pred sudom pokrenut postupak, ali ako ne izraze protivljenje, smatrat će se da su prešutno dale saglasnost. Pojam stranke treba šire tumačiti tako da obuhvata sve fizičke i pravne osobe koje su zakonom normirane kao stranke. U situaciji u kojoj se državni pravobranilac, u skladu s mjerodavnim nacionalnim pravom, po zakonu smatra strankom u postupku u stvarima koje se tiču roditeljske odgovornosti, protivljenje te stranke izboru suda koji su izvršili roditelji djeteta nakon trenutka u kojemu je pokrenut postupak pred sudom prepreka je za priznanje prihvatanja prorogacije nadležnosti od

[18] Visoki trgovački sud Republike Hrvatske, Pž-4212/10–3, 13. 7. 2010.

svih stranaka u postupku u tom trenutku.[19] S druge strane, ako nema takvog protivljenja, pristanak te stranke može se smatrati prešutnim i pretpostavka je nedvosmislenog prihvatanja prorogacije nadležnosti od svih stranaka.[20]

5.1. Pisani oblik

Prvi način ispunjavanja formalne valjanosti sporazuma stranaka o nadležnom sudu je njegovo sastavljanje u pisanom obliku, s datumom i potpisom dotičnih stranaka.

U predmetu *Coreck Maritime* iz 2000. godine Sud pravde EU je utvrdio da je dovoljno da se u ugovoru navode objektivni faktori na temelju kojih su se stranke sporazumjele o nadležnom sudu ili sudovima (C-387/98 Coreck Maritime GmbH protiv Handelsveem BV *et al.* [2000], 9. 11. 2000, para. 15, u: Babić 2006, 78). Ti faktori moraju biti dovoljno precizni da omoguće sudu pred kojim je postupak pokrenut da odluči o svojoj nadležnosti, ali mogu se konkretizovati s obzirom na okolnosti slučaja. U predmetnom slučaju radilo se o prorogacijskoj klauzuli sadržanoj u teretnici kojom je bila propisana nadležnost sudova države glavnog poslovnog sjedišta prevoznika. Prema mišljenju Suda, takva je klauzula dovoljno precizna da se može utvrditi sudovi koje države su nadležni.

Pisani oblik postoji kada su stranke, dvije ili više, potpisale isti dokument u kojem je sadržan sporazum o izboru nadležnog suda i kada je naveden datum zaključenja sporazuma. Ako odvojena dokumenta sadrže ili izričito upućuju na istu klauzulu o nadležnosti i svaka od stranaka je potpisala odvojene dokumente, također postoji pismeni oblik sporazuma (Magnus, Mankowski 2007, 406), ali u svakom od tih dokumenta treba da budu navedeni datumi za svaki odvojeni dokument.

Pri tumačenju odredaba o obliku, treba postići ravnotežu između dva međusobno oprečna cilja.[21] Tako je, na primjer, u predmetu *Russ protiv Nova* iz 1984. godine, sud odlučio da sporazum o nadležnosti nije valjano

[19] Presuda Suda EU od 19. 4. 2018, Alessandro Saponaro, Kalliopi-Chloi Xylina (C-565/16), EU:C:2018:265, para. 32.

[20] Presuda Suda EU od 19. 4. 2018, Alessandro Saponaro, Kalliopi-Chloi Xylina (C-565/16), EU:C:2018:265, para. 32.

[21] S jedne strane, sporazum o nadležnosti treba tumačiti usko zbog toga što on dovodi do derogacije nadležnosti sudova drugih država koja bi se inače mogla zasnovati prema ostalim pravilima o nadležnosti, posebno prema pravilima o općoj nadležnosti suda države prebivališta tuženog, koja predstavlja osnovno pravilo evropskog sistema nadležnosti. S druge strane, u tumačenju odredaba o prorogaciji

sklopljen ako je prorogacijska klauzula sadržana na poleđini teretnice bez upute na prednjoj strani (C-71/83 *Russ protiv Nova* [1984], 19. 6. 1984, para. 16, u: Babić 2006, 81). Prema mišljenju Suda EU, time nije pruženo dovoljno jemstvo da je druga strana doista pristala na klauzulu kojom se derogira nadležnost prema ostalim odredbama Briselske konvencije iz 1968. godine. Slično tome, prema praksi nacionalnih sudova za valjano sklapanje sporazuma o nadležnosti nije dovoljna puka predaja ili prilaganje općih uslova poslovanja (Njemački Savezni [vrhovni] sud, 9. 3. 1994, NJW [1994], str. 2699: italijanski Kasacijski sud, 19. 12. 1994, odluka broj 10910, Rivista di diritto internazionale privato e prozessuale [1997], str. 414; Viši zemaljski sud [*Oberlandesgericht*] u Hamu, 20. 1. 1997, IPRspr. [1977], broj 118, u: Babić 2006, 81) ili njihovo štampanje na poleđini računa (Žalbeni sud u Milanu, 26. 9. 1978, Rivista di diritto internazionale privato e prozessuale [1978], 843, u: Babić, 81). Ti slučajevi iz drugih građanskih i trgovačkih predmeta pokazuju da stranke trebaju ugovoriti nadležnost na način da to ne ostavlja bilo kakve nedoumice.

5.2. Sporazum zaključen pred sudom prema pravu države članice

Drugi oblik u kojem je moguće zaključiti sporazum o izboru nadležnog suda ostavljen je državama članicama, s tim što se odnosi na zaključivanje sporazuma pred sudom. Tu odredbu je moguće tumačiti na način da treba da budu ispunjeni uslovi za zaključivanja sporazuma o izboru nadležnog suda koji se primjenjuju kada ne postoji strani element ili da se odnosi na uslove o izboru nadležnog suda kada postoji strani element, odnosno da li treba da budu ispunjeni uslovi prema građanskom procesnom pravu ili procesnom međunarodnom privatnom pravu. S obzirom na to da je riječ o sporovima sa stranim elementnom, treba primjenjivati pravila procesnog međunarodnog privatno prava, a samo u slučaju da tim pravilima nije normirana forma sporazuma treba primijeniti odredbe građanskog procesnog prava. Prema pravu Republike Hrvatske u građanskim i trgovačkim stvarima, nadležnost suda Republike Hrvatske određuje se primjenom Uredbe 1215/2012, a stranke se mogu sporazumjeti o nadležnosti suda države koja nije članica EU,

treba izbjeći prekomjerni formalizam koji bi bio nespojiv s poslovnom praksom. Preusko tumačenje formalnih pretpostavki za prorogaciju može dovesti u pitanje ostvarenje načela stranačke autonomije u određivanju nadležnosti (Babić 2006, 81).

osim ako je za predmet spora isključivo nadležan sud Republike Hrvatske ili neke druge države članice EU, a na koji sporazum se na odgovarajući način primjenjuju odredbe Uredbe 1215/2012 o prorogaciji nadležnosti.[22]

Okolnost da se sporazum zaključuje pred sudom pokazuje da se zaključuje u pismenoj formi u obliku zapisnika.

5.3. Priopćenja elektronskim sredstvima

Posljednji način za zaključenje sporazuma o izboru nadležnog suda je putem priopćenja elektronskim sredstvima koja osiguravaju trajan zapis i ona su istovjetna „pisanom obliku". Značaj tog načina ugovaranja nadležnosti suda najbolje se ogleda u razvoju interneta i može se očekivati da će biti sve više zastupljen u praksi. Razvoj interneta se može posmatrati od prve veb-stranice 1991. godine do donošenja Uredbe Brisel II ter, kada je postojalo 1,71 milijardi veb-stranica (Ćosić 2019).

Čak i puka razmjena slova, faksova, telegrama predstavlja „pisanje", kao i elektronska komunikacija i elektronska pošta koje omogućavaju zadržavanje evidencije, sada su potpuno ekvivalentne pisanoj formi (Magnus, Mankowski 2007, 406).

Značajno je mišljenje Suda pravde EU o sporazumu o nadležnosti suda zaključenom elektronskim putem, za koje se može reći da ukazuje na značaj ugovora zaključenog elektronskim putem i da stranke treba da budu oprezne. Naime, u predmetu *Jaouad El Majdoub protiv CarsOnTheWeb.Deutschland GmbH*[23], Sud pravde EU je donio odluku da tehnika prihvaćanja „klikanjem" općih uslova kupoprodajnog ugovora koji sadržavaju sporazum o nadležnosti sklopljenog elektronskim putem među profesionalcima predstavlja priopćenje elektronskim sredstvima koje osigurava trajni zapis tog ugovora u smislu te odredbe, kada ta tehnika omogućuje ispis i spremanje teksta tih općih uslova prije sklapanja ugovora. Da bi sporazum bio valjan, treba ponuditi „mogućnost" da se osigura trajni zapis sporazuma o prenošenju nadležnosti, nezavisno o tome je li kupac doista trajno zapisao tekst općih uslova nakon ili prije nego što je označio kvadratić koji naznačuje da prihvata navedene uslove. Zbog toga okolnost da se internetska stranica koja sadržava te uslove ne otvara automatski prilikom registracije na internetskoj stranici i prilikom

[22] Zakon o međunarodnom privatnom pravu, *Narodne novine* 101/17, član 46 stav 1 i 3.

[23] Presuda Suda pravde EU od 21. 5. 2015, Jaouad El Majdoub, CarsOnTheWeb. Deutschland GmbH (C-322/14), ECLI:EU:C:2015:334, para 39.

svake kupovine ne može dovesti u pitanje valjanost sporazuma o prenošenju nadležnosti. Sud pravde EU je tom odlukom omogućio lakše zaključivanje sporazuma o izboru nadležnog suda u slučaju ugovora zaključenih elektronskim putem, čime će se povećati broj ugovorene nadležnosti, i ujedno postavlja pravilo da stranke treba da budu aktivne. Zahtijev da stranke budu aktivne treba primjenjivati i na druge ugovore.

U elektronskoj komunikaciji nije uvijek sadržan i verifikovani potpis, ali i u tim slučajevima, prema Uredbi 1215/2012, treba smatrati da je sporazum valjan pod uslovom da se može utvrditi da stranka koristi imejl adresu ili drugu formu elektronske komunikacije putem koje je ugovorena nadležnost. U sudskoj praksi nalazimo mišljenje da je uslov pismene forme ispunjen ukoliko je prorogacijska klauzula sadržana u općim uslovima poslovanja.[24] Za valjanost sporazuma prema Uredbi Brisel II ter potreban je potpis stranaka, što kod sporazuma u elektronskom obliku zahtjeva elektronski potpis. Elektronski potpis predstavlja podatke u elektronskom obliku koji su pridruženi ili su logički povezani s drugim podacima u elektronskom obliku i koje potpisnik koristi za potpisivanje.[25] Valjan je samo elektronski potpis koji ispunjava uslove Uredbe (EU) broj 910/2014 Evropskog parlamenta i Vijeća od 23. jula 2014. o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu i stavljanju van snage Direktive 1999/93/EZ (Odjeljak 4). Elektronski potpis mora ispunjavati sljedeće zahtjeve: (a) na nedvojben način je povezan s potpisnikom, (b) omogućava identificiranje potpisnika, (v) izrađen je korištenjem podataka za izradu elektronskog potpisa koje potpisnik može, uz visok nivo pouzdanja, koristiti pod svojom isključivom kontrolom, i (g) povezan je s njime potpisanim podacima na način da se može otkriti bilo koja naknadna izmjena podataka.[26]

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[24] Vrhovni sud Republike Hrvatske, Gr1–115/14–2, 4. 4. 2014.

[25] Uredba (EU) broj 910/2014 Evropskog parlamenta i Vijeća od 23. jula 2014. o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu i stavljanju van snage Direktive 1999/93/EZ, *Službeni list EU* L 257 od 28. 8. 2014, član 3 stav 1 tačka 10).

[26] Uredba (EU) broj 910/2014 Evropskog parlamenta i Vijeća od 23. jula 2014. o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu i stavljanju van snage Direktive 1999/93/EZ, član 26.

6. PREŠUTNA NADLEŽNOST

Uredba Brisel II ter, osim izričitog ugovaranja nadležnosti suda putem sporazuma stranaka koji je zaključen najkasnije u trenutku pokretanja postupka pred sudom, omogućava ugovaranje nadležnosti tokom postupka. Dakle, prema Uredbi Brisel II ter moguće je prešutno ugovaranje nadležnosti. Osobe koje postanu stranke u postupku nakon što je pred sudom pokrenut postupak mogu izraziti svoju saglasnost nakon što je pred sudom pokrenut postupak, a ako ne izraze protivljenje, smatrat će se da su prešutno dale saglasnost.[27] U svakom slučaju, sud države članice trebat će provesti incidentalni postupak kako bi ispitao postojanje pretpostavaka dopuštenosti prorogacije te prije nego što sud izvede određeni zaključak o postojanju saglasnosti stranke za prorogaciju nadležnosti, sud treba da informiše stranke o njihovom pravu da ne prihvate tu nadležnost (Aras Kramar 2020, 69).

Iako je pravilo da punomoćnik, zastupnik po zakonu, zakonski zastupnik i privremeni zastupnik sve radnje poduzimaju u ime stranke, a radnje koje je poduzeo smatraju se kao da ih je sama stranka poduzela, u smislu prešutne nadležnosti treba procijeniti odnos stranke i njenog zastupnika. Tako u praksi Suda EU u tumačenju Uredbe broj 2201/2003 nalazimo mišljenje da se ne može smatrati da su nadležnost sudova pred kojima je pokrenut postupak za rješavanje zahtjeva u području roditeljske odgovornosti „izričito ili na neki drugi nedvosmislen način prihvatile sve stranke u postupku“, u smislu te odredbe, isključivo na temelju toga što zastupnik *ad litem*, koji zastupa tuženog, a kojeg su po službenoj dužnosti odredili ti sudovi zbog nemogućnosti obavještavanja tuženog o aktu kojim se pokreće postupak, nije osporavao nadležnost tih sudova.[28] Sud je za takvo mišljenje posebno opredijelila činjenica da on ne može od tuženog dobiti sve informacije nužne za prihvatanje ili osporavanje nadležnosti tih sudova s punom sviješću o relevantnim okolnostima. Iako je „neki drugi nedvosmisleni način“ iz Uredbe 2201/2003 zamijenjen odredbom da se neizražavanje protivljenja smatra davanjem prešutne saglasnosti, primjenjivo je i dalje mišljenje Suda EU u situacijama kada zastupnik stranke ne može da stupi u kontakt sa strankom.

[27] Uredba Brisel II ter, član 10 stav 2.

[28] Presuda Suda EU od 21. 10. 2015, *Erich Gasser GmbH, MISAT SRL* (C-116/02), ECLI:EU:C:2003:657.

7. LITISPENDENCIJA

Pojam litispendencije u EU odgovara shvatanju u našem pravu da je riječ o paralelnim postupcima koji teku o istoj stvari između istih stranaka (Varadi *et al*. 2016, 516). Litispendencija dobija značaja u međunarodnoj nadležnosti, jer je riječ o nadležnosti koja je u pravilu konkurenta, što ostavlja mogućnost da za spor može biti nadležan i sud neke druge države (Poljić 2016, 76).

Slučaj *Erich Gasser GmbH protiv MISAT-a SRL*[29] ukazao je na nedostatke pravila za litispendenciju i potrebu izmjene tih pravila kako bi se ostvarila ugovorna volja stranaka. U tom slučaju sud je dao prednost ranije pokrenutom postupku u odnosu na postupak pred sudom čija je nadležnost bila ugovorena, čime nije ispoštovana volja stranaka u sporazumu o izboru nadležnog suda.

