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Mateja DUROVIC, PhD*

HOW TO PROTECT CONSUMERS IN THE DIGITAL ERA: AN EXAMPLE OF THE ONLINE CHOICE ARCHITECTURE

The ongoing process of digitalisation has brought a number of new challenges to the existing regulatory frameworks for consumer protection. One of these major challenges is the phenomenon of the online choice architecture, which is used to push consumers to make specific economic decisions while acting as participants of the digital market. In the majority of cases, such pressures should not be allowed as they rely on consumers' vulnerability. This paper examines the phenomenon of online choice architecture and the fact that the existing consumer law framework does not provide adequate legal protection to the consumers from online choice architecture, calling for a consumer law reform that would enable better protection of consumers.

Key words: *Consumer law. – Online choice architecture. – Digital Services Act. – Unfair Commercial Practices Directive. – Dark patterns.*

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1. INTRODUCTION

In the contemporary digital world, online choice architecture represents a particular challenge for consumer protection. Discussions surrounding online choice architecture (OCA), or dark patterns, typically centre on the negative consequences of the defaults, the difficulty of obtaining consent, or the ways in which data is being exploited to capitalise on consumer unawareness. This paper argues that OCA and the use of defaults demand the extension of the category of vulnerable consumers to include all users in an online environment in which dark patterns can be detected. To illustrate the vulnerability of consumers, this contribution will look at fertility apps as a particularly sensitive case study, following the research conducted by Katherine Kemp (Kemp 2023, 1–33).

In this paper, we will also present personal data as a modern currency when it comes to digital consent. The hope is that this will raise awareness and show that although providing personal data seemingly comes at no cost to consumers, it is the price paid for the use of any service in the online environment, being revenue-generating for businesses. This is paradoxical as, although price is one of the most important factors when it comes to the consumers' decision-making framework, data privacy is often neglected despite it directly influencing consumers (Durovic, Lech 2021, 702). The idea of data as a currency is later explored in the fifth section of the paper. Analogy demands the inclusion of consumers active in online environments where OCA contains dark patterns into the category of vulnerable consumers based on their inability to compare services in regard to the main currency of the online world: data (Esposito, Grochowski 2022, 26).

The first section of the paper delves into three prevalent taxonomies employed in the surveyed literature. After explaining the terminology used in the sector and later employed in the paper, one of the taxonomies is chosen for the purpose of consistency. Throughout the second, third and fourth sections, the concepts of defaults, consent and data are explored and the connections between them are explicated. These sections bridge the gap in the current literature and explore the most prevalent issue that appears in data processing, namely obtaining informed consent. It will be shown how defaults work to obtain an uninformed form of consent, which is then used for the collection and processing of data, and which consumers are unaware of. The sixth section explores five solutions identified in the literature that seem to tackle the problem of obtaining informed consent. After these are analysed, two personal solutions are proposed and explored, before a summary of the paper is provided.

2. ONLINE CHOICE ARCHITECTURE

Online choice architecture is an umbrella term that refers to the environment created by marketers and content designers, alongside user experience and interaction designers (CMA 2022b, 2). OCA can be used to hide dark patterns that aim at influencing consumer behaviour. Through detailed literature research, it has been observed that multiple taxonomies have been used to describe and organise these dark patterns. For completeness purposes, three such taxonomies will be summarised, before choosing one of them and justifying the choice.

Gray *et al.* (2018, 1) discusses five types of dark patterns: nagging, obstruction, sneaking, interface interfering, and forced action. Nagging is described as a diversion from the current task that can occur multiple times. Obstruction refers to acts that block the task flow, increasing the difficulty of performing it; methods of achieving this include introducing intermediate currencies, making it more difficult to compare prices of services, a practice known as price comparison prevention, or requiring users to sign up for an account that is almost impossible to close, aka 'roach motel'. Sneaking refers to practices aimed at disguising relevant information; such practices include actions that do not lead to the perceived result, aka 'bait and switch', hidden costs, sneaking items into the basket, and forced continuity of different subscriptions. Interface interfering refers to attempts to create a bias in favour of certain aspects existent within the user interface, with identified tactics including hiding information, preselecting the unfavourable options, or manipulating the user interface.

These manipulations may amount to: adding false countdowns to influence consumers into deciding quicker, making an option appear more prevalent, including disguised ads that assume the form of interactive games or answering trick questions. Forced action refers to the necessity to take additional steps to advance towards the desired outcome. Such actions may involve sharing additional data, obtaining additional benefits for adding more friends or completing tasks to obtain something available for purchase.

In the United Kingdom, the Competition and Markets Authority (CMA) used another taxonomy, proposing that dark patterns be divided into three components: choice structure, choice information, and choice pressure. Choice structure refers to how the options are presented. The altering of the method of presenting information comprises the choice information component. Lastly, choice pressure considers practices that aim to influence the consumer's decision-making. The relevant OCA practices identified by the CMA are encompassed in Table 1 (CMA 2022, v).

Table 1. OSA practices according to component

Choice Structure	Choice Information	Choice Pressure
Defaults Ranking Partitioned pricing Bundling Choice overload and decoys Sensory manipulation Sludge Dark nudge Virtual currencies in gaming Forced outcomes	Drip pricing Reference pricing Framing Complex language Information overload	Scarcity and popularity claims Prompts and reminders Messengers Commitment Feedback Personalisation

Source: CMA 2022a, v.

Another taxonomy is the one structured by Mathur *et al.* (2019, 81:5). This taxonomy lists five dimensions that help us to characterise each dark pattern, rather than naming the different practices, as previous taxonomies do. The five dimensions are: asymmetric, covert, deceptive, hides information, and restrictive. An asymmetric dark pattern enhances certain elements of the interface to the disadvantage of others. A dark pattern is covert if it hides information from users through the design of the interface aimed at influencing their choices. A deceptive dark pattern induces false beliefs through misleading statements or omissions, even if they are affirmative. To qualify for the 'hides information' dimension, a dark pattern must delay making necessary information available to the user. A restrictive dark pattern restricts the choices that are available to the user (Mathur *et al.* 2019, 81:6).

It is submitted that the confusing nature of this taxonomy deems it worthy of rejection. It must be observed that the 'covert' and 'hides information' dimensions appear to overlap considerably. This makes it harder to accurately characterise and classify dark patterns. Further clarification, describing the differences between the dimensions highlighted above, is necessary before this taxonomy can be used for the purposes for which it was instituted, namely, to characterise and classify dark patterns.

3. DEFAULTS

Despite the comprehensive presentation provided above, the paper focuses on defaults, and at times dark nudges, information overload and framing. Within the following contribution, dark nudges and nudges will be used to convey the same meaning, referring to practices that are meant to influence consumers and ensure that they reach a desired outcome. For the purpose of clarity, in the following contribution, 'default' will be used to highlight that a consumer cannot reject the terms and conditions if they are unhappy with the privacy policies, equally they are unable to negotiate or modify privacy policies.

A default can be considered a pre-selected option when consumers are faced with a particular action or set of options. Defaults can have both a positive and a negative impact on the consumers' ability to follow their interests. For example, a pre-installed anti-virus could help consumers to avoid computer viruses. However, this can also mean that consumers are enrolled in a subscription that forces them to pay for something they may not need (CMA 2022b, 2). Additionally, this also prevents the consumers from conducting their own research on what is available on the market and choosing the option that fits them best, impacting competition. Furthermore, it has been pointed out by the CMA that such conduct may also increase a business's market share beyond what the product is worth (CMA 2022b, 30). Hence, businesses may be discouraged from competing with one another to provide better offers and attract customers and focus on creating partnerships that promote bundling.

Defaults are problematic when they entertain and rely on consumer biases. Consumers tend to act quicker, and their attention spans are shorter. In addition, consumers skim rather than read the information presented and are more responsive to recommendations (Duggan, Payne 2011, 3). Weinreich *et al.* showed that out of the pages surveyed, 25% had been displayed for less than 4 seconds, 52% of the visits lasted less than 10 seconds, with only 10% of visits lasting longer than 2 minutes (Duggan, Payne 2011, 4). By exploiting this modified online behaviour, defaults exert a strong effect on consumer behaviour. Jachimowicz *et al.* (2019, 161) showed that a default is 27% more likely to be selected out of two options. Additionally, opt-out defaults have been proven to lead to a greater uptake of the pre-selected decision. An old famous study by Eric Johnson and Daniel Goldstein surveyed the prevalence of organ donors in countries with an opt-in and an opt-out system for organ donation. It has been highlighted that approximately 90% of the individuals

are organ donors when opt-out defaults are employed, while only 10% of the individuals will donate organs when the system is based on opt-in defaults (Johnson, Goldstein 2003, 1338).

The practice of taking advantage of the benefits of opt-out defaults is most prevalent when businesses try to collect data that can later be treated as a business asset. For example, the Clue app, a mobile application tracking fertility, automatically uses customer data for research purposes, provided that the terms have been accepted. There is an option to opt-out of this, by contacting the company.[1] Hence, the cost of opting-out and protecting personal data is increased through the use of defaults.

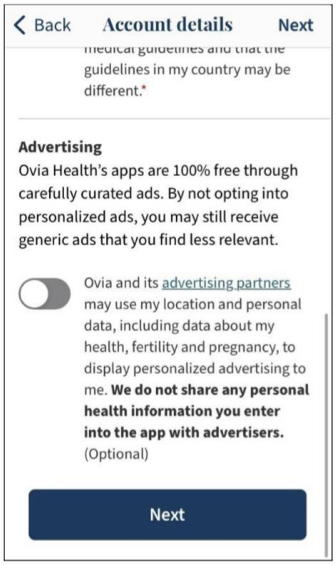
4. CONSENTING IS THE NEW DEFAULT

Choice architects are the ones that decide how information will be conveyed to consumers, what are the actions that consumers need to take, and what the options will look like, including what is the default. It is evident that the information can be thus framed to highlight certain aspects over others, which will remain undetected provided the consumer embodies the online behaviour described above. Therefore, choice architects have the power of influencing how defaults are presented, in order to take advantage of behavioural economics when obtaining the consumer's consent.

This practice can be observed in the choices presented in the Ovia app regarding data sharing. The OCA has been designed to create the impression that there is no possibility that the consumers' personal health information will be shared with advertisers. This has been done through the use of bold lettering right next to the 'Next' button. However, the sentence prior to the bold lettering explicitly mentions that personal health data may be shared with advertisers to display more personalised data. These sentences are contradictory as information regarding health, fertility and pregnancy qualifies as personal health information. After reading this the consumer may still be conflicted about whether or not to opt-in to this section. The first paragraph of the setting description is used to eliminate such uncertainty. The use of the construction 'you may still receive generic ads that you find less relevant' is meant to present opting-in as a recommendation that will bring numerous benefits to the consumer.

[1] Clue Privacy Policy, *https://helloclue.com/privacy*, last visited March 11, 2024.

Figure 1. Screenshot of the Ovia app account settings



Source: Kemp 2023, 15.

It can be noted how the consumers' ability to compare the conditions under which products or services are offered is reduced by manipulating key pieces of information and choosing which characteristics will be displayed first or written in bold. The inability to compare such conditions is a key point in our discussion as without the ability to understand which providers better safeguard their private data; consumers cannot make this a criterion in their choice, ultimately vitiating the consumer's consent. Businesses lack an incentive to compete in the domain of safeguarding consumer data or offering autonomy over how the data is used. This can be noted in the study conducted by Katherine Kemp, where one third of the apps analysed state in the fine print of their privacy policies that consumer data may be sold as a business asset, despite previously assuring consumers that they do not sell data or they never sell data (Kemp 2023, 13).

5. DATA

This section takes a look at the current regulation for obtaining consent for data processing purposes. It will be shown that data may be processed, provided that prior consent is obtained from the consumer. Customarily, the purposes for which the data is processed are laid out in the privacy policy.

This allows companies to sneak in additional purposes and obtain the consumer's consent through the default acceptance of the conditions, which is required prior to completing certain actions.

Although under data privacy law consent is required for data processing, it is unlikely that consent is given freely, due to the complex nature of framing the request. Under Article 7 of the General Data Privacy Regulation (GDPR), a request for consent 'shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language'.

The average time necessary to read privacy policies is very long. Coupled with the shorter attention spans of users, this allows businesses to sneak in multiple processing purposes that allow them to handle the data in ways that consumers may have not wanted. The requirement imposed by the GDPR fails to ensure that consumers understand the nature of the request. The current environment permits the abuse of behavioural patterns, with the aim of hiding the purposes for which data is used and obtaining consent for multiple purposes. Sanchez-Rola *et al.* (2019, 340) shows that despite the GDPR, tracking may take place without the user's consent. The study shows that 90% of websites create cookies prior to the consumers deciding whether or not they want to be tracked.

Even more concerning is the fat that although consumers agree to share their data, they do not understand what data will be collected. There may be a false impression that the collection of data takes place when signing up. However, the data collection takes place at multiple levels, from inputted data to inferences drawn from the news articles accessed or the use of other features provided within an app. The Ovia app provides a health assessment meant to provide a more tailored experience to users. However, this is another opportunity to create a virtual profile for the user, which can later be sold to advertisers or other companies. Examples of the questions have been procured by Katherine Kemp can be seen below.

Box 1. Examples of Ovia Health Assessment questions

Box 1 – Examples of Ovia "Health Assessment" Questions

"How many pregnancies have you had?

"How many pregnancy losses (miscarriages) have you had?"

"Check the box if you have a history of: Endometriosis; PCOS; Uterine Fibroids; Diagnosed infertility; Multiple anormal paps; Depression; None of the above"

"Do you have a history of malignancy (cancer)?"

"Do you have painful periods?"

"Do you have a uterus?"

"In the last 12 months, did you ever eat less than you felt you should because there wasn't enough money for food?"

"Are you worried that in the next 2 months, you may not have stable housing?"

"How often does this describe you? I don't have enough money to pay my bills: Never; Rarely; Sometimes; Often; Always"

"In the last 12 months, have you ever had to go without health care because you didn't have a way to get there?"

"Are you afraid you might be hurt in your apartment building or house?"

"What is your highest education level?"

Source: Kemp 2023, 7.

Under the current regime, the nature of procuring consent is a paradox. Consenting to an action would imply that there is an alternative. However, the reality is that most often the alternative to giving consent is accepting that the consumer will not obtain the product or service. Hence, it can hardly be argued that one can even talk about obtaining consent for data processing in a world where the processing of data conditions the consumer's access to services. Therefore, obtaining consent appears to be just a façade.

Moreover, the inability to understand or monitor how data is used or how it is collected further supports the inclusion of online users in the category of vulnerable consumers in cases where OCA relies on dark patterns. The fertility apps privacy terms describe the collection of technical data. Consenting to the general terms and to the collection of this data allow the app to share the data collected from consumers with partners. For example, the Flo app shares data with AppsFlyer which later shares with its partners, including Pinterest, Google Ads, Apple Search Adds, and Facebook (Kemp 2023, 17).