Taj propust iz Uredbe 44/2001, pod uticajem slučaja *Erich Gasser GmbH protiv MISAT-a SRL*, ispravljen je u Uredbi 1215/2012. Prema Uredbi 1215/2012, ako su pred sudovima različitih država članica pokrenuti postupci u pogledu istog predmeta spora između istih stranaka, svaki sud, osim onog pred kojim je prvo pokrenut postupak, po službenoj dužnosti zastaje s postupkom sve dok se ne utvrdi nadležnost suda pred kojim je prvo pokrenut postupak, osim ako je postupak pokrenut pred sudom države članice kojem je sporazumom dodijeljena isključiva nadležnost.[30] Ukoliko je sporazumom dodijeljena isključiva nadležnost, svaki sud druge države članice prekida postupak do trenutka kada se sud pred kojim je pokrenut postupak na osnovu sporazuma oglasi nenadležnim na osnovu sporazuma.[31] U tim slučajevima, na zahtjev suda pred kojim je pokrenut postupak povodom spora, svaki drugi sud pred kojim je pokrenut postupak bez odgode obavještava prethodni sud o datumu pokretanja postupka.[32] Čini se da Uredba 1215/2012 ostavlja samim strankama inicijativu da pruže obavještenje o postojanju drugog postupka (Forner-Delaygua 2015, 392). Štaviše, tok parnice po tom pitanju može zavisiti od tuženog koji je u prvom postupku poduzimao pravne radnje na početku postupka razmatranja nadležnosti (Forner-Delaygua 2015, 392).

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29 Presuda Suda EU od 9. 12. 2013, Vasilka Ivanova Gogova, Ilije Dimitrova Ilieva (C-215/15), ECLI:EU:C:2015:710, para. 47.

30 Uredba 1215/2012, član 29 stav 1 i član 31 stav 2.

31 Uredba 1215/2012, član 29 stav 1 i član 31 stav 2.

32 Uredba 1215/2012, član 29 stav 2.

Uredba Brisel II ter slijedi Uredbu 1215/2012 i propisuje da je nadležnost ugovorena sporazumom isključiva.[33]

Ako se postupak pokrene pred sudom države članice kojem je prihvatanjem nadležnosti iz člana 10 prenesena isključiva nadležnost, svaki sud druge države članice zastaje s postupkom do trenutka kada se sud pred kojim je pokrenut postupak na temelju sporazuma ili prihvaćanja nadležnosti proglasi nenadležnim na osnovu sporazuma ili prihvatanja nadležnosti.[34]

Uredbom Brisel II ter nije propisan rok u kojem sud treba odlučiti o nadležnosti. Rješenje bi bilo izmjena procesnih pravila u državama članicama. Međutim, to ne bi bio prvi put da države članice treba da provedu dodatne procedure ili izmjene postojeća pravila kako bi se pridržavale prava EU (Ratković, Zgrabljić Rotar 2013, 265). Promjene bi se odnosile samo na odluku o nadležnosti kod sporazuma o izboru nadležnog suda kada su pokrenuti postupci u dva suda, a postojeći sistem mogao bi ostati u svim ostalim slučajevima (Ratković, Zgrabljić Rotar 2013, 265). Problem bi mogao biti riješen tako što bi se u nacionalnom sistemu dao primat toj vrsti slučaja i korišćenjem postojećih procedura koje su ekspeditivnije. Predviđanje roka za donošenje odluke o nadležnosti omogućava poštovanje autonomije stranaka. Zbog toga je najbolje rješenje ono koje je dato u Uredbi Brisel II ter, koje je sadržano i u Uredbi 1215/2012, ali sa dodatkom pravila o vremenu.

Sudovi neće morati da se angažuju za odlučivanje da li je dogovorena isključiva nadležnost ili ne, što bi moglo uticati na kraće trajanje postupka. Nadležnost koja je ugovorena prema Uredbi Brisel II ter je isključiva, čime nije ostavljen bilo kakav prostor za ocjenu vrste nadležnosti. Kada se stranke dogovore o neekskluzivnoj prorogaciji, nije neophodno dati apsolutni prioritet izabranom sudu pošto se sporazumom ne isključuje nadležnost drugih sudova.

Sud pred kojim je kasnije pokrenut postupak čija se nadležnost zasniva na sporazumu o izboru isključivo nadležnog suda nastavlja postupak, dok drugi sudovi zastaju sa postupkom dok se ne utvrdi njegova nadležnost. Kada se utvrdi nadležnost suda, svaki sud, osim tog suda, oglašava se nenadležnim u korist suda koji svoju nadležnost zasniva na sporazumu o izboru isključivo nadležnog suda.[35]

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33 Uredba 1215/2012, član 10 stav 4.

34 Uredba Brisel II ter, član 20 stav 4.

35 Uredba Brisel II ter, član 20 stav 5.

Prema Uredbi broj 1215/2012, obaveza je svakog suda da, na zahtjev suda pred kojim je pokrenut postupak povodom spora, svaki drugi sud pred kojim je pokrenut postupak bez odgode obavijesti o datumu pokretanja postupka. Iako izgleda samo kao deklarativna dužnost i „dostavljanje informacije", to je značajno pravilo, osim kada se nadležnost suda zasniva na sporazumu o izboru nadležnog suda. Važnost se ogleda u činjenici što sud pred kojim je ranije pokrenut postupak odlučuje kada je pokrenut postupak, a ne drugi sud pred kojim se postavlja pitanje njegove nadležnosti. Na primjer, ako je pred sudom države B izjavljen prigovor njegove nenadležnosti zbog ranije pokrenutog postupka u državi A, dužnost je suda B da se obrati sudu države A radi dostave informacije kada je pokrenut postupak pred sudom države A. Sud države B na osnovu dokaza ne odlučuju kada je pokrenut postupak u državi A već tu informaciju dobija od suda države A. Necjelishodnost tog rješenja prepoznato je u Uredbi Brisel II ter, kojom je normirano kada se smatra da je postupak pokrenut i dužnost je suda pred kojim je to pitanje postavljeno da odluči o vremenu pokretanja postupka pred drugim sudom. Smatra se da je pred sudom pokrenut postupak[36]:

1) u trenutku u kojem je pismeno kojim se pokreće postupak, ili jednakovrijedno pismeno, podneseno sudu, pod uslovom da podnosilac zahtjeva nije nakon toga propustio poduzeti radnje koje je morao poduzeti kako bi pismeno bilo dostavljeno protivnoj stranci;
2) ako pismeno mora biti dostavljeno prije njegovog podnošenja sudu, u trenutku u kojem ga je primilo tijelo zaduženo za dostavu, pod uslovom da podnosilac zahtjeva nije nakon toga propustio poduzeti radnje koje je morao poduzeti kako bi pismeno bilo podneseno sudu, ili
3) ako postupak pokreće sud po službenoj dužnosti, u trenutku u kojem je donesena odluka suda o pokretanju postupka ili, ako takva odluka nije nužna, u trenutku u kojem je sud zabilježio predmet.

Sporno je na koji način tuženi treba da ukaže na postojanje sporazuma o izboru isključivo nadležnog suda. Ne može biti dovoljno da tuženi u prvom postupku jednostavno navede riječi „sporazum o nadležnosti" (Weller 2016, 29). Takav standard bi stvorio nerazmjeran rizik zloupotrebe, rizik od „obrnutog torpeda" (Weller 2016, 29). Zbog toga mora postojati bar neka vrsta *prima facie* standarda (Weller 2016, 29). Ali nije jasno šta tačno treba biti potrebno *prima facie* na osnovu Uredbe 1215/2012. Onemogućavanje zloupotreba može se spriječiti ako bi se od tuženog *prima facie* zahtijevalo

[36] Uredba Brisel II ter, član 17.

da navede postojanje sporazuma s bližim određenjima sporazuma – kada je zaključen, gdje, između kojih stranaka, kakva je nadležnost ugovorena i kojeg suda je nadležnost ugovorena. Tuženi treba da dostavi i sporazum na koji se poziva. U krajnjem slučaju, ako tuženi na poziv suda ne bih dostavio sporazum na koji se poziva, sud ne bi imao obavezu daljeg ispitivanja postojanja sporazuma.

Postoji mogućnost da dođe do sukoba između zakonske isključive nadležnosti i ugovorene isključive nadležnosti, ako je za slučajeve u kojima se može ugovoriti nadležnost, prema Uredbi Brisel II ter, u državama članicama propisana isključiva nadležnost. Ako je u državi članici zastupljeno pravilo da se ne može ugovoriti nadležnost za sporove za koje je propisana zakonska isključiva nadležnost, taj sporazum je valjan. Uredba Brisel II ter ima pravnu snagu iznad domaćeg prava i ako bi prema domaćem pravu bila propisana isključiva nadležnost za slučajeve u kojima se može ugovoriti nadležnost, prema Uredbi Brisel II ter sporazum bi bio valjan.

Postoje tri moguća načina postupanja suda koji je izabrani sud (Bergson 2015, 6).

1) Bez odluke: sud koji nije izabran nije dužan odlučivati o tome da li postoji sporazum o isključivoj nadležnosti. Kada tuženi u postupku istakne postojanje sporazuma o isključivoj nadležnosti drugog suda i dokaže da je postupak započeo pred izabranim sudom, sud koji nije izabran oglasit će se nenadležnim u korist izabranog suda.
2) Potpuno odlučivanje: sud koji nije izabran mora dati potpunu odluku da li postoji sporazum o isključivoj nadležnosti u korist izabranog suda ili ne.
3) Određivanje „srednje osnove“: sud koji nije izabran samo treba da se uvjeri da postoje dokazi da postoji sporazum o isključivoj nadležnosti prije nego što se oglasi nenadležnim u korist izabranog suda.

Možemo odbaciti prve dvije opcije, te slijedi da je određivanje „srednje osnove“ prikladno, pa se od suda koji nije izabran zahtjeva se oglasi nenadležnim u korist izabranog suda nakon što utvrdi da postoji sporazum o nadležnosti drugog suda (i da je postupak započet pred izabranim forumom).

Kada sud države članice donese odluku o nadležnosti, sudovi drugih država članica dužni su poštovati tu odluku. U slučaju *Gothaer*[37], tužilac Goter je pokrenuo postupak pred belgijskim sudovima zbog navodne štete

[37] Presuda Suda EU od 15. 11. 2012, Gothaer Allgemeine Versicherung AG and others, Samskip GmbH (C-456/11), ECLI:EU:C:2012:719.

prouzrokovane instalacijom tokom tranzita. Belgijski sudovi su odlučili da je tužba nedopuštena na osnovu toga što je postojao sporazum o nadležnosti u korist islandskih sudova u teretnom listu. Goter je kasnije pokušao ponovo da pokrene postupak protiv Samskipa u Njemačkoj, koji je uspješno pred Sudom EU isticao da je nedopustivo raspravljanje pred njemački sudom jer je odluka belgijskog suda obavezujuća u Njemačkoj. Sud EU je smatrao da koncept „presude", prema Uredbi 44/2001, obuhvata sve odluke suda države članice, bez ikakve razlike u odnosu na njihov sadržaj, te uključuje odluku u kojoj se sud države članice oglašava nenadležnim na osnovu klauzule o nadležnosti. Sud EU je uputio na koncept međusobnog povjerenja između sudova država članica, napominjući da odbijanje priznanja presude kojom je odlučeno o nadležnosti može biti suprotno sistemu dodjele nadležnosti prema Poglavlju II Uredbe 44/2001. Prema mišljenju Suda EU, bilo je irelevantno što njemačko pravo smatra da je belgijska presuda bila „presuda o proceduralnom pitanju" koja ne bi imala pravo na priznanje, te je zbog obima odluke belgijskog suda trebalo odrediti sporno pitanje kao pitanje prava EU, a ne odlučivati prema domaćim pravilima o *res iudicata*.

Slučaj *Gothaer* govori u prilog šireg tumačenja prava EU i da pravila o nadležnosti EU imaju prioritet u odnosu na domaće propise iako su domaći propisi *lex specialis*. Principima prava EU mora se omogućiti primjena, iako na opći način normiraju određeno pravno pitanje. U smislu odnosa sudova koji nisu izabrani kada postoji sporazum o izboru nadležnog suda, zaključujemo da odluka o nadležnosti jednog suda koji nije izabran obavezuje drugi sud koji nije izabran. Veza između litispendencije i priznanja presude je da se litispendencijom pokušavaju izbjeći nepopravljive presude koje bi uzrokovale scenario sukoba presuda (Forner-Delaygua 2015, 383, 384).

Veza između dva postupka može biti novi izvor „torpedo tužbi". S jedne strane, može se dogoditi da *prima facie* stranka ubijedi izabrani sud da postupak pred sudom koji nije izabran nije u vezi sa postupkom koji se vodi pred izabranim sudom. U drugu ruku, ostavljena je mogućnost sudu koji nije izabran da odluči da raniji postupak nije u vezi sa postupkom pred izabranim sudom niti pokriven sporazumom o nadležnosti (Forner-Delaygua 2015, 388).

8. UTICAJ NEPRIMJENJIVANJA PRAVILA O LITISPENDENCIJI NA PRIZNANJE STRANE SUDSKE ODLUKE

Kod priznanja strane sudske odluke, osnovno je pravilo da se odluka donesena u državi članici priznaje u drugim državama članicama bez potrebe za ikakvim posebnim postupkom[38], a to pravilo je sadržano i u Uredbi 2201/2003.[39] U sudskoj praksi nalazimo da nije primijenjeno pravilo litispendencije i da je okončan sudski postupak koji je kasnije pokrenut, a takvi se slučajevi mogu očekivati u budućnosti. Postavilo se pitanje pravnog djelovanja odluke koja je donesena u postupku koji je kasnije započeo i to da li je sud dužan priznati odluku iz postupka koji je kasnije pokrenut. Prema mišljenju Suda EU, pravila o litispendenciji iz člana 27 Uredbe 44/2001 i člana 19 Uredbe 2201/2003 treba tumačiti na način da im je protivno to da sudovi države članice suda pred kojim je postupak u bračnom sporu, sporu o roditeljskoj odgovornosti ili sporu o obavezi izdržavanja pokrenut ranije samo zbog povrede navedenih pravila odbiju priznati odluku suda pred kojim je postupak započeo kasnije i koja je postala konačna. Konkretno, ta povreda ne može sama za sebe opravdati nepriznavanje spomenute odluke zbog njezine očite suprotnosti s javnim poretkom te države članice.[40] To mišljenje se odnosi i na član 29 Uredbe 1215/2012 i član 20 Uredbe Brisel II ter. Sud će samo u rijetkim slučajevima moći da sazna činjenicu da je pokrenut drugi postupak, zbog čega se zahtijeva aktivan odnos stranaka i da ukažu sudu da je pokrenut postupak pred drugim sudom. Pasivan odnos stranaka i donošenje odluke u kasnije pokrenutom postupku ne dovodi u pitanja javni poredak države u kojoj se traži priznanje sudske odluke. Javni poredak nije niti će biti određen već predstavlja sveukupnost normi u jednoj državi koje treba tumačiti u međusobnoj vezi. Opće je prihvaćeno da su stavovi o značenju javnog poretka i njegovoj primjeni najbolje sažeti u preporukama sadržanim u „Završnom izvještaju o javnom poretku kao prepreci za izvršenje međunarodnih arbitražnih odluka“ Komiteta za međunarodnu trgovačku arbitražu Udruženja za međunarodno pravo, koji je prihvaćen na zasjedanju tog udruženja održanom u Nju Delhiju 2002. godine (Sikirić 2009, 228). Smatra se da procesni javni poredak obuhvata dva temeljna zahtjeva, načela (Sikirić 2001, 64). Prvi je „poštovanje prava na odbranu ili načelo kontradiktornosti“ (Fouchard [1996] Droit international privé, t. 1652, 972, u: Sikirić 2001, 64). Drugi je „načelo jednakosti stranaka“

38 Uredba Brisel II ter, član 30 stav 1.

39 Uredba 2201/2003, član 21 stav 1.

40 Presuda Suda EU od 16. 1. 2019, Stefano Liberato, Luminite Luise Grigorescu, ECLI:EU:C:2019:24, para. 56.

(Fouchard [1996] Droit international privé, t. 1652, 972, u: Sikirić 2001, 64). Za ostvarenje tog drugog načela dovoljno je da se poštuje opća ravnoteža i da se svakoj stranci pruži jednaka mogućnost da korisno izloži svoje argumente (Fouchard [1996] Droit *international* privé, t. 1652, 972, u: Sikirić 2001, 64). Sama činjenica da je odluku donio sud pred kojim je kasnije pokrenut postupak nije u suprotnosti sa tim zahtjevima. Tumačenje da u navedenom slučaju iz prakse postoji povreda javnog poretka značilo bi previše široko tumačenje javnog poretka i njegovu primjenu na veliki broj slučajeva, što bi u velikoj mjeri uticalo na priznanje stranih sudskih odluka.