6. PERSONAL DATA: A NEW CURRENCY SHAPING CONSUMER BEHAVIOUR

When choosing different products or services, price is often the most important factor guiding the consumer's decision. In the online environment, most services appear to be free, but disclosing personal data is the price paid by consumers. A logical conclusion would be that data privacy should replace price as a comparison criterion when using online services. In turn, businesses would have to compete to improve their data policies to attract consumers. As previously discussed, consumers do not spend time reading privacy policies as they perceive using online services as free, despite being concerned about having control over their personal data.

Personal data acts as an intermediary or a virtual currency that is interposed between consumers and their enjoyment of the online environment. The recent EU Enforcement and Modernisation Directive[2] ensure that consumer protection law safeguards consumers even in such cases where services or products are obtained in exchange of the provision of data.[3] A similar mention is made within the European Digital Content Directive.[4] This neglected currency facilitates the reluctance of businesses to change their data policies without regulatory intervention. Coupled with the absence of competition between businesses retarding making their services available at a lower 'data cost' for consumers, this supports the lack of meaningful alternatives when choosing whether to consent to the data policies. Absent such meaningful alternatives, accepting privacy policies or terms and conditions has become akin to a default due to several factors. First, it is the take-it-or-leave-it nature of these agreements that makes it impossible for consumers to have autonomy over their data. Second, the erroneous belief that the default 'I agree' is a recommendation made by choice architects (Sanchez-Rola 2019, 344) contributes to consumers blindly agreeing to the terms. For the purpose of this contribution, the opt-out agreements, where pre-selected options are available, are taken as a form of

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

[3] *Ibid*., 31.

[4] Directive (EC) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] *OJ L* 136/1, recital 24.

a default 'I agree'. Third, there is another erroneous belief that as accepting is the default and many other consumers had previously accepted the same terms and conditions, these cannot be 'that harmful'.

These factors facilitate the manipulation of consumers by businesses. For example, the My Calendar fertility app assures consumers that it will never sell their data. However, in its privacy policy, it states that 'If we are involved in a merger, acquisition, reorganization, restructuring, or other sale or transfer of all or any portion of our assets or business, that could involve your Personal Information and User Data being transferred to the buyer or surviving entity' (Kemp 2023, 13). This may seem harmless at first glance, but it allows the app to treat the user's data as a business asset and later share it with partners.

Another subscription-based app, Pregnancy+, provides two levels of services for its members, the gold and silver standard. Both involve tracking the consumer's data with the aim of delivering the best personalised experience. The app looks at what functions the consumer uses more and how they access it. For the gold members, the app uses the consumers' advertising ID. Despite allowing Phillips to show consumers targeted advertisements through external advertising channels, using the identifier allows Google to independently use the advertising ID to personalise the advertisements gold members will be shown in the Google app (Kemp 2023, 17).

The ability to access personalised content does not seem to be detrimental to the consumers' enjoyment of the online environment. However, their inability to have autonomy over their own data surely is. As explored above, the language used in privacy policies hides how and what data will be collected. Often the ambiguity of the OCA also manages to convince consumers to share their data. It is argued that the absence of the ability to understand the above-mentioned, coupled with the effect and use of defaults, calls for the scope of the 'vulnerable consumer' category to extend to encompass all the users of online environments where dark patterns are present. Typically, vulnerable consumers include the elderly and the young, due to their unfamiliarity with the online environment. However, extension is motivated by the inability to provide informed consent of the aforementioned users. In addition, the consumers often share sensitive data, as is the case of the consumers that use the services provided by the above-analysed applications. The issue here is that such data will be used to target consumers while they are using other online services. Such targeting may contribute to additional distress to consumers. It is argued that the lack of autonomy characteristic to online environments, where the OCA is dominated by dark patterns, calls for the inclusion of consumers present in the aforementioned environment in the category of vulnerable consumers.

7. LEGAL SOLUTIONS

Various solutions aimed at ensuring that defaults or the OCA do not vitiate consent have been implemented in various jurisdictions. In the United Kingdom, the Competition and Markets Authority (CMA) proposed two solutions to counteract the negative effects of defaults and dark patterns in the context of OCA and to ensure that informed consent is obtained. First, the CMA put forward the necessity for a mandatory default that is in the interest of the consumer (CMA 2022a, 39) but that this solution would not be effective for the following reasons. Determining what is in the best interest of each consumer is impossible as each consumer is different. Hence, further guidance is necessary for the implementation of the mandatory default. In addition, there are important issues that still need to be addressed before this solution can be adequately considered. Would the authorities rely on the benchmark of the average consumer when determining what the mandatory default would be? The average consumer is a legislative construct implying that each consumer is an individual who is reasonably well-informed, observant, and circumspect (Keller *et al.* 2011, 379).[5] How would the authority ensure that businesses comply with this requirement and that the default they propose is the one that is the closest to the interest of the consumer, rather than the most business-wise one?

Some may argue that Jachimowicz *et al.* (2019, 162) answers these challenges by proposing the smart default. These are defaults that use behavioural economics to deliver a tailored pre-selected option that is in the interest of each particular consumer. The aim is to produce the perfect default for each consumer, to avoid situations in which defaults nudge consumers into choosing less favourable options. Furthermore, smart defaults would eliminate the potential of a blanket approach which otherwise fails to satisfy all the consumer's preferences.

However, it is submitted that this solution needs to withstand different challenges as it will require the collection and processing of data. It is considered that smart defaults are in no way more advantageous than traditional defaults, due to the lack of transparency that they seem to feature and the processes that they are derived from. Thus, it is impossible to ascertain whether a smart default would be the option that best caters to the interest of the consumer, based on the collected data, and is not influenced by the interests of various business entities. In addition, it is necessary to obtain consent for the processing of data. This would be problematic as it

[5] Consumer Rights Act 2015, s 64(5).

will run into difficulties outlining characterising consent and ensuring that consent is informed and given freely. If consumers do not understand how their data will be used and are unaware of all the conditions they agree to, then it cannot be argued that consent is 'freely given, specific, informed'. It is submitted that more guidelines would be provided regarding what qualifies as 'plain and intelligible language'.

Second, the CMA proposed that businesses should be required to ensure that consumers make an active choice (CMA 2022a, 44). This solution seems to answer the challenge of a lack of alternative choices, other than agreeing to a privacy policy or to the terms and conditions. However, there is at least one challenge that this solution cannot answer, namely its inability to ensure that it is resistant to the influence of dark patterns, such as dark nudges. It must be considered that, although having alternative choices seems to improve competition in terms of data privacy and, consequently, incentivises businesses to provide better privacy policies; businesses may still take advantage of behavioural economics through OCA, to the detriment of the consumers.

However, from the European Union perspective, it is also important to take into consideration the powerful Directive 2005/29/EC on unfair commercial practices (UCPD).[6] The UCPD covers unfair practices in general, and thus, while the online choice architecture or the term 'dark pattern' may not have a legal definition in the UCPD, most instances of dark patterns are considered unfair commercial practices and can be covered by the scope of the UCPD (Hacker 2021). Further, the European Commission has issued guidance regarding the interpretation and application of the UCPD with regards to dark patterns, including a section explaining how the relevant provisions of the UCPD can be used to challenge the fairness of practices when dark patterns are involved, in the context of business-to-consumer commercial relationships (European Commission 2021, 4.2.7).