9. ZAKLJUČAK

Mogućnost zaključenja sporazuma o izboru suda u stvarima povezanima s roditeljskom odgovornošću značajan je napredak ka većem značaju autonomije volje u porodičnom pravu.

Uredba Brisel II ter za normiranje formalnih uslova i pravnog djelovanja sporazuma o izboru suda ima uzor u Uredbi 1215/2012, čiji je predmet nadležnost u građanskim i trgovačkim stvarima i u njoj su sadržane norme koje predstavljaju proizvod višedecinijskog iskustva započetog Briselskom konvencijom iz 1968. godine. Ta činjenica sugeriše da će Uredba Brisel II ter imati uspjeh u praksi, s obzirom na to da se zbog kratkog perioda primjene ne mogu analizirati njeni rezultati u praksi. Prema Uredbi Brisel II ter sporazum o izboru suda sastavlja se u pisanom obliku, s datumom i potpisom dotičnih stranaka ili se zaključuje na zapisnik pred sudom u skladu s nacionalnim pravom i postupkom, a sva priopćenja elektronskim sredstvima koja osiguravaju trajan zapis istovjetna su „pisanom obliku". Osim izričitog zaključenja sporazuma, moguće je ugovaranje nadležnosti i konkludentnim radnjama stranaka. Osobe koje postanu stranke u postupku nakon što je pred sudom pokrenut postupak mogu izraziti svoju saglasnost nakon što je pred sudom pokrenut postupak, a ne izraze li protivljenje, smatrat će se da su prešutno dale saglasnost.

Značajno pitanje je i način ostvarivanja sporazuma i mogućnost jedne od ugovornih strana da ne postupi prema sporazumu. Slučaj *Erich Gasser GmbH protiv MISAT-a SRL* ukazao je na nedostatke pravila za litispendenciju i potrebu izmjene tih pravila kako bi se ostvarila ugovorna volja stranaka. U tom slučaju sud je dao prednost ranije pokrenutom postupku u odnosu na postupak pred sudom čija je nadležnost bila ugovorena, čime nije ispoštovana volja stranaka u sporazumu o izboru nadležnog suda. Uredba Brisel II ter slijedila je rješenja Uredbe 1215/2012 i ugovorenoj nadležnosti

dala karakter isključive nadležnosti kojoj je dužan dati prioritet svaki drugi sud pred kojim se pokrene parnični postupak. Svaki sud druge države članice oglašava se nenadležnim u korist suda čija je nadležnost ugovorena.

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AGREEMENT ON COURT JURISDICTION PURSUANT TO BRUSSELS II TER REGULATION AND ITS IMPACT ON THE JURISDICTION OF OTHER COURTS

Summary

The paper discusses the form of the agreement on the choice of court according to Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial disputes and the matters related to parental responsibility and on international child abduction (amendment) and impact agreement to the jurisdiction of other courts. The specificity of this agreement is the possibility of choosing a court in matters of family law, which was not previously possible. The goal of the study is to analyse the formal conditions for the validity of the agreement and to indicate its implementation in practice. The findings of the study showed the ways that the agreements on the choice of the competent court are concluded, and how to ensure their legal effect towards all courts in the European Union, i.e. their influence on the rules of *lis pendens*.

Key words: *Jurisdiction*. – *European Union law*. – *Family law*. – *Agreement of the court of choice*. – *Lis pendens*.

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ŠTA JE „AUTOPLAGIJAT"?

U današnjoj klimi pojačane društvene pažnje u vezi sa plagijarizmom, u globalnoj akademskoj zajednici se kao poseban oblik etički problematičnog ponašanja sve češće označava i praksa autoplagiranja. Ako se za plagijat i može reći da je bio predmet podrobnih pojmovnih analiza, to nije slučaj sa autoplagijatom. Ovaj kratak osvrt ima za cilj pokušaj te vrste. Polazeći od odredbe čl. 25 Kodeksa profesionalne etike Univerziteta u Beogradu, razmatraju se najbitnija obeležja ovog akademskog etičkog prestupa. U preduzetoj pojmovnoj analizi se utvrđuje da se tvorac Kodeksa opredelio da inkriminiše kao etički neprihvatljivu samo užu praksu „duplog objavljivanja" (duplicate or dual publication). Zaključuje se da i u slučaju pribegavanja takvoj praksi ne može biti govora o etičkom prekršaju autoplagiranja ako autor jasno naznači da ponovo objavljuje/upotrebljava vlastiti ranije objavljeni ili na drugi način iskorišćeni rad, odnosno delove rada.

Ključne reči: *Plagijarizam. – Autoplagijat. – Duplo objavljivanje. – Tekstualno recikliranje. – Akademsko napredovanje*.

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1. Uvod

Iako su još stari Rimljani reč *plagiarius*, koja je izvorno značila „otmičar", počeli da koriste za označavanje krađe intelektualne tvorevine,[1] ipak se tek naše doba može nazvati erom plagijarizma. Pozner primećuje da „plagijarizam privlači sve veću pažnju", premda nije posve jasno „da li je to zato što postaje sve češći, ili zato što njegove granice postaju nejasne i sporne, ili zato što se češće otkriva (digitalizacija je dovela do toga da ga je lakše počiniti ali i otkriti)" (Posner 2007, 9). Svedoci smo unekoliko protivrečnih trendova. S jedne strane, društva u etabliranim ustavnim demokratijama pokazuju nultu toleranciju prema slučajevima plagijarizma nosilaca državne vlasti i političara, pa su oni koji su uhvaćeni u tom etičkom prestupu primorani da podnesu ostavke usled velikog pritiska javnosti (vid. Kotkamp 2021).[2] S druge strane, nove generacije, koje odrastaju u digitalnom dobu, imaju drugačiji odnos prema sadržajima koji su im dostupni na mrežama i kojima pristupaju kao da ti sadržaji nemaju autora, što posledično utiče na njihovu

[1] Jedna od prvih upotreba vezuje se za čuvenog pesnika Marcijala, koji je živeo u 1. veku n. e. Njegovi epigrami su bili nadaleko poznati, pa su mnogi od njih kružili po Rimu i pre objavljivanja. Marcijal se, tako, suočio sa praksom da ih i drugi pesnici recituju bez naznačavanja autorstva. On pominje izvesnog Fidentina (*Fidentinus*) koji mu je preoteo delo i predstavljao ga kao svoje. Budući da u to vreme nije postojala mogućnost pravne zaštite, Marcijal je koristio stihove za odbranu autorstva (Maričić, Šajin 2019, 132 fn 22). Ovo su pomenuti stihovi: *Una est in nostris tua, Fidentine, libellis pagina, sed certa domini signata figura, quae tua traducit manifesto carmina furto*. „Ta knjiga što čitaš za svoje društvo, / sve su to stihovi moji. / Ali kad sričeš pa zapneš, uštvo, / izgledaju kao da su tvoji" (Marcijal 1990, 43).

[2] To se, nažalost, ne može reći za Srbiju. Nijedan od slučajeva optužbi za plagijarizam čiji su akteri visoki nosioci državnih funkcija nije rezultirao njihovim ostavkama. Štaviše, u najpoznatijem takvom slučaju, onom sadašnjeg ministra finansija, koji je više puta dobijao institucionalni ishod pred nadležnim etičkim organima Univerziteta u Beogradu, novi zamajac opštem trendu nekažnjivosti dala je skorašnja odluka Ustavnog suda Srbije (Odluka broj IUo-107/2020). U zaključnom delu Odluke kaže se „da je celovito uređivanje pitanja akademske čestitosti, a što svakako podrazumeva adekvatno sankcionisanje neakademskog ponašanja, od posebnog značaja ne samo za Univerzitet u Beogradu, već za društvo u celini, ali... upravo zbog demokratskog razvoja društva ova pitanja moraju biti uređena na ustavnopravno utemeljen način." Ostaje, međutim, pitanje da li je Ustavni sud svojim krajnje problematičnim rezonovanjem ostavio bilo kakav ustavnopravni prostor za ostvarenje proklamovanog cilja (više o Odluci u Jovanović, 2022, 28–29).

sposobnost da shvate etičku problematičnost plagijarizma (Gabriel, 2010). Na sve to se, kao poseban izazov, nadovezuje rapidan razvitak veštačke inteligencije koji dodatno otežava otkrivanje slučajeva plagijarizma.[3]

U toj i takvoj klimi pojačane društvene pažnje usmerene na plagijarizam, u globalnoj akademskoj zajednici se kao poseban oblik etički problematičnog ponašanja sve češće označava i praksa *autoplagiranja*. Ako se za plagijat i može reći da je bio predmet podrobnih pojmovnih analiza,[4] to nije slučaj sa autoplagijatom. Ovaj kratak osvrt ima za cilj pokušaj te vrste. Praktični značaj takve analize se ogleda u jasnijim smernicama koje bi fakultetska i univerzitetska etička tela imala u slučaju postupanja sa zahtevima za utvrđivanje neakademskog ponašanja kada postoji osnovana sumnja da je rad drugog lica nastao kao rezultat autoplagijata.[5]

2. Autoplagijat – kratka pojmovna analiza

Autoplagijat je u našu pravno-etičku „orbitu“ ušao zahvaljujući članu 25 Kodeksa profesionalne etike Univerziteta u Beogradu.[6] Tom odredbom se ustanovljava zabrana „autoplagiranja“ a taj prekršaj definiše kao „ponovno objavljivanje svog ranije objavljenog rada ili za drugu svrhu iskorišćenog rada kao novog i originalnog“. Autoplagiranje ne samo što je posve nov etički prekršaj u našoj akademskoj zajednici već, kao što to primećuje jedan od autora koji se bavi tom problematikom, on predstavlja i „moralno eksplozivan pojam koji generiše pojmovnu konfuziju“. I premda se, s obzirom na njegovu povezanost sa pojmom plagiranja u užem smislu, može „učiniti korisnim“ utoliko što „kao strašna reč“ odvraća moguće prekršioce, pojam autoplagiranja ima i potencijal da „na nediskriminatoran način i katkad bespotrebno pripisuje krivicu“ (Andreescu 2013, 796).

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[3] Nedavno je objavljen naučni rad pod naslovom „Chatting and Cheating: Ensuring Academic Integrity in the Era of ChatGPT“ (Cotton, Cotton, Shipway 2023), u kojem se opisuje kako alati za veštačku inteligenciju (AI) „pokreću brojne izazove i brige, posebno u vezi sa akademskom čestitošću i plagijatom“. Međutim, ni čitaoci, a ni recenzenti koji su rad odobrili za objavljivanje, nisu znali da je sam rad napisao kontroverzni AI četbot ChatGPT (Fazackerley 2023).

[4] Najpodrobnija analiza te vrste na našem jeziku može se naći u Vodinelić 2015, 126–200.

[5] Vidi, čl. 3 st. 1 Pravilnika o postupku utvrđivanja neakademskog ponašanja u izradi pisanih radova, *Glasnik Univerziteta u Beogradu* 193/16. Izmene objavljene u *Glasniku Univerziteta u Beogradu* 196/16, 197/17, 199/17 i 203/18.

[6] *Glasnik Univerziteta u Beogradu* 193/16.

Zbog toga je važno pokušati da se izbegne ta konceptualna zbrka. U literaturi se na tu temu uobičajeno govori o dva glavna oblika autoplagiranja. Prvi je „praksa objavljivanja onoga što je suštinski isti rad u dva ili više časopisa“ (*duplicate or dual publication*). Drugi oblik autoplagiranja postoji kada „autor iznova koristi neke delove ranije objavljenog rada u novoj publikaciji“ (*redundant publication*) (Roig 2005, 43). Taj drugi oblik se naziva i „tekstualno recikliranje“ (*textual recycling*), za koji se još kaže da „izaziva protivrečne reakcije... delom zbog toga što pripada oblasti akademske prakse u kojoj postoje očite disciplinarne razlike. Posebno kada se uporede humanističke i tzv. ‘tvrde’ nauke, mogu se pronaći neke suptilne razlike u pogledu normi citiranja i navođenja“ (Bruton 2014, 184).[7] Zbog toga se na „tekstualno recikliranje“ „uobičajeno gleda kao na etički ‘sivu zonu’, sa mnogo prihvatljivih i tolerabilnih postupaka“ u procesu pisanja naučnih radova (Andreescu 2013, 778).

Valja, najzad, biti potpuno svestan činjenice da se u globalnoj akademskoj zajednici o autoplagiranju kao etički problematičnoj naučnoj praksi raspravlja gotovo isključivo u oblasti biomedicinskih i tehničkih nauka, u kojima su članci u časopisima dominantan vid naučnog rada; u kojima je praksa potpisivanja velikog broja koautora na isti rad izuzetno raširena; u kojima se naučna istraživanja, koja su osnov za naučne radove, često obavljaju u komercijalne svrhe, pa se otvara i pitanje prava intelektualne svojine. Međutim, jedno se čini izvesnim – i u pomenutim naučnim disciplinama će se ponovno korišćenje ranije objavljenog rada „smatrati prihvatljivim – kada je podložno obznanjivanju (*disclosure*) (urednicima, koji treba da donesu na-informacijama-zasnovanu odluku), navođenju (*referencing*)... i kada je isključena povreda autorskih prava“ (Andreescu 2013, 777–778). Isti principi – a to je posebno značajno za humanističke nauke – važiće i „kada je članak preštampan u nekoj drugoj vrsti izdanja (kada autor ponovo upotrebljava svoj članak kao poglavlje u knjizi)“ (Andreescu 2013, 778 fn 3).

Na osnovu svega rečenog postaje jasno da je zajednički imenitelj za etički neprihvatljivu praksu plagiranja i autoplagiranja to što se „u oba slučaja primarna povreda tiče prevarnog i lažnog prikazivanja (*deceptively misrepresenting*) nečega kao drugačijeg od onog što jeste“ (Bruton 2014, 178). Svima koji se bave tom problematikom jasno je, međutim, da je odgovornost isključena kada uslov prevarnog i lažnog prikazivanja nije ispunjen. Pa tako, Braton kaže: „Naravno, kada se obezbedi odgovarajuće navođenje, autoplagiranje više nije tema“ (Bruton 2014, 186). Andresku

[7] Na primer, praksu korektnog *verbatim* navođenja celog paragarafa iz tuđeg rada, koja je uobičajena u humanističkim naukama, „uobičajeno izbegava većina autora i urednika biomedicinskih časopisa“ (Roig 2015, 49).

slično napominje da je „autoplagiranje problem samo ako autor propusti da verodostojno obznani raniju publikaciju ili ponovnu upotrebu. Ako autori to učine, pokriveni su i u pravnom i u moralnom pogledu“ (Andreescu 2013, 796). Najzad, Roig, autor najopsežnije i najcitiranije naučne studije o plagiranju i autoplagiranju, u istom tonu zaključuje da „svako treba da bude slobodan da uz odgovarajuće navođenje i citiranje ponovno upotrebljava svoj raniji rad“ (Roig 2015, 26).