The UCPD protects consumers against misleading practices and misleading omissions that deceive or are likely to deceive the average consumer.[7] Recognizably, in many instances of dark patterns, 'relevant information is hidden or provided in a way that makes the consumer take a certain

[6] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('unfair commercial practices directive'), *OJ L* 149/28.

[7] Articles 6 and 7 UCPD.

decision which, in absence of that specific practice, they otherwise would not have taken' (BEUC 2022, 7). More significantly, however, a commercial practice will be considered misleading as long as it 'in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct'.[8] The emphasis on 'overall presentation' here is fundamental in regulating dark patterns. Often, online users are manipulated by dark patterns that do not relate to any truth-apt information or content. For example, in the case of sensory manipulation where one option is made to appear more colourful and visually striking while the other option is purposely designed to be dull and less noticeable, there is no material information present that can be proven true or false to begin with. In such cases the manipulative factor is solely to do with the deceptive presentation of the choices to users.

The European Commission has also issued guidelines regarding non-fact-based manipulative practices, such as visually obscuring important information or promoting a specific option, using trick questions and ambiguous language, or deploying default interface settings, e.g. using pre-ticked boxes, inter alia. While it could be argued that the use of the term 'overall presentation' is overly broad and inherently vague, Article 6(1) of the UCPD does contain a list of elements to be considered in the assessment of unfairness. Notably, Article 6(1) (d) refers to 'the price or the manner in which the price is calculated', which has strong relevance for many types of dark patterns, such as drip pricing. That said, this list of elements clearly lacks scope in the context of online business-to-consumer transactions, and there is an opportunity to expand it to more easily apply to dark patterns.

Articles 8 and 9 of the UCPD regulate aggressive practices, which also has a strong impact on the digital market (Kaprou 2022, 77). Accordingly, a commercial practice 'shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise'.[9]

8 Article 6 UCPD.

9 Article 8 UCPD.

Moreover, the UCPD also provides the material elements to consider when assessing an aggressive practice, including the 'exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product'.[10]

This provision can successfully capture many forms of dark patterns if 'the trader, via the techniques used to revamp the user interface (e.g., A/B testing), is aware of the choices that are most likely to be made by consumers under different circumstances and therefore can use that fact to their own advantage' (BEUC 2022, 8). Having said that, practical difficulties may arise during investigation and enforcement, since relying on this provision involves demonstrating, as a matter of fact, that the trader possesses such knowledge. This can be a difficult burden of proof to satisfy.

The European Union has also recently adopted the new Digital Services Act (DSA)[11] which partially addresses OCA. The Digital Services Act aims at regulating OCA, to prohibit nudging techniques or other dark patterns that would prevent consumers from making free choices or interacting with the platform. Besides the solution proposed by the Digital Markets Act,[12] which so far seems the only viable one, two other solutions may be worthy of consideration. First, it may be useful to show consumers the sum generated by companies from their data. A study conducted amongst 600,000 US households showed that households that regularly received a letter comparing their own energy consumption to that of similar neighbours reduced their consumption by an average of 2%, the same effect that would have been brought about by an energy price increase of 11%–20% (Allcott 2011, 1082).

Second, another solution may be the use of generative AI models with the aim of simplifying privacy policies whenever they are displayed, to reduce the cost of reading them. However, this raises the question of how responsibility is to be apportioned in the event that legal action is brought about.

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10 Article 9 UCPD.

11 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, *OJ L* 277/1.

12 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 PE/17/2022/REV/1 *OJ L* 265/1.

The DSA states that 'providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions'.[13] While the phrasing of this article might appear ambitious and extensive, it excludes a significant group of intermediary services from the DSA's restrictions on dark patterns. By limiting the application of Article 25 only to online platforms instead of all intermediary services, the scope of the DSA is narrower than some may expect. As a result, 'a wide range of intermediary services are not subject to the ban', 'including businesses foundational to online commerce, such as ISP's, web-hosting services and domain name registrars' (MacKinnon 2022, 1). This exclusion is arguably a consequential one, given that these intermediary services 'often have consumer-facing businesses'. On the other hand, given that the vast majority of dark patterns are found on large online platforms, it is likely that this scope will be sufficiently broad.

The term 'dark patterns' is never explicitly mentioned or alluded to in the UCPD due to its recency in the field of consumer law. The DSA successfully updates EU law in this aspect. The DSA defines dark patterns on online interfaces of online platforms as 'practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions'.[14] It highlights how dark patterns can be used to make the consumer to make decision they do not want to make or to behave in a manner they have not wanted to, which eventually can produce undesirable and negative outcomes for them. As such, the DSA attempts to prohibit all instances of 'deceiving or nudging recipients of the service via the structure, design or functionalities of an online interface or a part thereof'.[15]

A breakthrough by the DSA pertains to its regulations on unfair advertising practices. Misleading advertising constitutes a significant dark pattern which can unduly manipulate and deceive consumers, especially when these advertisements involve targeted information unbeknownst to consumers. Article 26 of the DSA states that online platforms 'shall not present advertisements to recipients of the service based on profiling', and Article 39 highlights additional requirements for online advertising transparency. The UCPD is not easily applicable to advertising practices, even with its vague

13 Article 25(1) DSA.

14 Recital 67 DSA.

15 *Ibid.*

requirement of professional diligence, thus this is undoubtedly a much-needed addition to protect consumers from deceptive advertising. That said, there remain no limitations to diverse forms of micro-targeted online manipulation techniques that enable continuous observation of consumers on the internet for the purposes of online advertising. This is arguably a core issue that is yet to be resolved, which might undermine the rest of the efforts by the Commission in this area.

Overall, the DSA serves to supplement the UCPD in areas where it is lacking, and not to replace it. Thus, regulation of the majority of dark patterns will still fall under the scope of the UCPD's provisions. Further, the DSA is insufficient in furnishing the UCPD's areas of incompletion that were mentioned above. It might be more productive of an endeavour to instead focus on reforming the UCPD's provisions to make them more applicable to dark patterns, as well as for the Commission to issue further guidance incorporating the concept of digital asymmetry.

Moreover, in the European Union, the recently passed Digital Markets Act obliges platforms to refrain from combining data sourced from core platform services with personal data obtained from any other service offered by the gatekeeper or third parties. This is the only solution that seems to take into account the shortfalls of behavioural economics and tries to impair businesses from taking advantage of them. If businesses cannot use the data sourced from core platform services or another service, then the value of settings such as those that hide the collection of location data from consumers will decrease. The solution brought forward by the Digital Markets Act aims at eliminating the market for hidden settings and deceiving choice architecture, rather than intervening to ensure fair competition in this area or facilitating competition in terms of data privacy settings. Although some may argue that this is an over-paternalistic approach, it is submitted that this may be what is needed in the current environment, considering the high cost that consumers are faced with when researching privacy policies. It may be further argued that the large amount of time that would be required to ensure that a consumer is familiar with all the privacy policies makes competition at a data privacy policy level impossible.

8. CONCLUSION

The discussions surrounding online choice architecture and dark patterns are usually focused on the harmful effects of defaults, the difficult nature of procuring consent, or how data is being used for purposes consumers are unaware of. This paper has tried to link the research and show how defaults work towards procuring consent for data processing.