Ako se sada pažljivo protumači odredba čl. 25 Kodeksa profesionalne etike Univerziteta u Beogradu, uočava se da se njegov tvorac opredelio da inkriminiše kao etički neprihvatljivu samo užu praksu „duplog objavljivanja“ (*duplicate or dual publication*). Naime, „ranije objavljen ili za drugu svrhu iskorišćen rad“ može se objaviti kao „nov i originalan“ *prevashodno ako po svojoj formi i obimu pripada istoj vrsti naučnog rada*. Teško je zamisliv – s obzirom na uobičajene akademske i izdavačke uzuse o dužini teksta – čak i pokušaj da se ranije objavljen naučni članak objavi, na primer, kao „nova i originalna“ monografija.[8] Primeri „duplog objavljivanja“ koji bi mogli biti kvalifikovani kao autoplagijati su: kada autor u više publikacija (časopisa, zbornika) objavi isti rad (kao članak, poglavlje); kada autor isti rad u više publikacija objavi pod različitim naslovima; kada autor već objavljen rad na jednom jeziku ponovo objavi na drugom jeziku. U svim tim slučajevima ključno je da je *izostala naznaka da je reč o već objavljenim tekstovima*. Odnosno, pravila dobre naučne prakse krše se samo u onim slučajevima „u kojima je suštinski identičan originalni rad već objavljen, a da se na njega u isto vreme ne poziva“ (Gamper 2009, 10).[9]

Govoreći o plagijarizmu, Pozner uočava jedno važno obeležje koje se često previđa: „Čitaocu mora *da bude stalo* do toga da li je prevaren o autorskom identitetu kako bi obmana prešla granicu i postala prevara, odnosno predstavljala plagijat“ (Posner 2007, 20). On navodi primere u kojima se autorstvo dela pripisuje određenim licima, iako se zasigurno zna ili se u najvećem broju slučajeva može pretpostaviti da oni nisu tvorci tih dela. Prvi primer su tzv. pisci iz senke (*ghost writers*), koji su stvarni tvorci autobiografskih dela na čijim se koricama kao autori navode neke slavne

[8] U našoj akademskoj sredini nije uobičajeno da časopisi u društveno-humanističkim naukama, pa i u oblasti prava, objavljuju stotinak strana duge priloge, koji bi se, načelno, mogli docnije štampati i kao monografije. To, međutim, nije slučaj u nekim drugim akademskim sredinama (npr. američkoj), u kojima članci te dužine nisu retkost u određenim časopisima (npr. *Harvard Law Review*, *The Yale Law Journal*, *California Law Review*).

[9] „Autoplagijat (*Selbstplagiat*) je ponovna upotreba sopstvenog naučnog rada (ili njegovih delova) bez ikakvog pozivanja na originalni rad“ (Meinel 2013; tako i Vodinelić 2015, 135).

ličnosti iz sveta estrade, sporta ili politike. Drugi primer je iz sveta prava. Naime, sudske odluke su često proizvod rada sudijskih pomoćnika. Osim toga, presude neretko sadrže i čitave pasuse koji su *telle quelle* preuzeti iz podnesaka stranaka. Sve to ne sprečava sudije da na kraju tih presuda stave vlastito ime. Pa ipak, u tim slučajevima se niko od čitalaca/stranaka ne oseća prevarenim i ne pokreće pitanje plagijata, naprosto zato što im *nije stalo* ko tačno stoji iza tih dela (Posner 2007, 20–25).

Stvari stoje posve drugačije sa naučnom produkcijom. Ona se danas u akademskom svetu po pravilu vezuje za neki konkretan cilj – stručno i univerzitetsko napredovanje. Otuda je onima koji čitaju – recenziraju i/ili ocenjuju – neko naučno delo *stalo* do toga da se otkloni svaka sumnja u *autorstvo* dela. Povrh toga, takvu sumnju treba otkloniti i u pogledu toga da li je ono što autor objavljuje uistinu *novo* delo. Zbog toga, *kvalifikovanje jednog postupka kao etičkog prekršaja „autoplagiranja" treba strogo odvojiti od ocene o (ne)ispunjenosti propisanih uslova za akademsko napredovanje*. Potencijalni problem je to što je u oba slučaja reč o sudu o tome da li jedan rad ima obeležja „novog" rada.[10] Ako autor izričito navede da je delo koje objavljuje (kao članak ili poglavlje u nekom uređenom zborniku) ranije već objavljivano (na drugom mestu, pod drugim naslovom, na drugom jeziku), ono se za potrebe postupka utvrđivanja etičke odgovornosti ima ceniti kao „novo" delo. Odnosno, u datim okolnostima, „duplo objavljivanje" se ne može kvalifikovati kao etički prekršaj autoplagiranja. To, međutim, ne znači da će pod istim uslovima pomenuto, „duplo objavljeno" delo biti vrednovano i kao „novo" u smislu uslova za akademsko napredovanje. Ocena u potonjem slučaju zavisiće od drugih, kvantitativno-kvalitativnih naučnih merila i standarda.

Zoran Tomić uočava da su u tom kontekstu moguće različite korelacije sudova o neetičkom postupanju (autoplagiranju) i naučnom vrednovanju za potrebe akademskog napredovanja: „a) ako je nešto već staro lažno podastrto kao novo, a njegov odnos prema onom doista novom je kvantitativno ili/i kvalitativno dominantan – tada je reč o autoplagiranju; b) ako je staro neistinito predstavljeno kao novo, a po nespornom stručnom sudu ono što

[10] To što se u Etički kodeks uvodi pojam „originalnosti" u vezi sa prekršajem autoplagiranja samo doprinosi konceptualnoj konfuziji. Naime, prema našem Zakonu o autorskim i srodnim pravima (*Službeni glasnik RS* 104/2009, 99/2011, 119/2012, 29/2016 – odluka US i 66/2019): „Autorsko delo je originalna duhovna tvorevina autora" (čl. 2 st. 1). To znači da se „originalnost" povezuje sa autorstvom, pa su svi radovi jednog autora, nezavisno od njihovih drugih kvaliteta, uključujući i to da li se mogu označiti kao novi ili ne, „originalni" u smislu Zakona. Iz toga sledi da i radovi koji se u smislu Etičkog kodeksa mogu kvalifikovati kao „autoplagijati" – utoliko što su prevarno prikazani kao „novi" – jesu „originalni" radovi datoga autora.

je doista novo/originalno dominira – i kvantitativno i kvalitativno – spram starog, smatram da nema autoplagijata; v) ako je staro legitimno označeno kao korišćeno, a ono novo, do tada nekorišćeno je inferiorno, bespogovorno ekspertski utvrđeno kao takvo – kvalitativno ili/i kvantitativno – spram ranije objavljenog, nije reč o autoplagiranju, ali ni o radu koji se može bodovati kao novi i doneti neku privilegiju autoru; g) ako je ono što je staro u jednom tekstu tačno označeno kao već objavljeno – navedeno istinito kao takvo – a novi odlomak je uveliko preovlađujući, bilo kvantitativno, bilo (i) kvalitativno (stvarno originalno štivo, doprinos po kvalifikovanom mišljenju!) – nema govora o autoplagiranju“ (Tomić 2020).

Zbog toga se između dva različita suda o tome da li jedan rad ima obeležja „novog“ dela uspostavlja sledeća *logička korelacija: dok sve ono što se u smislu Etičkog kodeksa okvalifikuje kao „autoplagijat“ ne može biti ni vrednovano za potrebe naučnog napredovanja, obrnuto ne važi – sud o tome da neki „duplo objavljeni“ rad za potrebe napredovanja ne zaslužuje da se iznova vrednuje ne implicira nužno da je reč o autoplagijatu.*[11]

Čak i kada bi se pribeglo širem tumačenju odredbe čl. 25, prema kojem bi inkriminisan bio i postupak „tekstualnog recikliranja“ – pa bi kažnjivo bilo i „ponovno objavljivanje svog ranije objavljenog rada ili za drugu svrhu iskorišćenog rada [npr. članka] kao [dela] novog i originalnog“ naučnog rada, npr. monografije – i tada bi odlučujuće konstitutivno obeležje etičkog prekršaja autoplagiranja bilo to da je autor na prevaran način celinu ili delove rada prećutno i bez navođenja integrisao u novo naučno delo.[12]

3. Zaključno slovo

Etički pravilnici na Univerzitetu u Beogradu su najvećma zasnovani na tekstu Osnova za kodeks o akademskom integritetu na visokoškolskim ustanovama u Republici Srbiji, koji je Nacionalni savet za visoko obrazovanje

[11] Iz takve logičke korelacije dva suda mogao bi se izvesti zaključak da pitanje da li je neki rad „novo“ delo u smislu Etičkog kodeksa, koje se može javiti u postupku autorovog (re)izbora u akademsko zvanje, treba tretirati kao *prethodno pravno pitanje* na koje treba da odgovori nadležni etički odbor. Prema važećim univerzitetskim propisima to, međutim, nije slučaj.

[12] U jednoj studiji na tu temu se kaže: „Komplikovanije pitanje određivanja odgovarajuće ponovne upotrebe teksta u akademskom izdavaštvu javlja se tamo gde autori nastoje da usavrše ili doteraju prethodno objavljeni rad.“ Autori studije, međutim, staju na stanovište da i u tim slučajevima nema neetičkog ponašanja ako se da jasna napomena o prethodno objavljenom radu (Bretag and Mahmud 2009, 195).

doneo 2016. godine.[13] U tač. 22 se nalazi definicija autoplagiranja, koja je skoro u celini preuzeta u čl. 25 Kodeksa profesionalne etike Univerziteta u Beogradu. Razlika je u sledećem – poslednji deo teksta iz tač. 22. Osnova, u kojem se precizira da se bitno obeležje neetičkog postupka sastoji u tome što „nije izričito navedeno da je u pitanju već objavljen ili za drugu svrhu iskorišćen rad", tvorac Kodeksa je izostavio, očigledno smatrajući da to dovoljno jasno proizlazi iz pređašnje definicije autoplagiranja. U svetlu svega rečenog, ta intencija tvorca Kodeksa da se rukovodi nomotehničkim principom jezičke ekonomije ne menja ništa u krajnjem zaključku – prema postojećoj pravnoj regulativi etičke odgovornosti na Univerzitetu u Beogradu, *ne može biti govora o etičkom prekršaju autoplagiranja ako autor jasno naznači da ponovo objavljuje/upotrebljava vlastiti ranije objavljeni ili na drugi način iskorišćeni rad, odnosno delove rada*.

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WHAT IS SELF-PLAGIARISM?

Summary

In today's era of heightened sensitivity to plagiarism, self-plagiarism is gaining recognition as a distinct ethical concern within the global academic community. While plagiarism has undergone detailed conceptual analysis, the same cannot be said for self-plagiarism. This concise review seeks to address this gap by examining key aspects of this academic ethical issue, as outlined in Article 25 of the Code of Professional Ethics at the University of Belgrade. Through this conceptual analysis, it becomes apparent that the Code specifically condemns the narrower practice of "duplicate or dual publication" as ethically unacceptable. It is clear that self-plagiarism does not occur when an author transparently acknowledges their intention to republish or reuse their previously published or utilized work, including its constituent parts.

Key words: *Plagiarism. – Self-plagiarism. – Double publication. – Textual recycling. – Academic advancement.*

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Dr Zoran S. MIRKOVIĆ**

OSNIVANJE I POČECI ČASOPISA ANALI PRAVNOG FAKULTETA U BEOGRADU

Nakon što mu je 1946. godine oduzet *Arhiv za pravne i društvene nauke*, Pravni fakultet Univerziteta y Beogradu bio je punih sedam godina bez svog časopisa u kome bi nastavnici i asistenti imali priliku da objavljuju svoje naučne i stručne radove. U to vreme se rodila ideja o pokretanju novog fakultetskog časopisa – *Anala Pravnog fakulteta y Beogradu*. Sledi ukratko ispričana istorija njegovog nastanka.[1]

Na sednici Saveta Pravnog fakulteta održanoj 1. jula 1948. godine, pod tačkom četiri dnevnog reda – izvršenje plana rada za 1948. godinu, profesor Jovan Đorđević i docent Radomir Lukić su ukazali da nije ni započet rad na

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zborniku naučnih radova nastavnika Pravnog fakulteta. Prethodno je bio izabran Odbor za zbornik, koji je sada bio pozvan da se aktivira i „da se ispuni ova kolektivna obaveza u određenom roku“.[2] Vredi zabeležiti da je te godine objavljen prvi broj *Zbornika Pravnog fakulteta u Zagrebu*, što je moguće bio dodatni podsticaj da se članovi Odbora podsete dužnosti koja im je poverena.

To pitanje je, međutim, ponovo pokrenuto tek na sednici Saveta Pravnog fakulteta održanoj 20. novembra 1951. godine. Tada je bio razmatran izveštaj Odbora za izdavanje zbornika naučnih radova nastavnika Pravnog fakulteta. Taj izveštaj je podneo prodekan R. Lukić, u međuvremenu unapređen u zvanje vanrednog profesora. Prema njegovom mišljenju, zbornik ne bi trebalo izdavati jer radovi nisu na onom nivou koji bi Fakultet „mogao i trebalo da dá“. Pomenuo je i da postoje materijalne teškoće za njegovo izdavanje. Potom je uzeo reč profesor Borislav Blagojević, koji je izneo stav da bi, umesto pomenutog zbornika, Pravnom fakultetu trebalo vratiti časopis *Arhiv za pravne i društvene nauke* jer ga je Udruženje pravnika bez ikakvog osnova uzelo od Fakulteta. Predložio je da Savet donese odluku o vraćanju Arhiva. Dekan Mihailo Konstantinović je raspravu o tom pitanju odgodio za neku od narednih sednica.[3]

Rasprava o vraćanju časopisa *Arhiv za pravne i društvene nauke* Pravnom fakultetu vođena je na sednici Saveta održanoj 29. decembra 1951. godine. Dekan M. Konstantinović je rekao da izveštaj Odbora za izdavanje zbornika „obuhvata dva pitanja: 1) pitanje izdavanja zbornika Pravnog fakulteta i 2) izdavanje jedne periodične publikacije od strane Fakulteta u vezi sa predlogom prof. Blagojevića o vraćanju ’Arhiva za pravne i društvene nauke’ pod okrilje Fakulteta“. Najpre je R. Lukić izneo stav Odbora za izdavanje zbornika da se prikupljeni materijal, ako ne može da se objavi zbornik, „izda kao neka povremena publikacija“. B. Blagojević je ponovio svoj predlog za preuzimanje *Arhiva za pravne i društvene nauke* i rekao da za to postoje „i lični i materijalni uslovi“. Posle duže diskusije u kojoj je naročito naglašena potreba da se stupi u kontakt s Udruženjem pravnika FNRJ u vezi sa tim pitanjem, Savet je odlučio da se diskusija o ovoj tački nastavi na idućoj sednici.[4]

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2 Arhiv Pravnog fakulteta, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1947–48*, Zapisnik sa sednice od 1. jula 1948. godine.

3 APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1951–52*, Zapisnik sa sednice od 20. novembra 1951. godine.

4 APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1951–52*, Zapisnik sa sednice od 29. decembra 1951. godine.

Na sednici Saveta od 3. januara 1952. godine dekan je otvorio diskusiju o toj tački dnevnog reda rezimirajući sadržaj diskusije sa prethodne sednice. Dušan Jevtić, vanredni profesor, ukazao je na potrebu da fakultetski časopis postoji kako bi nastavnici i asistenti imali mogućnost da objavljuju svoje radove. J. Đorđević je smatrao da nije bitno ime časopisa nego hoće li se izdavati. B. Blagojević je, kao inicijator vraćanja *Arhiva za pravne i društvene nauke*, izneo sledeće činjenice: „'Arhiv' je posle oslobođenja pokrenut kao zajednički organ Pravnog fakulteta i pravničke organizacije koja se tada stvarala u našoj zemlji. Uredništvo se obrazovalo putem zajedničkog delegiranja. Fakultet ni jednog trenutka nije mislio da ustupi 'Arhiv' nego je nekoliko puta napominjano da je 'Arhiv' organ Fakulteta. I u prvom broju 'Arhiva' koji je izašao posle rata naglašeno je da je to nastavak ranijeg časopisa, pa je i numeracija nastavak ranije. Fakultet je mislio da će primanjem pomoći od strane drugih učiniti uslugu našoj zemlji a ne da se time odriče svog časopisa." Te znamenite reči profesora Blagojevića puna su istina o otimanju *Arhiva za pravne i društvene nauke* od Udruženja pravnika FNRJ; takav status *Arhiva* ostao je nepromenjen do današnjeg dana.

Honorarni vanredni profesor Leon Geršković, istaknuti funkcioner nove vlasti, ukazao je da u pogledu vraćanja Arhiva postoje „izvesni formalni elementi" (sic), da je *Arhiv* postao opštejugoslovenski časopis i da bi vraćanje Pravnom fakultetu „značilo korak unazad". On je smatrao „da nema realne mogućnosti za izdavanje dva pravna časopisa u Beogradu". L. Geršković, koji je voljom Partije došao na Pravni fakultet u Beogradu, očigledno nije imao sluha za tradiciju, organe i tela Fakulteta. Docent Andrija Gams je podsetio da je pre rata postojalo više pravnih časopisa u Beogradu i da je i „sada moguće izdavati dva i više časopisa". Smatrao je da okolnost da će časopis biti organ Fakulteta ne znači da neće imati jugoslovenski karakter. R. Lukić se vratio predlogu sa prethodne sednice da treba obrazovati jedan odbor koji bi ispitao mogućnosti izdavanja jedne publikacije. Docent Mihailo Jezdić je bio za to da se pitanje objavljivanja prikupljenog materijala razdvoji od pitanja vraćanja *Arhiva*. Sličnog je mišljenja bio i profesor Nikola Stjepanović, koji je smatrao da pitanje preuzimanja *Arhiva* ne može rešiti sâm Fakultet. L. Geršković i J. Đorđević su istakli teškoće koje postoje u vezi sa izdavanjem jednog časopisa. Ta dvojica profesora, po svemu što su rekli, nisu bili skloni vraćanju *Arhiva* pod okrilje Pravnog fakulteta. J. Đorđević je bio i glavni i odgovorni urednik *Arhiva za pravne i društvene nauke*, što je i ostao do smrti.

Na kraju je prof. B. Blagojević, pošto njegov predlog nije podržan, povukao predlog o preuzimanju *Arhiva za pravne i društvene nauke*. Nažalost, ni upornost ni argumentacija profesora Blagojevića, koja je bila neupitna i nesporna, nisu pomogle da se *Arhiv* vrati svome osnivaču – Pravnom fakultetu. Spoljne sile, oličene u Udruženju pravnika FNRJ, koje je formirano

da bi držalo pod državno-partijskom kontrolom veoma važnu pravničku profesiju, bile su jače od Pravnog fakulteta i njegovih profesora, naročito predratnih, na koje se, po pravilu, gledalo sa nepoverenjem.

Zaključujući raspravu, dekan M. Konstantinović je predložio, a Savet usvojio, da se obrazuje jedan odbor „koji bi ispitao sve mogućnosti za izdavanje jedne periodične publikacije od strane fakulteta". U Odbor su ušli redovni profesor Miloš Radojković, vanredni profesor Dušan Jevtić, docenti Dragoslav Janković, Dragomir Stojčević i Andrija Gams i asistent Dragoslav Avramović.[5]

Na sednici Saveta Pravnog fakulteta održanoj 18. decembra 1952. godine, pod tačkom pet dnevnog reda, razmatrano je pitanje pokretanja fakultetskog časopisa. Pročitan je Izveštaj Komisije (Odbora) za časopis Pravnog fakulteta koji je sadržao predloge o pokretanju časopisa. Posle duže diskusije, u kojoj su učestvovali profesori M. Konstantinović, J. Đorđević, M. Radojković i M. Žujović i docenti D. Stojčević, M. Jezdić, A. Gams i D. Janković, Savet je doneo sledeće zaključke:

„1) Potrebno je početi sa izdavanjem fakultetskog časopisa u toku 1953. godine.

2) Treba preduzeti sve mere da se obezbede potrebna materijalna sredstva za izdavanje ovog časopisa. U vezi sa ovim redakcioni odbor će izraditi potrebne kalkulacije.

3) Časopis će izlaziti tri-četiri puta godišnje, i to na sedam-osam štampanih tabaka.

4) Pitanje naziva časopisa biće kasnije diskutovano i o tome doneta odluka."

5) U redakcioni odbor časopisa izabrani su profesori M. Konstantinović, J. Lovčević, M. Radojković, B. Blagojević i R. Lukić, docenti D. Janković i A. Gams i honorarni docent N. Srzentić. Za sekretara je izabran asistent D. Avramović.

6) O eventualnom angažovanju jednog honorarnog službenika za potrebe obavljanja poslova u vezi sa časopisom trebalo je da bude naknadno odlučeno.

[5] APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1951–52*, Zapisnik sa sednice od 3. januara 1952. godine.

7) Predviđeno je da „autori članaka, članovi redakcije i drugi poslovi oko uređivanja časopisa budu honorisani“.[6]

Na sednici Saveta Pravnog fakulteta od 16. januara 1953. godine, prilikom primanja zapisnika sa prethodne sednice održane 18. decembra 1952. godine, u vezi sa tačkom pet dnevnog reda, prof. B. Blagojević je izjavio da na poslednjoj sednici nije mogao da ostane do kraja i zato nije mogao da izrazi neslaganje sa svojim izborom za člana redakcionog odbora fakultetskog časopisa. Zbog toga je zamolio Savet da bude oslobođen tog članstva. Kao glavni razlog on je naveo da je uvek smatrao i da i dalje smatra da časopis Pravnog fakulteta treba da nosi ime koje je uvek nosio – *Arhiv za pravne i društvene nauke*. Pošto je bilo neizvesno da će časopis moći da izlazi sa tim imenom, on je smatrao da ne može da učestvuje u radu redakcionog odbora tog časopisa. Osim glavnog razloga, naveo je i nekoliko manje važnih: da je previše zauzet, da se ne slaže da časopis izlazi tri-četiri puta godišnje nego smatra da treba da izlazi svakog meseca i najzad da u redakcionom odboru svakako treba da bude prof. J. Đorđević. Posle kraće diskusije, Savet je uvažio molbu prof. B. Blagojevića da se oslobodi članstva u redakcionom odboru Pravnog fakulteta.[7]

Konačno, glavni i odgovorni urednik časopisa bio je prof. Mihailo Konstantinović, a članovi redakcije redovni profesori Jovan Lovčević i Miloš Radojković, vanredni profesor Radomir Lukić, docenti Dragoslav Janković i Andrija Gams, honorarni docent Nikola Srzentić i asistent Dragoslav Avramović. Usmeno fakultetsko predanje kazuje da je prof. Konstantinović nadenuo časopisu i ime – *Anali Pravnog fakulteta y Beogradu*. Ime, često i nepretenciozno, imalo je da ukaže da se u časopisu beleže postignuća iz nauke, struke i nastave na Pravnom fakultetu y Beogradu, u zemlji, ali i šire. Sledeći najbolje tradicije *Arhiva*, i *Anali* su bili i ostali „časopis za pravne i društvene nauke“.

U pomenutom sastavu redakcija je radila 1953. godine. Od prvog broja 1954. pa do prvog broja (broj 1–2) 1960. godine sastav redakcije je izmenjen samo utoliko što su umesto Dragoslava Avramovića u redakciju ušli asistenti Dragaš Denković i Vladan Stanković.

U impresumu su bili dati sadržaj časopisa, sastav uređivačkog odbora, a na zadnjoj korici poruka pretplatnicima. Na unutrašnjem delu zadnjih korica prvog broja Anala bilo je zapisano: „Nezavisno od volje redakcije ovaj broj

[6] APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1952–53*, Zapisnik sa sednice od 18. decembra 1952. godine.

[7] APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1952–53*, Zapisnik sa sednice od 16. januara 1953. godine.

izlazi sa zadocnjenjem od mesec dana. Redakcija se nada da će sva četiri broja predviđena za ovu godinu izaći do kraja decembra." Ovo je redak primer odgovornosti članova redakcije prema preuzetim obavezama.

Rubrike su bile: članci, diskusije, prilozi, međunarodni pregled (povremena rubrika), sudska praksa, prikazi, pregled časopisa, beleške, *in memoriam* i primljene knjige.

U prvom broju Anala članke su objavili: Milan Bartoš „Pravo Ujedinjenih nacija", Borislav T. Blagojević „Uporedno pravo – metod ili nauka", Andrija Gams „Svojina i imovina", Mehmed Begović „Utvrđivanje očinstva prema članu 26 Zakona o odnosima između roditelja i dece" i Dragomir Stojčević „*Exheredatio sui* u prvobitnom rimskom pravu".

U rubrici „Diskusija" Mihailo Stupar se bavio pitanjem organa starateljstva. Za rubriku „Sudska praksa" priloge su dali Mihailo Jezdić, Vladimir Kapor, Živomir Đorđević, Pavle Dimitrijević i Dragaš Đ. Denković. Borivoje Poznić, Vojislav Simović, Ljubica Kandić, Pava Konstantinović, Velimir Vasić i Predrag Mihailović prikazali su četiri strane i dve domaće (jugoslovenske) knjige.

U rubrici „Pregled časopisa" Smilja Avramov je napisala redove o *The American Journal of International Law*, Dragoslav Avramović o *Economic Journal*, Jovan Lovčević o *Finanzarchiv* i Milan Žujović o *Revue d'Economie Politique*.

U prvom broju *Anala* iz 1953. godine napisani su *in memoriae* za preminule profesore od početka Drugog svetskog rata do tog vremena. To su bili profesori: Mihailo Ilić i Đorđe Tasić, koje je umorio Gestapo na Banjici 1944, odnosno 1943. godine, Božidar V. Marković, koji je preminuo 1946. godine, Ljubomir Dukanac, koji se upokojio posle duge i teške bolesti 1949. godine, te Dragoljub Aranđelović, Relja Popović i Milan Todorović, koji su preminuli 1950. godine. Nije bilo teksta o Iliji Pržiću, koga su streljale nove vlasti odmah po oslobođenju Beograda u jesen 1944. godine.

U rubrici „Beleške" napisano je o doktorskim ispitima na Fakultetu, radu Katedre za građansko pravo sa međunarodnim privatnim pravom, radu Opšteg seminara za istoriju države i prava i pripremama za Petu interfakultetsku konferenciju pravnih fakulteta Jugoslavije. To su svedočanstva o aktivnom akademskom životu na Pravnom fakultetu u Beogradu.

Od 1953. do kraja 1960. godine izašlo je ukupno 28 svezaka *Anala*,[8] pri čemu su svake godine nominalno objavljivana po četiri broja. Redakcija je nastojala da objavljuje prvenstveno članke o aktuelnim pitanjima domaćeg pozitivnog prava, da u časopisu dobiju mesto teorijska pitanja domaćeg

[8] Godine 1953. izašle su tri sveske (br. 1, 2 i 3–4). Od 1954. do 1958. svake godine su izlazile po četiri sveske, 1959. tri (br. 1, 2 i 3–4), a 1960. godine dve (br. 1–2 i 3–4).

savremenog prava i analiza sudske prakse, ali su isto tako objavljivani članci iz raznih oblasti pravnih i društvenih nauka. Redakcija je često tražila od pojedinih autora da specijalno za *Anale* obrade određena aktuelna i najznačajnija pitanja.

Osim profesora i asistenata sa Pravnog fakulteta, doprinos časopisu su davali brojni drugi pravnici-teoretičari sa drugih pravnih fakulteta i instituta i pravnici-praktičari (sudije, javni tužioci, visoki državni činovnici, advokati i drugi).

U budžetu Fakulteta predviđana su sredstva za rad *Anala*. Tako je za 1954. godinu časopisu budžetom ukupno odobreno 1.402,261 dinara, da bi zbog povećanja cene hartije i grafičkih usluga taj iznos za 1955. godinu porastao na 2.200,000. Od pretplate i prodatih brojeva preko knjižara 1955. godine prihodovano je oko pola miliona dinara, sledeće godine je taj iznos nešto opao.

Administracija časopisa je vršila razmenu sa stranim i domaćim časopisima. Ta razmena je stalno povećavana. U 1956. godini izvršena je razmena sa 96 časopisa, od čega 28 domaćih i 68 stranih časopisa. Časopisi dobijeni razmenom predavani su fakultetskoj Biblioteci, čime su smanjivani izdaci Fakulteta za nabavku časopisa.[9]

Na sednici Fakultetske uprave od 17. marta 1955. godine odlučeno je da se o izveštaju o radu *Anala* diskutuje na Sekciji Pravnog fakulteta Udruženja univerzitetskih nastavnika, a ne na Fakultetskoj upravi.[10]

U prvom Statutu Pravnog fakulteta iz 1956. godine, u članu 121, propisano je: „Fakultet izdaje svoj časopis 'Anali Pravnog fakulteta'. Časopis uređuje urednik sa uređivačkim odborom, koje bira Uprava. Uređivački odbor je dužan da krajem svake školske godine podnose izveštaj Fakultetskoj upravi." Ista odredba je ponovljena i u članu 113. Statuta iz 1959, članu 238. iz 1961. i članu 192. iz 1967. godine.[11] Prema odredbama Statuta iz 1967. godine, časopis *Anali* je postao deo Centra za dokumentaciju i publikacije.

Na sednici Fakultetske uprave od 5. maja 1958. godine prof. J. Lovčević je u ime redakcije *Anala* izneo mišljenje da su „autorski honorari koji se isplaćuju za objavljene napise isuviše niski". Posle kraće diskusije Fakultetska uprava je donela odluku o povećanju honorara za tekstove objavljene u *Analima*

[9] APf, *Izveštaj o radu Pravnog fakulteta u Beogradu školske 1954/55, 1955/56 i 1956/57 godine*, 28–29.

[10] APF, *Zapisnik sa sednice Saveta Pravnog fakulteta u Beogradu u školskoj 1954–55*, Zapisnik sa sednice Fakultetske uprave od 17. marta 1955. godine.