It has been argued that in the current environment, consumers active in online environments where the OCA is dominated by dark patterns should be classified as vulnerable consumers for three reasons. First, the use of defaults vitiates the consumer's ability to consent to privacy policies. Second, consumers are unable to monitor or often even understand how and when data is collected. Third, consumers fail to understand that all the 'free' services are paid with their data. Thus, they fail to compare services and products based on the currency of the online environment: data. It has been explored how, although consumers wish to have more control over their data, they do not invest time into reading privacy policies, which would incentivise businesses to develop better policies. In the absence of a way to incentivise businesses to improve their data policies through competition on the market, several other solutions were explored.

Following this paper, further research into whether showing consumers the profit generated by companies using their personal data would incentivise users to start considering the way that a business handles data as a more important factor in their purchasing decision. In addition, further research into the effects of using generative AI models to simplify consumer policies would be desirable for assessing the suitability of the aforementioned proposal. What is certainly necessary is a reform of the consumer law, to address the consumer law challenges brought about by online choice architecture and dark patterns.

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ORDERLY DEVELOPMENT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article analyzes the use of precedent by the European Court of Human Rights. It examines the various types of precedents in the practice of the Court and how they are utilized. It discusses different methods of development of case law, including overruling precedents, branching of the case law, and fragmentation of the case law. The article also proposes guidelines for the orderly development of case law.

Key words: *Precedent. – Case law. – European Court of Human Rights.*

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1. INTRODUCTION

The phrase "the orderly development of the Convention case-law" is borrowed from the 1990 *Cossey* judgment[1] of the European Court of Human Rights (ECtHR). In the *Cossey* case, the Court used this phrase to explain why it would not depart from precedent. One of the reasons cited was the need for the orderly development of its case law. At first glance, it might seem contradictory that the Court justifies its adherence to precedent by referring to the development of case law. However, in its practice and generally, precedent does not represent static law and does not preclude certain development. Indeed, in the *Cossey* case, the ECtHR made it clear it would not depart from precedent without cogent reason. Thus, departure from precedent has not been ruled out. Given that the Court is not a lawmaking court, departing from precedent essentially means deviating from the interpretation of the European Convention on Human Rights (ECHR), provided in the precedential judgment. This interpretation is typically rendered in specific factual circumstances. In some cases, the interpretation is closely tied to the facts, while in others, it is not.

The relationship between interpretation and fact is relevant for qualification of departure. If the interpretation has changed in essentially the same factual circumstances, the precedent is overruled. However, if the interpretation has changed in different factual circumstances, the old precedent remains applicable to the facts comparable with the original set of facts, while a new precedent is established for the new set of facts. The interpretation addressing the issue in the old precedent is branching in two or more lines of cases or is modifying from case to case. The specifics of these developments in case law may not always be clear, and differences of opinion can emerge, regarding whether there are good reasons for departing from precedent, whether the conditions are met for a new interpretation in essentially same factual circumstances, or whether different factual circumstances require a new interpretation. It is my proposition that examination of the concept of the orderly development of case law can be helpful in ensuring sound case law development and addressing these questions.

The article will commence with a brief explanation of precedents in common law legal systems and European Continental legal systems. It will then delve into the practical application of precedent by the European Court of Human Rights and distinguish between precedents where comparability

[1] *Cossey v. The United Kingdom* (App. No. 10843/84) Judgment of 27 September 1990, para. 35.

of facts is not relevant and those where it is. Within the second category of precedents, three modes of development will be identified: 1. overruling the precedent, 2. branching of the case law, and 3. fragmentation of the case law. These three modes of development are not without their challenges. The article will introduce the concept of orderly development of case law and demonstrate how it can help address these challenges.

2. THE PRECEDENT IN DOMESTIC LAW

2.1. The Precedent in Common Law Legal Systems

In *Jurisprudence* Sir John Salmond stated that:

"A precedent ... is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large" (as quoted by Collier 1988, 794).

Authors concur that in common law legal systems precedent is not the literal text of a judicial decision, but rather the legal essence that the courts derive from it. Svein Eng points out that in common law countries a judgment primarily resolves a specific case, but it also serves as the foundation for the general rule (Eng 2000, 277). This makes the precedent a form of unwritten law – *lex non scripta* (Tiersma 2007, 1188). There is a trend, however, towards textualizing the precedent in some common law countries (Tiersma 2007). Textualization of the precedents makes the law less prone to manipulation and more rigid (Tiersma 2007). The certainty in the law, equality and judicial efficiency have been usually cited as justifications for the doctrine of precedent (Maltz 1988, 368–370).

The requirement of analogy is deeply rooted in the doctrine of precedent. While Thomas Hobbes, Sir Matthew Hale and David Hume had differing views on precedent, G. J. Postema found common ground among them in the significance of analogy. He summarized their views as follows: "[T]he form of reasoning is thought to be the same: the instant case is located within or related to the complex details of common life . . . reposited in the common law, and conclusions are drawn from this context depending on the strength of the analogies to it" (Postema 1987, 32, quoted in Hunter 2001, 1250)". They did not, however, delve extensively into the subject of analogy. Earl Maltz (1988, 372) observed that the definition asserting that precedent

controls “the result in all future cases in which the facts are similar to the precedent case in all relevant respects” is not quite helpful and should be supplemented by a consideration which facts are relevant.

2.2. Precedent in European Continental legal systems

It is well established that, in European Continental legal systems, the lower courts are not legally bound to adhere to the judicial decisions of the higher courts. However, Yvon Loussouarn (1958, 257) observed that, in practice, they are *de facto* bound to do so. In Continental legal systems, the courts do not create law, but rather offer interpretation of legislation. The interpretations provided in the judgment of the higher courts are usually expected to guide the decisions of the lower courts. This practice stems from the inherent concept of unity within each judicial system. If each court were to independently interpret domestic legislation, it would lead to the fragmentation of the legal system. This principle of unity is a common feature shared by all Continental legal systems. In discussing precedent in international jurisprudence, which blends different legal cultures, Sanja Djajić (2018, 225) remarked that the concept of *de facto* precedent unites the common law and civil law approaches to judicial decisions.

Former Judge and President of the ECtHR, Luzius Wildhaber commented on the difference in legal reasoning between common law judges and Continental law judges. He noted that common law judges tend to engage in prudent reasoning, moving upwards from the facts of the case, while Continental law judges often employ sweeping reasoning, starting from abstract principles (Wildhaber 2000, 1530). Wildhaber emphasized that the gap between these two legal systems is not as wide as often depicted in literature. He pointed out that the rule of *stare decisis* in common law is not absolute, since exceptions exist. Thus, the House of Lords could depart from previous decisions, and courts can distinguish cases based on reasonable distinctions in the facts. On the other hand, he observed, that European Continental law courts routinely follow precedents (Wildhaber 2000, 1530).

3. PRECEDENT IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In principle, the European Court of Human Rights is not a lawmaking court; its primary role is to interpret and apply the European Convention on Human Rights. In the ECtHR practice, precedent comprises preserved

interpretation of the Convention. Interpretations may originate in a single case or be synthetized from multiple cases, eventually forming precedents. Unlike precedents in common law legal systems, a precedent of the Court is *lex scripta* – written law. The chambers or the Grand Chamber refer to and often quote specific sentences or textual sequences from previous judgments. The quoted text from previous judgments, referred to as "principles" by the ECtHR in recent years, has various functions. It can serve as a precedent in the strict sense, directly determining outcome of the case, but the Court also uses them as components in its legal reasoning.