[11] Statut Pravnog fakulteta, *1956*, 27; *1959*, 29; *1961*, 44; *1967*, 47.

od 1. januara 1958. godine, i to za članke 12.000–14.000 dinara, diskusije 12.000, priloge 6.000–9.000, sudsku praksu 12.000–14.000, prikaze knjiga 9.000–12.000, pregled časopisa 9.000–12.000 i beleške 6.000–9.000 dinara. Za rubrike za koje je bio predviđen autorski honorar od minimuma do maksimuma, visinu honorara je određivao glavni urednik. Istovremeno, glavnom uredniku je povećan honorar na 20.000, a sekretarima na 10.000 dinara, po izdatom broju.[12]

Na sednici Fakultetske uprave, od 19. septembra 1960. godine, razmatrana je molba prof. Konstantinovića da bude oslobođen dužnosti glavnog i odgovornog urednika časopisa *Anali*. U Zapisniku sa sledeće sednice Fakultetske uprave od 28. septembra 1960. godine stoji: „Na predlog dekana Fakulteta i diskusije Fakultetska uprava je odlučila da prihvati ostavku dr M. Konstantinovića na dužnosti glavnog i odgovornog urednika 'Anala', a da pitanje izbora novog odbora i urednika odloži za jednu od narednih sednica i da se prethodno prouči mogućnost proširene izdavačke aktivnosti Fakulteta. Ovom prilikom dr J. Đorđević (novi dekan – *autori*) zahvalio se dr M. Konstantinoviću da je svojim radom uspeo da 'Anale' digne na visok nivo, da su 'Anali' jedan od najbolje uređenih naših časopisa i izrazio svoje žaljenje zbog njegovog odlaska sa ove dužnosti.“[13] Broj 1–2/1960. poslednji je broj Anala koji je izašao pod uredničkom palicom profesora Konstantinovića. Od sledećeg broja (3–4/1960) časopis je uređivao honorarni redovni profesor Milan Bartoš.

Mihailo Konstantinović (1897–1982), vršeći dužnost prvog glavnog i odgovornog urednika Anala sedam godina, ostavio je neizbrisiv trag i u koncepciji i u stilu uređivanja fakultetskog časopisa. Otuda se *hom-mage*-u koji mu je časopis odao posvećujući mu poseban broj povodom stodvadesetpetogodišnjice rođenja krajem 2022. godine dodaje i ovaj prilog, koji podseća na osnivanje i početke objavljivanja *Anala Pravnog fakulteta u Beogradu*, važne događaje u istoriji Ustanove, neodvojive od ličnosti i dela profesora Konstantinovića.

[12] APF, *Zapisnik sa sednice Fakultetske uprave Pravnog fakulteta u Beogradu u školskoj 1957–58*, Zapisnik sa sednice od 5. maja 1958. godine.

[13] APF, *Zapisnik sa sednice Fakultetske uprave Pravnog fakulteta u Beogradu 1959–60*, Zapisnik sa sednica od 19. i 28. septembra 1960. godine.

/PRIKAZI

Letizia COPPO, PhD*

Gabriele Carapezza Figlia, Ljubinka Kovačević, Eleonor Kristoffersson (eds). 2023. *Gender Perspectives in Private Law*. Cham: Springer.

> "Studies of the world [...] that fail to take into account women's experience of that world are incomplete, and prevent us from having a greater repertoire of societal as well as individual choices."
>
> (Menkel-Meadow 1985, 42)

While, as we have been told since childhood, we should never judge a book by its cover, the front cover, along with the table of contents, can at first glance reveal how promising the book is and its inherent strengths. This is certainly the case for Springer's new *Gender Perspectives in Private Law*, edited by a professor of private law at LUMSA in Italy, a professor of labor law at the University of Belgrade in Serbia, and a professor of private and taxation law at Örebro University in Sweden.

The first strength of the book lies in the very fact that the editors – like the vast majority of the contributors – come from Europe and from different legal traditions. As it is well established, the feminist and gender

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theories applied to law were born in US law schools, where they have taken the proportions of true streams of legal thought – under the eloquent heading of "law &" movements (Monateri 2021, 273) – stemming from legal realism[1] and deconstructive legal theory.[2] This has resulted into a certain predominance of North American scholars – and consequently of the North American perspective – in the development of gender-sensitive legal theories.[3] European contributors soon started exploring the field, but rather unsystematically in comparison with their American predecessors, and without giving rise to a dedicated branch of legal theory.

This book marks a turning point in the trend, as it offers a mainly European – in the sense that will be explained later – but still plural perspective on private law and gender intersections, without forgetting the great debt to American contributions. Here, private law is conceived in a broad meaning that goes beyond the traditional categories of tort, property, contract, and family – beyond substantive law and beyond national law. One of the originality factors of the book is that it provides a gender-sensitive reading of subjects in which the connection between law and gender is rather unexplored: thus, in addition to contributions devoted to family law, tort law, property law and labor law, there is one contribution aimed at unearthing the gender issues hidden behind conflict private international law rules and there are two contributions devoted to the impact of gender on procedural rules and process pluralism.[4]

In the chapter Gender Issues in Private International Law, Mirela Župan and Martina Drventić suggest an interesting reflection on how the "blind" application of the conflict of law rules may lead to gender inequality, whenever the linking criteria refers to a country in which gender equality is not granted either at the formal or at the substantive level (e.g., in countries where women and men are not awarded the same inheritance rights), and

[1] Gray (1909), Holmes (1881), and Holmes (1897) can be considered to be the manifestos of the movement at issue. See Llewellyn (1931) for one of the most vivid accounts of the legal realist thought. For further discussions, see Radin (1931), Fuller (1934), and Burrus (1962). For a link between the movement in question and gender theories, see Quinn (2012).

[2] Derrida (1985), Balkin (1987). For a link between the deconstructive approach and gender studies, see Elam (2001).

[3] See, for example, Menkel-Meadow (1996; 2012). On more specific issues, see Bryan (1992), Girdner (1989), Grillo (1991), Lefcourt (1984), Regehr (1994), Woods (1985), Fineman (1988), Hart (1990), Lerman (1984), discussing criticisms of mediation as a remedy for domestic abuse, Willrich (1989).

[4] To get an idea of the variety of processes involved, see Menkel-Meadow (2020).

whenever it is a matter of enforcing a foreign decision acknowledging some institutions or practices that from a European perspective may be considered a threat to gender equality (e.g., surrogacy).

In connection with that, the contribution raises the issue of the relativeness of the concepts of public order or mandatory provisions as limits to the application of a foreign law or the enforcement of a foreign judgment. The complexity of this issue has increased following certain decisions of national courts, such as the one of the Italian Supreme Court on punitive damages awards,[5] which distinguishes between "national public order", as the limit for national courts regarding the application of national law, and "international public order", as the limit for national courts regarding the application of foreign laws and the enforcement of foreign decisions. In these respects, the contribution does not indulge in merely theoretical or methodological speculations but provides several concrete applications in gender-sensitive domains such as the celebration of marriage, the consequences of divorce, the issues of the bride's surname, transnational surrogacy, and child abduction.

In the chapter Gender Discrimination: Procedural Issues Between Procedural Autonomy, EU Provisions and Effectiveness of Judicial Protection, Cettina di Salvo re-reads the core general rules of civil procedure from a CJEU perspective, in the light of gender equality protection, applying the leverage of the rights to an effective remedy and effective judicial protection, enshrined in Article 47 of the EU Charter of Fundamental Rights and in Articles 6 and 13 of the European Convention on Human Rights. Namely, the authoress casts light on how victims of gender discrimination are more likely to have special difficulties in accessing justice, especially when such discrimination is also based on other risks factors (so-called multiple discrimination), and how an extension of the legal standing to competent associations and legal entities would facilitate gender litigation and discourage discrimination upstream.

Furthermore, the authoress investigates the difficulties that the victims of discrimination encounter in proving their claims (especially when based on the so-called indirect discrimination) due to a number of factors that hinder access to certain types of evidence, such as paychecks of male colleagues and structural informative asymmetry. Finally, the authoress discusses the topic of sanctions, and, above all, the never-ending issue of ensuring effective enforcement of court decisions ascertaining the existence of discriminatory conduct in cases where the appropriate remedy for the victim would be

[5] The full text of the decision, translated into English, is available in Coppo (2017).

the performance of a certain action by the wrongdoer, rather than mere compensation. Here, the procedural topic of *astreintes* is intertwined with the substantive question of whether, in cases of contractual discrimination, courts are empowered to compel the discriminating party to conclude with the victim the very contract that the discriminating party had refused on a gender basis, i.e., whether courts are entitled to issue an order that stands for the refused contract.[6]

In the chapter Gender Perspectives in Mediation, Jelena Arsić and Nevena Petrušić discuss the impact of gender on various stages of the mediation process, from the selection of mediators, the disclosure phase and the behind-the-table and across-the-table negotiations, to the style of mediation and its efficiency. The adopted perspective is double: on one side it is a study of the gender differences in the way in which the parties involved in the dispute select a mediator, interact with this latter, interact with their lawyers and with each other; and on the other side it is a study of how gender affects the way in which the mediator conducts the process. As far as the latter perspective is concerned, we should firmly retain the authoresses' warning: it is of utmost importance that the mediator analyzes the gender dynamics involved in the conflict when preparing the process and conducts this latter it in a way that allows the minimization of the risk of gender-related power imbalances.

Mediators can truly be impartial only if they become gender-responsive rather than opting out of gender. To that end, a gender-sensitive perspective would be a fundamental component in the education of mediators (but also negotiators, neutral evaluators, arbitrators, judges, etc.).[7] There is no doubt that mediation is only one of the possible "alternative" – or, better, "appropriate"[8] – processes that can be hosted by the iconic "multi-door courthouse",[9] but it is the most widespread in Europe. While awaiting the improvement and further diversification of the process pluralism in the European space, the readers can (and should) complete the picture with all the contributions by North American scholars that investigate the gender-

6 See Carapezza Figlia (2018), and for a specific focus on gender, Carapezza Figlia, Letizia (2023).

7 For a broader reflection on law and education, see Menkel-Meadow (2013).

8 Menkel-Meadow (2014).

9 See Sander (1976).

related emotional components that influence the parties' approach to litigation and the negotiation of conflicts, some of which have inspired the chapter under review.[10]

Not only does the book offer a picture of a rather unprecedented European perspective on law and gender, as above-illustrated, but it also offers it with an approach that aims to be exhaustive, i.e., to cover all the sensitive issues, at least from the standpoint of private law. If such an ambition of exhaustiveness is missed by the reader at first glance, it will be clearer as soon as the reader considers the entire context in which this book is placed. In fact, the book is not isolated, but is part of a book series (Gender Perspectives in Law) and of a broader project that envisages the building of a strategic partnership between universities, aimed at implementing gender-sensitive legal education for all present and future actors in the legal environment, whatever their profession may be.[11]

One of the several outcomes of the project has been the publication of a textbook, *Gender-Competent Legal Education*, by Dragica Vujadinovic, Mareike Fröhlich, Thomas Giegerich (eds.), which should be read together with *Gender Perspectives in Private Law*, as one supplements the others. While the textbook focuses on the issues raised by the impact of gender on all the traditional categories of private law and other branches of the law, the book under review recollects multiple perspectives of some more specific and hot topics related to the issue of gender in private law. While the textbook is the basis, this book is the complement, for it offers a more in-depth look into the issues that are perceived as important and sensitive by a multi-disciplinary and multi-country pool of jurists. It is for the purpose of making such issues (and the "plurality of feminist understandings of gender equality issues"[12]) emerge spontaneously, without any prior construction, that the book has been preceded by a call for papers open to professionals in the legal, political, sociological, and historical domains.

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10 The list is not exhaustive, but you may include Fisher, Shapiro (2005), Ryan (2005), and Menkel-Meadow (2006), which discusses the importance of what is called "transformative empathy".

11 The book series of which this volume is part, represents an added value to the project Erasmus+ Strategic Partnership in Higher Education, called New Quality in Education for Gender Equality - Strategic Partnership for the Development of Master's study Program "Law and Gender" (LAWGEM), co-funded by the EU's Erasmus+ program.

12 Vujadinović, Dragica, and Krstić, Ivana, Preface, V.

The result has been an enriching melting pot of methods, scientific approaches, cultural backgrounds, and legal traditions, capable of reflecting, without banalizations, the complexity of the context and the idea of "unity in diversity", which is one of the pillars of the European community.[13] A taste of it is offered, for instance, in the comparison between the four contributions devoted to labor law: Gender Perspective of Development of Labour Law, by Ljubinka Kovačević; Leading or Breeding; Looking Ahead: Gender Segregation in the Labour Market and the Equal Distribution of Family Responsibilities, by Mario Vinković; Legal Approaches to Protection Against Gender-Based Violence and Harassment at Work with a Particular Focus on the Situation in the Republic of North Macedonia, by Todor Kalamatiev and Aleksandar Ristovski; and Digital Work and Gender Equality, by Helga Špadina.

In Kovačević's contribution, the method is the one of an accurate and vivid diachronic analysis of the relationship between labor law and gender, ending with the adoption of a *de jure condendo* perspective that informs the reader of the issues still to be resolved by contemporary legal systems and the current trends in the development of labor law. The authoress skillfully combines those two methods with a "global law" approach, to the extent that she investigates the contribution that has been offered historically by international standards, and with a "philosophy of law" or "law & economics" approach, diving the gendered reading of labor law into the dimension of financial crisis and neoliberal policies.

The picture changes with Vinković's contribution, which deals with more specific issues – gender segregation in the labor market, regarding the equal distribution of family responsibilities – and essentially from the viewpoint of existing legislation and policies, above all with reference to Croatia. He also does not neglect to reflect upon future developments, with a look at Europe. Similarly, Kalamatiev and Ristovski's contribution offers an insightful account of the status of legislation against harassment in the workplace in North Macedonia (where we can also find a remedial approach) and combines it with a synchronic analysis of the situation in other countries and their respective attitudes towards the problem. It is interesting to note that the United States is among those other countries. A significant part is also devoted to the European Union.

Finally, Špadina's contribution adopts a learning-from-experience and problem-solving approach to look at the future; in fact, she analyzes the gender-related issues raised by the digitalization of work experienced during the COVID-19 pandemic to identify the pros and cons and suggest

[13] For an actualization, see Bieber, 2021.

workable solutions for a gender-friendly adjustment to the new context. The authoress is rather a pioneer in the field, from the perspective of law and gender, and one of the several interesting elements of her contribution is the reflection on the impact of gender on the new rights stemming from labor digitalization (e.g., the right to disconnect and not be "omni-available") and the European policies on work-life balance. Such an intersection between gender imbalances and digital vulnerability is unquestionably an added value of the contribution. Furthermore, the author does not neglect the International and European dimensions, since global problems (e.g., gender inequality and digital vulnerabilities) require global responses.

From a different angle, methodological issues are also crucial in the chapter by Rosemary Hunter (The Reproduction of Gender Difference and Heteronormativity in Family Law), where the authoress addresses the fundamental question of how family law participates "in the construction of gendered and sexual subjectivity" by engaging in a constant dialogue between the normative layer of family law and the heteronormative layer behind the scenes.

In other words, the authoress investigates how the wide range of "social and cultural norms attaching to relationships and the presumption that families should be formed through a male-female couple" influence the concrete application of the rules that family law provides regarding the establishment of legally recognized relationships, the attribution of legal parenthood, the post-divorce distribution of marital property, and the post-separation agreements on child custody and the allocation of parental functions. One of the merits of the contribution is the disenchanted and critical outlook of the authoress, who shows that the progress towards gender equality at the normative level may backfire due to the tendency of the heteronormative elements to replicate the same gender-imbalanced dynamics, adapted to the new context.[14] Again, the message to be retained is that gender equality does not mean gender neutrality, otherwise it would just remain a formal declaration of principle.

Relevant practical examples of how the "law in action" attempts to mitigate such discrepancy between formal gender equality and substantive gender equality, and how it could improve in doing that, can be found in Amalia Blandino Garrido's contribution (Compensation for Damages Suffered by

[14] The authoress' words are eloquent: "The march of gender neutrality in law (as in post-separation property division and parenting) can create disadvantages where background social inequalities continue to operate. And the march of inclusion in law (as in the extension of marriage and legal parenthood to same-sex couples) can entrench other exclusions or create new ones."

Women Performing Unpaid Domestic Works), and in Fuensanta Rabadán Sánchez-Lafuente's contribution (The Best Interests of the Child and Gender Perspective).

The first contribution offers a very accurate analysis of the evolution of European legal systems – also undertaken from a comparative perspective – on a rather delicate tort-law issue: whether , and under what conditions, the spouse/cohabitant who has wrongfully (completely or partially) lost his/her housework capacity should be entitled to compensation for such loss, how should the damages be calculated, and whether the other spouse/cohabitant should also be entitled to such compensation for the lost chance of contribution. In line with the premises, the authoress calls for a legislative intervention aimed at establishing policies capable of acting on the heteronormative level by promoting a gender-equal sharing of domestic tasks.

The second contribution also focuses on extremely delicate gender-related questions, namely, whether shared child custody would promote an effectively joint parental responsibility or be just a screen to hide pre-existing inequalities, and whether such a solution would be acceptable even in cases of endo-familial gender-based violence. The perspective is again one of comparative law and European law, and one of the merits of the contribution is a rich overview of case-law, primarily that of the European Court of Human Rights. Such an overview leads to the paramount conclusion that the attribution and allocation of parental responsibility should neither be related to gender nor to the persistence of a relationship between the parents, but to the mere biological or legal relationship with the child.

As apparent from the mentioned contributions, Europe is the focus of the book, but in a broad sense and not the exclusive one: in a broad sense, since the contributions include European countries, such as the United Kingdom, Serbia and the Republic of North Macedonia, which are not currently EU member States, and not the exclusive one, since the contributions include experiences that are extra-communitarian also from a geographical viewpoint, namely the Indian experience (Banerjee-Dube 2023). Such a diversion might appear eccentric and exotic, compared to the focus of the book, but ultimately it does perfectly fit with it, as India, with its consolidated experience of inherent pluralism, can teach Europe an important lesson when it comes to the necessity of conjugating the multiplicity of coexisting ethnical, religious, cultural, and legal identities, which demands a personalistic approach, with a shared axiological framework.

The reader's expectations of a promising book are, therefore, far from mislead by the contents. After a comprehensive and thorough reading, what they can feel is a reassuring sense of globality and "panism": even the contributions that primarily focused on national experiences, do not fail to extend their horizons to other dimensions through a comparative method that, without losing sight of distinctive elements, reaches the essence and reveals globally common problems and shared values. To that, one should add a certain feeling of inclusion: gender is portrayed as a dynamic concept that should raise awareness rather than indifference, promotion rather than tolerance, and should overcome a merely binary logic to welcome all those nuances that are an expression of personal identity.

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Krstić, Ivana, Marco Evola, Maria Isabel Ribes Moreno (eds). 2023. *Legal Issues of International Law from a Gender Perspective*. Cham: Springer, 224.[**]

"*What is most important is to cease legislating for all lives*
what is liveable only for some, and similarly,
to refrain from proscribing for all lives
what is unlivable for some."

\- Judith Butler, *Undoing Gender*

Hilary Charlesworth may have been right, at the time, in saying that international lawyers usually perceive themselves as partisans of virtues and crusaders of principles, so they find it arduous to believe that an international legal system does not deliver on its promise of equal respect for all persons (Charlesworth 1994, 1, 7). However, the authors of the papers compiled in the volume *Legal Issues of International Law from a Gender Perspective* actually forthrightly acknowledge the lack of a gender approach in international law and present original gender-sensitive and gender-competent insights. The book aims to oil the wheels of change regarding the dominant discourse in international law and to contribute to overcoming its gender blindness. Edited by Ivana Krstić from the University of Belgrade, Marco Evola from the LUMSA University Palermo, and Maria Isabel Ribes

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Moreno from the University of Cádiz, this is the third volume of the series *Gender Perspectives in Law*. The series attempts to provide gender-competent legal knowledge, which is pivotal for rethinking different legal fields with the objective of eliminating gender-based biases and discrimination. Apart from this volume, the series includes three books discussing feminist approaches to law, gender perspectives in private law, as well as public law and policies. The series editors, Dragica Vujadinović and Ivana Krstić, both from the University of Belgrade, jointly wrote the introductory part of the volume, which precedes ten authored papers, outlines the main ideas behind the series and offers detailed summaries of each chapter.

The book opens with the contribution titled "The Fight Against Discrimination on the Grounds of Sex, Sexual Orientation and Gender Identity in the External Relations of the European Union", written by one of the co-editors, Marco Evola, which analyses and compares the non-discrimination efforts of the European Union (EU) on grounds of sex, sexual orientation and gender identity, within both its internal and external action, with an emphasis on the latter. Among the valuable insights offered by this research is the fact that, even though gender equality permeates through all issues covered by the EU external action, efforts against discrimination based on sex, sexual orientation and gender identity can mostly be found with regard to EU accession and the European Neighbourhood Policy (p. 27). This approach – which is neither holistic nor homogenous, as the author ingeniously describes it – has led to the conclusion that EU recognizes the value of non-discrimination on the grounds of sex, sexual orientation, and gender identity solely for its benefits in achieving broader EU objectives (p. 27). Evola underlines that the Court of Justice of the European Union (CJEU) has failed to contribute to strengthening gender equality, as well as combating stereotypes and the root causes for discrimination against women and LGBTIQ persons, since it is still balancing between economically oriented and human rights-based approaches (pp. 7, 9). Tension between these two approaches can also be found in the practice of the EU institutions governing both internal and external action (p. 27). Although the major role that the economic rationale still plays in the EU structures is acknowledged throughout the paper, as is the fact that it was only after the adoption of the Lisbon Treaty that EU started to shift its focus towards the human rights arena and included non-discrimination in its external action (p. 29), it would be rather interesting if the paper more meticulously challenged the remark that this initially economic union is not truly equipped in terms of its competences to deal with major human rights issues, such as discrimination. Moreover, the conclusions of the paper could be considered as important

additional arguments confirming the pressing need for the EU accession to the European Convention on Human Rights (ECHR), whose monitoring body is actually progressively becoming gender-sensitive (p. 37).

In fact, Ivana Jelić offers an analytical overview of the approach to gender equality adopted by the abovementioned monitoring body, the European Court for Human Rights (ECtHR) in her paper "Feminist Justice and the European Court of Human Rights". It is acknowledged that, due to its famous use of evaluative interpretation,[1] the ECtHR continuously tends (and arguably succeeds) to protect human rights that were not explicitly enshrined in the ECHR, and gender-oriented rights are no exception (p. 36). Even though Jelić identifies the remarkable progress in the recent development of ECtHR case law, with groundbreaking verdicts regarding internal prostitution or bullying in the workplace, she also warns that there is still a considerable need to safeguard a significant number of women's rights (pp. 38–39). Unsurprisingly, the cases of direct gender discrimination under Article 14 are not very common before the ECtHR, either because of the legislative changes that Member States have already implemented or due to the ECtHR invoking the *Câmpeanu* formula,[2] which is "not as adequate as frequently used" (p. 42). What is more, Protocol No. 12 has not been referred to in cases concerning Article 14 (p. 43). Jelić is also unmistaken in her critique of the ECtHR for not using the *jura novit curia* principle when ruling on applications that do not claim violation of non-discrimination articles in gender-sensitive cases (p. 43). On the other hand, cases concerning indirect discrimination have appeared more often before the ECtHR, due to de facto inequalities caused by gender-neutral national provisions (p. 43). Notwithstanding the fact that the ECtHR is increasingly becoming gender-conscious, Jelić remarks that the Court is still reluctant to explicitly find violation of the principle of non-discrimination in such cases (p. 51). Finally, the analysis of the recent case law, together with the rather positive approach of the ECtHR to affirmative action for achieving factual gender equality implemented by some Member States, indicates that "there are more achievements to be commended than flaws to be corrected" (p. 51). The paper could pique one's curiosity to explore whether there is a link between the recent praiseworthy

[1] In words of the Court, ECHR is "a living instrument", which must be interpreted "in the light of present-day conditions" (*Tyrer v. The United Kingdom*, App. No. 5856/72, Judgment of 25 April 1978, para. 31).

[2] The Court uses the formulation that "there is no need to give a separate ruling on the remaining complaints" in order to explain (its usual) refraining from examining violations of Article 14 in cases where violations of other articles were found (p. 42). See *Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08, Judgment of 14 July 2014, para. 156.

development in the jurisprudence of the ECtHR concerning feminist justice and the number of women judges sitting on the Strasbourg bench.[3] While this kind of correlation cannot be truly determined without empirical verification, it is intriguing that the percentage of female judges has been decreasing in recent years since its peak of over 40% in 2011 (Keller, Heri, Christ 2020, 184). In any case, the ECtHR remains closer to gender parity than most of the national courts of the Member States (Keller, Heri, Christ 2020, 196) and with the election of the first female President, Judge Síofra O'Leary, in 2022, it showed enthusiasm for further improvements.

One of the major challenges to gender equality is stereotypes regarding the social role of women, as determined by their reproductive capacity and function, which is the focus of Ludovica Poli's part "Female Reproduction and Sexuality: The Impact of Gender Stereotypes on Women's Rights in International Jurisprudence". The analysis is directed towards the case law of the ECtHR, as well as other UN treaty bodies, primarily the UN Human Rights Committee (HRC) and the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), regarding gender-based violence, access to contraception and abortion and reproductive health in general (pp. 57–63). Especially important is Poli's scrutiny of obstetric violence, which was first codified in Latin America (pp. 62). The concept denominates unnecessary harmful practices by healthcare providers towards female patients, usually conducted during pregnancy and childbirth, such as physical and verbal abusive treatment, medical procedures (including sterilization) without consent or with coerced consent, and gross violations of privacy (pp. 62–63). Additionally, particular attention is paid to the *Carvalho Pinto de Sousa Morais v. Portugal* case, in which ECtHR ruled that a comparator is not required for determining discrimination based on a stereotype, as well as that gender stereotypes regarding women's sexuality and reproduction inevitably lead to intersectional discrimination (p. 65). In the conclusion of this distressing text, full of valuable testimonies and comparative practices, Poli highlights the role of education in combating gender-based violence and discrimination, together with the fact that protection of women's reproductive rights is a necessary precondition for their enjoyment of other human rights (p. 66). Further research could focus on stereotypes leading to

[3] Without any kind of disregard for judges' impartiality, adequate gender representation is an important aspect of every adjudicating body, since it has been proven that female judges may offer valuable insights regarding gender-sensitive issues simply by virtue of being part of an underrepresented, historically oppressed and particularly vulnerable group (Keller, Heri, Christ, 2020, 201).

violent and discriminatory conduct towards LGBTQIA+ persons, especially perinatal treatment of transmasculine individuals that are still capable of giving birth.[4]

One aspect of such a discrimination of LGBTQ people that is connected to labour is tackled within the contribution titled "Workplace Discrimination Towards LGBTQ Employees and Employee Candidates in the Job Market: A European Approach to the Workplace Discrimination Towards LGBTQ", co-authored by Alparslan Özaltuğ and Berfu Yalçın. Although aware of recent populist homophobic voices echoing around Europe, the authors shed light on the anti-discriminatory protection provided under both the EU legal framework and the ECHR (p. 70). The paper points out key directives that promote equal treatment but underlines that their implementation is essential for full realization of human rights (pp. 70–71). Several ECtHR and CJEU cases regarding hate speech, both in and out of work context, are examined (pp. 74–78). However, what could have been more thoroughly explained is that when the ECtHR assesses that hate speech which negates the fundamental values of the ECHR, such speech is excluded from the protection due to the Article 17, which prohibits the abuse of rights, whereas in other cases hate speech is treated within the restriction clause embodied in Article 10 para. 2 of the ECHR (European Court of Human Rights 2023, 1). Furthermore, the results of the research show that both adjudicating bodies accepted the impartiality of the enterprise as a legitimate ground for setting certain restrictions in the workplace that may appear to be discriminatory (pp. 78–80). Özaltuğ and Yalçın are particularly interested in how strenuous proving discrimination in the workplace can be, in spite of the fact that according to 2000/78/EC Directive, as soon as the victim provides evidence of a *prima facie* case, the burden shifts back to the respondent (p. 80). The authors identify several issues with regard to this Directive that are yet to be clarified by the CJEU, such as the exact meaning of the *prima facie* case, the extent of the victim status and the *ratione personae* scope of the relevant directive (pp. 80–84, 87). Finally, the paper alerts national courts and other subjects influencing the development of human rights law to limit the ramifications of the odd exception regarding churches that was accepted by various European states (p. 84). Namely, employees' beliefs or religion may play a role in employment qualifications concerning churches and other religious organizations as employers, thus discrimination on this ground is allowed, which can be particularly detrimental for LGBTQ candidates (p. 85).

[4] Such a case illustrating ignorance and incapability of medical personnel to deal with anyone who is not within cisgender and heterosexual framework was recorded in the UK (Greenfield, Topper, 2021).

Just like Özaltuğ and Yalçın, Rigmor Argren supports proper enforcement rather than legislation revisions, but in the field of the Law of Armed Conflict (LOAC), in her paper "A Gender-Sensitive Reading of the Obligation to Prevent War Crimes Under the Law of Armed Conflict" (p. 101). Scanning the LOAC from the feminist angle, the author suggests that a gender-sensitive reading of the LOAC is necessary, primarily concerning the obligation to prevent war crimes, in order to strengthen the protection of all persons impacted by the armed conflict (p. 91). Underlining that public international law is distinctly masculine – since the public has traditionally been a male sphere, while the private has been reserved for females – Argren qualifies the LOAC as "hyper-masculine" (pp. 93–94). The gendered aspect of international humanitarian law in general can be detected in that not only are women and men treated differently by law, but they are also affected differently by armed conflicts (pp. 95, 97). Women may be reasonably expected to suffer more than men in the same situations, such as forced displacement, simply because their situations and responsibilities are different, i.e., given that women are usually "the caretakers of children and the main food provider" (p. 105). In addition, war crimes can disproportionally affect women, such as those including indiscriminate destruction of homes and livelihoods, which enhances the requirement to fulfil the obligation of preventing them (p. 108). The qualification of sexual violence and rape as war crimes is particularly praised in the paper, together with the work of ad hoc tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) in this regard (pp. 100–102). Finally, Argren highlights that within their preventive actions, States should revise their practices by applying a gender lens to their military manuals and rules of engagement, so that all war crimes, including those that disproportionally affect women, can be averted (p. 109).