In recent years, the legal reasoning of the ECtHR has been divided into two segments: 1. a general approach or general principles that relate to the broader legal context within which a specific disputed issue arises, and 2. the application of general principles to the specific issue at hand. The Court usually cites recent judgments in similar cases, and the references contained within these judgments lead to earlier cases, revealing a chain of cases in which the precedential principle was born, developed, and applied. In literature, such references, used as components of reasoning, have been likened to a "dense network" (Farnelli *et al.* 2022, 263). It is worth noting that the ECtHR is the most prolific international court. As of 22 October 2023, the Human Rights Documents (HUDOC) database, on the Court's website, reported that the Grand Chamber had delivered 5,297 judgments and 118 decisions, the chambers had rendered 62,589 judgments and 26,433 decisions, and the committees had produced 13,786 judgments and 19,698 decisions.[2] Consequently, the ECtHR case law thus contains an extensive collection of saved interpretations. In recent years, it has become a practice for the Grand Chamber not to reinterpret the Convention to resolve disputes but to utilize the "dense network" of references to previous judgments, thus relying on interpretations made in previous cases to resolve current disputes. However, such a practice may risk becoming selective and potentially dangerous, known as "cherry-picking".

In the *Chapman* case in 2001, the ECtHR outlined its position on the precedent as follows:

> "The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and

[2] ECtHR, HUDOC database, *https://hudoc.echr.coe.int* (last visited October 22, 2023).

> foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[3]

In *Chapman*, the Court made reference to the 1990 *Cossey* case, where a slightly different formulation was used. Responding to the observation by the applicant that the Court was not bound by its previous judgments, the Court stated in *Cossey*:

> "It is true that, as she submitted, the Court is not bound by its previous judgments; ... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[4]

Regarding this quote text, the Court referenced the *Inze* case from 1987. In paragraph 41 of the *Inze* judgment (referenced in *Cossey*), the Court elaborated on the prohibition of discrimination and on the Convention as a living instrument.[5] It may be noted that paragraph 41 in *Inze* specifically pertains to the second sentence of the text from *Cossey*. There was no reference to previous cases concerning the first sentence. Most likely, the Court's position, as stated in Cossey, was formulated for the first time there. This position was subsequently modified in *Chapman* and has since remained in its modified form in later cases. The modification includes several changes. One notable change is that one of the reasons for adhering to precedent – "the orderly development of the Convention case-law" – was omitted. The rational for this change is not immediately clear, and in

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[3] *Chapman v. the United Kingdom* (App. No. *27238/95*), Judgment of 18 January 2001, para. 70; *Christine Goodwin v. The United Kingdom*, (App. No. 28957/95), Judgment of 11 July 2002, para. 74; Similarly in *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 and 46951/99), Judgment of 4 February 2005, para. 121; *Savickis and Others v. Latvia* (App. No. 49270/11), Judgment of 9 June 2022, para. 202.

[4] *Cossey v. The United Kingdom* (App. No. 10843/84), Judgment of 27 September 1990, para. 35.

[5] *Inze v. Austria* (App. No. 8695/79), Judgment of 28 October 1987, para 41.

the author's opinion, it may not have been the most productive change. Two new reasons were introduced: foreseeability and equality before the law. Foreseeability is inherently linked to legal certainty, so this change is not particularly significant. Equality before the law might mean equal legal treatment in similar factual circumstances. This added reason thus underlines the importance of comparability of facts.

It should be added here that the Contracting States to the European Convention on Human Rights attached a specific function to case law – advancing the procedural efficacy of the Court. Through Protocol No. 14 to the Convention, they relocated the power to decide the admissibility and merits of the cases whose underlying legal issue had been the subject-matter of well-established ECtHR case law. This power was moved from the competence of the seven-judge chamber to the competence of the three-judges committee. Faced with the problem of a rising number of repetitive cases that burdened the workload of the Court, the Contracting States transferred these repetitive cases to a judicial formation with a smaller number of judges, thereby increasing the Court throughput (Djajić 2018, 230). This solution does not function without difficulties (Djajić, Etinski 2018, 73–98).

3.1. Precedents Without Comparability of Facts

The case law demonstrates different approaches taken by the ECtHR regarding the issue of comparability. In some cases, comparability exists at the level of disputed issues only. The interpretation used to address an issue in a precedent case is subsequently applied to address the same issue in later cases, even in a quite different factual situation. The Court denotes sometimes such mode of comparability by the phrase *mutatis mutandis*. In the 1995 *McMichael* case, the Court addressed procedural aspects of Article 8 of the ECHR in the context of parental relationship. Later, in the *Taşkın* case of 2004, in the context of environmental pollution, the Court applied the legal finding on procedural aspects of Article 8, referring to *McMichael* in a *mutatis mutandis* manner.[6] This legal finding on the procedural aspects of Article 8 has become relevant to the same issue in subsequent cases, regardless of the factual background. Because there are legal issues that are common to multiple articles of the Convention, there are precedents that apply across its various articles. The principle of legality is an important element of several

[6] *Taşkın and Others v. Turkey* (App. No. 46117/99), Judgment of 10 November 2004, para. 118.

articles. The Court defined the criteria of legality in the *Sunday Times* case of 1979,[7] and they have been reiterated in numerous cases and remain valid today.[8] The principles related to the fair balance between competing interests and the margin of appreciation can be considered as this type of principles. This type of precedents is based on the comparability of legal issues. They are not based on the comparability of facts, but facts may influence their development. In the *Leyla Şahin* case[9], the Court, under the influence of specific facts, extended the concept of legality to include legal acts that fall under statutory law.[10] Another addition to the basic precedential principle of legality pertains to factors that determine the precision and foreseeability of legal acts.[11] The ECtHR has, thus, established a general principle in multiple variants and selects one according to the requirements of the given case.

3.2. Precedents Involving the Relevance of Fact Comparability

Many precedents are rooted in the comparability of the facts. It is a commonplace in the general precedent doctrine that the essential facts of the precedent case and the subsequent case must bear similarity. The ECtHR has often cited prior comparable cases, and sometimes even series of comparable cases, providing the case names and paragraph references in brackets. On some occasions, the Court advises the reader to compare the facts of the current case with those of a previous case, again in brackets. The critical question here is whether the facts of the precedent case and the latter case are sufficiently comparable, in other words, whether the factual difference are significant enough to distinguish the current case from

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7 *Sunday Times v. The United Kingdom* (App. No. 6538/74), Judgment of 26 April 1979.

8 *Ovcharenko and Kolos v. Ukraine,* (App. Nos. 27276/15 and 33692/15), Judgment of 12 January 2023, para. 96; *Mustafa Hajili and Others v. Azerbaijan* (App. No. 69483/13 and 2 others), Judgment of 6 October 2022.

9 *Leyla Şahin v. Turkey*, (App. No. 44774/98), Judgment of 10 November 2005, para. 88.

10 *De Wilde, Ooms and Versyp v. Belgium* (App. Nos. 2832/66; 2835/66; 2899/66), Judgment of 18 Jun 1971, para. 93; *Sanoma Uitgevers B.V. v. the Netherlands*, (App. No. 38224/03), Judgment of 14 September 2010, para. 83.

11 *Karácsony and Others v. Hungary* (App. Nos. 42461/13 and 44357/13), Judgment of 17 May 2016, para 125; *Delfi AS v. Estonia* (App. No. 64569/09), Judgment of 16 June 2015, para. 122. *Cantoni v. France* (App. No. 17862/91), Judgment of 11 November 1996, para. 29; *NIT S.R.L. v. the Republic of Moldova* (App. No. 28470/12), Judgment of 5 April 2022, para 160.

the precedent. These references to comparability serve various purposes: sometimes they support or explain the Court's line of reasoning, and in other cases, they determine the case's outcome.

4. DEVELOPMENTS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

At least three modes of development can be observed in the ECtHR case law: 1. overruling of the precedent, i.e., rendering the precedent obsolete; 2. the birth of a new precedent alongside the old precedent, i.e., branching of case law; 3. fragmentation of the case law. While the first two modes may be considered forms of orderly case law development, the third mode is most problematic as it introduces the most uncertainty to the case law. A common thread for all three modes is the relevance of fact comparability.

4.1. Overruling the Precedent

Overruling a precedent involves setting aside a precedential judgment by a new judgment in a subsequent case. In the new case, the ECtHR interprets the ECHR differently and replies to the disputed issue contrary to the reply given in the precedent judgement. The essential facts in both cases are the same. The interpretation was not changed due to different facts, but due to developments in the sources the Court uses to interpret the Convention. This can include the emergence of a new European consensus on the disputed issue, changes in international law, or developments in documents of the Council of Europe, etc. The Court takes the phrase "European consensus" to mean an informal agreement of the Contracting States on a specific issue, emerging from their converging internal practices. It is widely recognized that the Court interprets the Convention as a living instrument. The Court is renowned for its evolutive interpretation. The above quoted passages from *Cossey* and *Chapman* support this. Alastair Mowbray also found in the case law other reasons, used by the Court, for overruling the precedent (Mowbray 2009, 179–201).

The *Christine Goodwin* case[12] is an illustrative example of overruling a precedent in the context of the orderly development of case law. The central issue at hand was whether the positive obligation of Contracting States

[12] *Christine Goodwin v. The United Kingdom* (App. No. 28957/95), Judgment of 11 July 2002.

under Article 8 of the Convention, to legally regulate the status of post-operative transsexual persons, falls within the margin of appreciation of the Contracting States. The issue initially appeared before the Court in the *Rees* case in 1986.[13] At that time, given the absence of a European consensus on the matter, the Court determined that the existence of this obligation fell within the margin of appreciation of the United Kingdom. This response was reiterated in several subsequent cases. Over time, the Court acknowledged that a European consensus had started to emerge. A majority of judges believed, however, that it had not reached a level where it could provide precise answers to specific questions regarding the status of post-operative individuals. In the *Christine Goodwin* case, the Court overruled the precedent set in *Rees*. Notably, in this instance, the Court did not confirm the existence of a sufficient level of European consensus, but it altered its interpretation anyway. The change of interpretation was influenced by factors such as the international development trend, extending beyond the Contracting States, in the legal regulation of the status of these individuals. Additionally, the Court considered the new importance given to dignity in its case law, among other factors. It should be noted, however, that in *Sheffield and Horsham*, the 1998 case that preceded *Christine Goodwin*, a minority of judges had already asserted that the European consensus had reached a sufficient level for a positive obligation of the Contracting States.[14] The existence and maturity of a European consensus as a source for interpreting the Convention is not straightforward. Different views of judges are possible and they occur from time to time. On the other hand, Kanstantsin Dzehtsiarou and Conor O'Mahony have criticized the Court's reliance on an "international trend" that extends beyond the Contracting States, from the platform of the common values of the States that share the same legal instrument (Dzehtsiarou, O'Mahony 2013, 351–352).

4.2. Branching of the Case Law

Shevchuk observed that similarity between the cases is required for the European Court of Human Rights to follow its previous precedents and that the Court uses the distinguishing technique to assess similarity (Shevchuk 2011, 157). He explained that the Court derived the distinguishing technique from the methodology of Anglo-Saxon case law and that the

[13] *Rees v. The United Kingdom* (App. No. 9532/81), Judgment of 17 October 1986.

[14] *Sheffield and Horsham v. The United Kingdom* (App. Nos. 22985/93 and 23390/94), Judgment of 30 July 1998.

Court uses it "when life conditions and social changes have an impact on the need to deviate from existing precedents, however without overruling such precedents" (Shevchuk 2011, 157). Having not been overruled, the precedent continues its life, but new line of divergent cases emerges. Indeed, sometimes a new factual framework, rather than social changes, requires divergence from existing precedents without overruling them.

The ECtHR considered the matter in the *Magyar Helsinki Bizottság* case in 2016.[15] The issue before the Court was whether the right to freedom of expression, as formulated in Article 10 of the Convention, includes the right of access to information held by a State. In the 1987 *Leander* case[16] the Court gave a negative answer, which was subsequently upheld in a series of later cases and thus became settled case law. The negative answer was given, however, in the context of the private interest of the applicants. The applicants sought information, held by State authorities, which was related to their private interest. In a new context, specifically the context of journalism and discussion on matters of public interest, the Court has started to depart from the settled case law. In this new context, the Court found that the right to freedom of expression includes the right of journalists, NGOs, bloggers, and other advocates of public interest to access to information of public interest held by a State. The Court did not characterize the modification of case law as the overruling of *Leander*, but rather as "a clarification of the *Leander* principles".[17] The *Leander* principle remains valid beyond the field of information of public interest, sought by advocates of public interest for public purposes. Thus, a new factual framework may lead to divergence from precedent without overruling it (for more see Etinski 2022, 18–19).

The issue of comparability of facts sometimes arises in this mode of development of case law, presenting a challenge for judges. This situation occurred, for example, in the *Savickis* case in 2022.[18] In this case, the Court altered its interpretation previously given in the *Andrejeva* case in 2009.[19] The central issue before the Court in both cases was whether Latvia's differential treatment of citizens and "permanently resident non-citizens", regarding the calculation of employment periods accrued outside Latvia during the time of the USSR for retirement pensions, complied with Article 14 of the Convention in connection with Article 1 of Protocol No. 1. Latvia

[15] *Magyar Helsinki Bizottság v. Hungary* (App. No. 18030/11), Judgment of 8 November 2016.

[16] *Leander v. Sweden* (App. No. 9248/81), Judgment of 26 March 1987.

[17] *Magyar Helsinki Bizottság v. Hungary*, op.cit., para. 154.

[18] *Savickis and Others v. Latvia* (App. No. 49270/11), Judgment of 9 June 2022.

[19] *Andrejeva v. Latvia* (App. No. 55707/00), Judgment of 18 February 2009.

included these work periods in the calculation of pensions of its citizens, but did not do so for "permanently resident non-citizens". In *Andrejeva,* the Grand Chamber decided, by a majority of 16:1, that this constitutes discrimination. In *Savickis*, the Grand Chamber arrived at a contrary conclusion, with a majority of 10:7. Natālija Andrejeva was employed in a State Federal company, but she worked in a regional department of the company, located in Latvia. On the other hand, Jurijs Savickis and the other applicants in the latter case were employed in companies in other Soviet Republics, working outside of Latvia, and concluded their employment there before settling in Latvia. This difference pertained to factual circumstances. Another difference was not factual, but related to a new legal view of the Constitutional Court of Latvia. In *Andrejeva*, Latvia justified the different treatment of citizens and "permanently resident non-citizens" by lack of economic resources. Subsequently, the Constitutional Court introduced a new justification – "constitutional identity". In the context of the case, "constitutional identity" implied a certain correction of historical injustice. The Baltic States had been occupied and annexed by the USSR and subjected to the Sovietization and Russification policies. In this context, Latvia argued that the applicants had the opportunity to obtain Latvian citizenship, but chose not to do so. Seven judges dissented, believing there was no good reason for departing from *Andrejeva*, as they considered the facts in the two cases essentially the same.