Given that armed conflicts are one of the most frequent causes of migrations, along with the fact that during armed conflicts and forced migrations women and girls are at high risk of being subjected to sexual violence, discrimination and having health-related consequences (Jolof *et al*. 2022, 13),[5] the next topic naturally follows. Ivana Krstić evaluates international refugee law from a gender perspective in her chapter "The Recognition of Refugee Women in International Law". Starting from the unfortunate fact that both the 1951 Refugee Convention and its 1967 Protocol are gender-neutral and do not include sex/gender among the grounds for persecution, Krstić advocates for their gender-inclusive and

[5] Without diminishing the challenges that refugees experience regardless of their gender, there are findings highlighting numerous stressors specifically encountered by female refugees (Jolof *et al*. 2022, 13).

gender-sensitive interpretation (p. 115). Such an approach would enable either gender to fall within the category of membership of a particular social group (which is recognized as one of the grounds for persecution), or the recognition of intersectionality regarding gender in combination with other prescribed grounds for persecution, such as race, religion or nationality (pp. 119–125). She emphasizes that smaller groups of women, e.g., members of a tribe opposing female genital mutilation or married women in Guatemala who were unable to leave their relationships, were qualified as a particular social group (p. 125). What is more, Krstić applauds the fact that even some national courts accepted the broad concept of gender as a particular social group, though she warns that judges are generally reluctant to follow such an extensive viewpoint, concluding that it remains the ground for persecution that is the most difficult to prove (pp. 124–125). In addition, the paper analyses other universal and regional human rights instruments that may provide women refugees with complementary protection, focusing especially on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Istanbul Convention Against Violence Against Women and Domestic Violence (Istanbul Convention) (pp. 114, 121). Unlike CEDAW, the Istanbul Convention refers to the migration and refugee status and distinguishes female migrants and asylum seekers as particularly vulnerable to gender-based violence (p. 121). It also explicitly requires that gender-based violence is recognised as a form of persecution. The author reminds us that rape, genital mutilation, forced sterilization, domestic violence and human trafficking are some of the examples of gender-related forms of persecution (pp. 123, 127). Moreover, since gender-related forms of persecution are typically committed by private individuals, it is underlined that under EU Directive 2011/95 actors of persecution can also be non-State actors, as long as it is demonstrated that States (or international organisations) are unable or unwilling to provide protection (p. 127). Finally, Krstić explains the meaning of the gender-sensitive asylum procedure, which is another requirement of the Istanbul Convention, highlighting its main features (p. 128). Notwithstanding the remarkable development that can be traced within this branch of public international law, the author concludes that further steps should be taken in order to achieve full recognition and protection of women in this field (p. 130).

It is worth recalling that the situation of female migrants around the world becomes even more complicated once climate change and natural catastrophes are added to the equation. It is estimated that women and children are 14 times more likely to die in a climate-change induced disaster and 80 times more likely to be displaced by climate change (Tower 2020). Given that the position of environmental migrants is still not recognized and regulated by public international law, together with the fact that around 80

per cent of people displaced by climate change are women (OHCHR 2022), it is high time that the international community responded not only to environmental causes of migrations, but also to their gender ramifications. After all, it must not be forgotten that women and girls are not only vulnerable *to* displacement but also *in* displacement (Tower 2020).

The interconnection between gender and the environment is the topic of Bojana Čučković's article titled "Screening International Environmental Law Through Gender Lenses: Already Gender-Sensitive, Still Not Gender-Responsive?". Starting from the observation that international environmental law (IEL) seems to be more gender-sensitive compared to other branches of public international law, it is admitted that environmental degradation is intensifying gender inequality, while gender is enhancing vulnerability to pollution (p. 134). It is particularly striking that several authors found the same similarity between the environment and women, in that they are both objectified, subordinated and perceived as if they are made to serve the needs of others (p. 134). The paper begins with tracing the reasons for shifting focus from women to gender in IEL instruments and treaties (p. 138). This is immensely important since women are not vulnerable to environmental harm due to their sex, but because their gender and socially constructed roles lead to differential access to financial, natural and other resources, household division of labour, and lesser participation in decision-making (p. 138). Thus, "gender issues [...] cannot be limited to women's issues" (p. 138). Čučković also identifies the compartmentalization of engendering IEL, which means that gender mainstreaming is not evenly developed across IEL instruments (p. 139). Using the example of the UN Framework Convention on Climate Change, she explains that inclusion or absence of gender/women perspective in the basic treaty does not necessarily have any implications on further engendering of the particular area of environmental protection, because of the major importance that soft law instruments have in this regard (p. 139). Further, the paper turns to analysing the nature and content of engendering IEL, not only by differentiating between the provisions that are aimed more at achieving gender balance, compared to a wider concept of gender equality, but also by tracing the transformation of gender issues from being ad hoc to becoming permanently present on agendas of administrative and monitoring bodies within IEL (pp. 141–144). In spite of the increasing gender sensitivity of IEL, there is still "ample space for improvement" (p. 146–147). In order to become truly gender-responsive, it needs to recognize specific categories of women that are particularly vulnerable to environmental accidents and degradation, such as single mothers or rural women, and to take into account the multidimensionality of factors that disproportionally affect them (pp. 146–147). Finally, Čučković insists on developing further intersectional approach in environmental regimes and

including relevant gender-responsive provisions in national environmental legislation, together with dedicating national budgetary funds to gender-inclusive measures or implementing other initiatives that would increase the level of gender-responsiveness of the national environmental practices (p. 151). Interestingly enough, the balancing of the participation of women and men in decision-making is underlined several times as crucial, since women are often excluded from these processes within IEL (pp. 141, 146, 147).

Such underrepresentation of women, but this time regarding corporate boards, is under the spotlight in the paper "Putting Women's Rights to Work: The Participation of Women on Company Boards As a Human Rights Law Issue", co-authored by Linde Verhoeven and Alexandra Timmer. The analysis reveals that even though gender quotas on company boards have existed in Europe for two decades, national approaches to this matter vary dramatically, from hard law through soft law to no law at all (p. 154). What is more, the authors question the motivation behind the regulations of women's participation in decision-making, by casting light on the so-called "business case for diversity", which entails a rhetoric that justifies gender diversity based on its profitability and increased shareholder value (p. 157). Moreover, by using the CEDAW Committee's multi-layered conception of equality, it is analysed whether the CEDAW requires women's participation on company boards and to what extent, to determine that substantive equality cannot be achieved without proper representation of women and that failure to act in this regard can trigger state accountability (pp. 161–164). A substantive equality argument can also be found in the pages of the UN Guiding Principles on Business and Human Rights (UNGP), which is based on three pillars – Protect, Respect and Remedy, that are further analysed in the paper (pp. 164–166). The authors maintain that transformative equality mandates quotas to always be followed by other positive measures and policies tackling gender issues, especially those aimed at overcoming stereotypes that continue to disadvantage women, even after they become members of the board (pp. 166–168). Finally, Verhoeven and Timmer argue that, under the UNGP, companies are expected to act upon the underrepresentation of women on their boards as part of the responsibility to respect women's rights and the authors conclusively determine that all these obligations will become more crystalized and firmer in the future (pp. 170–171).

Still within the business sector, a progress related to placing gender provisions within international trade agreements is noticed by Mareike Fröhlich in her piece "Promoting Gender Equality in International Trade Agreements: Pioneering or Pipe Dream?". The paper opens with the assumption that countries which accepted trade liberalization are more successful in fostering gender equality (p. 180). However, the author points

out the difference between various industries, underlining that women are less likely to benefit from trade liberalization in male-intensive sectors, which must be considered when trade agreements are negotiated (p. 180). Fröhlich highlights that the progress achieved in the past two decades varies between introducing stand-alone chapters on gender and trying to gender mainstream the whole texts of the free trade agreements (Fröhlich, 2023, 183). Furthermore, 2020 was marked by the establishing of the WTO Informal Working Group on Trade and Gender, whose efforts are directed towards developing inclusive trade policies (p. 182). The author also claims that it was the inclusion of socially impactful topics, such as anti-discrimination provisions, environmental protection and sustainability, that urged focusing on gender issues (p. 182). The analysis shows the importance of adopting a gender perspective concerning trade liberalization, due to its effects on gender equality and women's economic empowerment and stresses the importance of trade liberalization's support of welfare and equality (p. 196). Even though the progress made thus far is commended, the author also admits that there is still much to be done in order to develop truly gender-responsive trade policies, especially since many countries are ignorant of gender issues (p. 196). Particular attention is dedicated to Chile and Canada as the most successful negotiators for gender mainstreaming, as well as the first multilateral agreement on trade and gender, from 2021 – Global Trade and Gender Agreement (pp. 184–187, 192–193). The paper concludes in anticipation of whether countries will join the agreement and continue to develop gender-responsive trade agreements, measures and policies, or whether this will all end as "a pipe dream" (p. 196).

Finally, the volume closes with the historical chapter "Standing Alone but Standing Tall: A Female Perspective of International Law from the Interwar Yugoslavia", in which Sanja Djajić aims to give a voice to "those who were silenced", while also challenging "the silence of today" (p. 200). It is a tale about international law depicted in its state between the two world wars from the perspectives of women in Yugoslavia, women in international law and the Balkan nations (p. 220). They all turned to it full of hope for its new and promising ideas, such as peace, progress and universalism (p. 220). The story is told from the angle of the inspiring personal history of Anka Godjevac Subbotić, the first and only female international lawyer in the interwar Yugoslavia, an exceptional personality who witnessed major changes that marked this period. Being the first woman to receive a doctorate in law at the University of Belgrade Faculty of Law in 1932, as well as the first person to be awarded a doctoral degree in Public International Law at the same university, Anka was a promising legal scholar in a patriarchal legal system with deeply rooted societal prejudices, where women had a nearly slave-like status (pp. 202, 203). In a word, women were legally allowed to

receive formal legal training, but not to practice law, in terms of becoming judges or public prosecutors (p. 204).[6] As for the academia, even though no formal restrictions were in place, women held no academic positions during this era (p. 204). Djajić carefully traces Anka's feminist efforts, from her academic papers, where she claimed that employment is necessary for the economic emancipation of women, without which there can be no good marriage (p. 206), to her participation in various international groups and organizations advocating for women's rights and making their fight a matter of international law (pp. 206, 208–215). Godjevac invested her efforts in lobbying for the equal rights principle regarding the nationality of married women, for which she was appointed expert within the national delegation to the Hague Codification Conference in 1930 (p. 210). From 1937, she was part of the Committee of Experts for the Legal Status of Women, established by the League of Nations, which was the first intergovernmental body to address the oppressed position of women worldwide as an international concern, and which would remain the League's first and only body whose composition was based on gender parity (pp. 211, 212). A year later, the World Woman's Party were founded, with the mission of ensuring that gender equality clauses were included in all international agreements, and Anka became the honorary secretary and member of its World Council (p. 213). Their efforts resulted in that such clauses found their place in the UN Charter and UN Declaration on Human Rights (p. 213). Djajić ultimately shows how international law of this era failed those who needed it most, primarily disadvantaged groups such as women and the peoples of Balkans, who remained on the fringes of the interwar stage (p. 219). Nevertheless, the author offers a somewhat more encouraging closure when suggesting that Anka is a symbol of empowerment and that we should all pick up the fight where she left off.

Nowadays the fight seems to be at least as complex as it was in Anka's time. While in some parts of the world the legal and factual position of women is more or less the same as it was in the interwar period, in more developed regions, such as in Europe where they managed to win at least nominal equality, they face other, novel challenges.[7] Regulations regarding the status and rights of LGBTQIA+ persons are only beginning to emerge

[6] They were, however, allowed to become advocates and members of the bar (pp. 202, 204).

[7] One such challenge has recently been traced by Éléonore Lépinard. She forewarns of rising femonationalism, which is the enrolment of feminist values in nationalist far-right political projects (Lépinard, 2020, 180) and appears in political discourse and policy debates in which nationalism, anti-immigrant sentiment, and Islamophobia are being promoted in the name of feminism (Lépinard, 2020, 18).

and only in old democracies. Therefore, it is safe to say that the book is in fact a much-needed contribution to this field, and it is welcomed in a time of crises, embodied in the rise of populism in Europe, multiple ongoing armed conflicts on different continents, and the recent end of the pandemic. Such events are infamous for diminishing rule of law, undermining human rights and worsening discrimination of those that are already marginalized.

The weaknesses regarding the gender-neutral gaze of international law identified in the book are also particularly important in the light of national law, because if states uphold gender stereotypes on the national plane – such as the one of men as breadwinners and women as caregivers – that is directly mirrored in the international arena.[8] On the bright side, international law does contribute to some international feminist strategies, which Charlesworth noticed in its focus on universal problems faced by women, irrespective of their cultural background, with the aim of overcoming the bog of essentialism (Charlesworth 1994, 10). International law does so, for example, by recognizing the challenges shared by women across the globe and providing them with multiple forums for advocacy, confrontation concerning these common issues, and codification of rules that could benefit them. Be that as it may, it must not be forgotten that there is also some truth in the opposite view, the one that defies sex as being the sole underlying reason of women's oppression,[9] and supports a more comprehensive understanding of their lives. The contributions in this volume succeed in following such a trend by continuously acknowledging the complex intersection between the different grounds for discrimination that women usually face, such as race, ethnicity, class, sexual orientation, age or family status. After all, there has long been no denying in international law that a certain amount of individualism is required for understanding the specific position of any member of the particularly vulnerable group in order to provide them with adequate protection.

No law student should go without being exposed to probably all the volumes in this series, as they are source of enlightenment that will shift their point of view, but this particular one should be mandatory reading for all undergraduates and postgraduates majoring in international law, because it will guide them on how to interpret and critically evaluate international legal norms in a gender-sensitive manner. It should also be recommended not only to legal practitioners working in this field, but also those engaged in human rights protection, such as judges, public prosecutors and public

[8] Charlesworth took similar stand concerning gender hierarchies (Charlesworth, 1994, 3).

[9] As argued by, for example, Catherine MacKinnon (MacKinnon, 1987). For "victimization rhetoric" see Ratna Kapur, 2002.

officials, for it is an eye-opening, captivating read that will raise their awareness about gender (and) law. As for scholars, they will certainly benefit from the volume due to its prominent authors and current topics.

Ultimately, the book is an undeniable contribution to the broader legal aspiration of equal respect and protection for all, even though it is debatable whether such a goal is attainable anytime soon, if ever. To achieve gender equality, as Anka Godjevac said, "a man must abandon prejudices on his superiority and woman's inferiority, [abandon his Balkan nature] and recognize a woman for *a human being*" (Godjevac 1928, 3, as cited on p. 207). And that is still an uphill battle.

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- 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.

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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...

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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.

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Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

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

Više od tri autora

T: Prema istraživanju koje je sproveo Tarner sa saradnicima (Turner *et al*. 2002, broj strane),

L: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

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Delo bez autora

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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)

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Članak

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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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L: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

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T: (Welch 1998)

L: Welch, Thomas. 1998. Letter to author, 15 January.

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L: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html*, last visited 28 February 2019.

U štampi

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L: Bogdanović, Luka. 2019. Ekonomske posledice ugovaranja klauzule najpovlašćenije nacije u bilateralnim investicionim sporazumima. *Nomos*, tom 11, u štampi.

T: (Spier 2003, broj strane)

L: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Prihvaćeno za objavljivanje

T: U jednom istraživanju (Petrović, prihvaćeno za objavljivanje) posebno se ističe značaj prava manjinskih akcionara za funkcionisanje akcionarskog društva.

L: Petrović, Marko. Prihvaćeno za objavljivanje. Prava manjinskih akcionara u kontekstu funkcionisanja skupštine akcionarskog društva. *Pravni život*.

T: Jedna studija (Joyce, prihvaćeno za objavljivanje) odnosi se na Kolumbijski distrikt.

L: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Sudska praksa

***F(usnote)**:* Vrhovni sud Srbije, Rev. 1354/06, 6. 9. 2006, Paragraf Lex; Vrhovni sud Srbije, Rev. 2331/96, 3. 7. 1996, *Bilten sudske prakse Vrhovnog suda Srbije* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16.

T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12 ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

F: Zakonik o krivičnom postupku, *Službeni glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014, čl. 2, st. 1, tač. 3; Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, 60, Art 6 (3).

T: Za reference u tekstu koristiti skraćenice (ZKP ili ZKP RS; Regulation No. 1052/2013; Directive 2013/32) konzistentno u celom članku.

L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

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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