4.3. Fragmentation of the Case Law

"Fragmentation of the case law" refers to the evasive form of development of case law, which encompasses the branching of the case law and alteration of the precedential principle on a case-by-case basis. This most problematic mode of case law development can be exemplified by certain cases concerning the interpretation of Article 1 of the Convention. The core issue revolves around whether individuals who are the victims of violations of the Convention by a Contracting State, but are located outside of its territory, fall under the jurisdiction of the Contracting State. In other words, it questions whether the Court has jurisdiction *ratione personae* to consider applications from these individuals.

Referring to previous decisions of the European Commission of Human Rights, in the *Drozd and Janousek* case[20] in 1992, the Court stated that the term "jurisdiction" was not limited to the national territory of the Contracting

[20] *Drozd and Janousek v. France and Spain* (App. No. 12747/87), Judgment of 26 June 1992, para. 91.

States. It noted that the Contracting States might be responsible for acts of their authorities that produce effects outside their own territories. In the *Loizidou* case of 1995, the Court found that Türkiye had jurisdiction over the actions of its soldiers in the occupied region of Northern Cyprus, thereby establishing that a person on that territory was under the jurisdiction of Türkiye. Consequently, the Court ruled that it had jurisdiction *ratione personae* and declared the application admissible.[21] However, in the *Banković* case of 2001, the Court reached a different conclusion. It held that the respondent States did not have jurisdiction over their air strikes on a TV station in Belgrade, and the victims were not under the jurisdiction of these States. As a result, the Court found it had no jurisdiction and declared the application inadmissible.[22] The Court noted that as a multilateral treaty, the Convention was applicable in a regional context, specifically within the legal space of the Contracting States and that the FR of Yugoslavia was outside of this legal space.[23]

In might seem that *Banković* overruled *Drozd and Janousek*, however, this was not the case. In the *Öcalan* case of 2005, the Court determined that Türkiye had established its jurisdiction over Abdullah Öcalan when he was handed over by the Kenyan officials to Turkish officials on the territory of Kenya. The *Öcalan* case set a precedent that was followed by subsequent cases. In the *Al-Saadoon and Mufdhi* case in 2009, the Court found that the United Kingdom had jurisdiction over two Iraqi nationals detained in British-controlled military prisons in Iraq.[24] This holding was reiterated in the *Hassan* case[25] and the *Jaloud* case[26] under similar circumstances. A new line of cases was thus created, where the exercise of physical power and control by an organ of a Contracting State over a person beyond the territory of the Contracting State brings the person under the jurisdiction of the Contracting State. This raises the question how much the fact of exercise physical power and control distinguishes these cases from the exercise of physical power

21 *Loizidou v. Turkey* (App. No. 15318/89), Decision of 23 March 1995.

22 *Bankovic and Others v. Belgium and Others* (App. No. 52207/99), Decision of 21 December 2001.

23 *Ibid.,* para. 80.

24 *Al-Saadoon and Mufdhi v. the United Kingdom,* (App. No. 61498/08), Decision of 30 June 2009, paras. 86–89.

25 *Hassan v. the United Kingdom* (App. No. 29750/09), Judgment of 16 September 2014.

26 *Jaloud v. the Netherland* (App. No. 47708/08), Judgment of 20 November 2014.

and control by the air force in *Banković*. In any case, the application of the Convention has extended beyond the regional circle of the territories of the Contracting States, as determined in *Banković*.

The next significant modification occurred in the *Hanan* case of 2021.[27] This expanded the jurisdiction of a Contracting State to include military pilots responsible for civilian deaths from airstrikes outside the territory of the Contracting State. The new *ratio decidendi* was that only the court of the Contracting State was competent to prosecute the pilots. This fact was absent in *Banković*. In *Banković*, the International Criminal Tribunal for the former Yugoslavia also had jurisdiction over pilots who took part in the bombing. In the *Ben Al Mahi* case of 2006, the Court held that Mohammed Ben El Mahi, a Moroccan national residing in Morocco, who felt injured by caricatures of the Prophet Muhammad, published in Denmark, was not under the jurisdiction of Denmark and rejected his application as inadmissible.[28] In the *Wieder and Guarnieri* case in 2023, the Court rule that Joshua Wieder, a USA citizen living in Florida, and Claudio Guarnieri, an Italian citizen residing in Berlin, fell under the jurisdiction of the United Kingdom regarding the interception of their Internet communication by the United Kingdom intelligence agencies on the territory of the United Kingdom.[29] The basis for the decision was that the interference with the applicants' rights occurred within the territory of the United Kingdom and therefore fell within its jurisdiction. The *Ben Al Mahi* case was not referenced in this decision. The interference in *Ben Al Mahi* also occurred on the territory of the Contracting State. Such development of case law concerning interpretation of Article 1 leaves an impression of fragmentation.

4.4. Overlapping and Complexity of the Modes of Development of Case Law

There are developments of case law that exhibit characteristics of various modes. The case law concerning the liability of individuals or entities responsible for media content in cases of unlawful speech by third parties, transmitted through the media, can be categorized into two chains of cases.

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[27] *Hanan v. Germany* (App. No. 4871/16), Judgment of 16 February 2021.

[28] *Ben Al Mahi and Others v. Denmark* (App. No. 5853/06), Decision of 11 December 2006.

[29] *Wieder and Guarnieri. the United Kingdom* (App. Nos. 64371/16 and 64407/16), Judgment of 12 September 2023.

The first chain begins by the *Jersild* case[30] and continued through *Thoma*[31], *Verlagsgruppe News*[32] and *Print Zeitungsverlag*[33]. The second chain starts with *Delfi*[34] and proceeds through *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*[35], *Pihl*[36] and *Sanchez*.[37] There are factual and legal difference between these two chains. The first chain pertains to all forms of media, other than the Internet. In these cases, the Court assessed the liability of persons responsible for media content for unlawful speech of a third party in light of the right to freedom of expression, as guaranteed by Article 10. The second chain is specific to Internet media, and the ECtHR examined the issue in light of Article 10, informed by international documents addressing hate speech on the Internet.

The precedential principle, as formulated in *Jersild*, asserts that criminal punishment of a journalist for televising the racist speech of a third party is not compatible with Article 10, as it hinders the press's ability to contribute to discussions of matters of public interests. In *Thoma* the Court ruled that imposing civil liability on a journalist working for a national radio station for quoting an article critical of individuals responsible for reforestation in Luxembourg, as published in a newspaper, was in violation of Article 10. There are factual and legal distinctions between *Jersild* and *Thoma*. The first case dealt with criminal liability and an unlimited number of members of racial and ethnic groups who were affected by racial speech. The second case pertained to civil liability and a limited number of identifiable individuals who were injured by the journalist's critique. The circumstances of the second case potentially triggered the right to protection of private life and required striking a fair balance between the right to freedom of expression and the right to the protection of private life. The judgment in *Thoma* implies that the Court considered the facts not sufficiently different to warrant departing from *Jersild*.

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30 *Jersild v. Denmark* (App. No. 15890/89), Judgment 23 September 1994.

31 *Thoma v. Luxembourg*, (App. No. 38432/97), Judgment of 14 December 2006.

32 *Verlagsgruppe News GmbH v. Austria*, (App. No. 76918/01), Judgment of 14 December 2006.

33 *Print Zeitungsverlag GmbH v. Austria*, (App. No. 26547/07), Judgment of 10 October 2013.

34 *Delfi AS v. Estonia* (App. No. 64569/09), Judgment of 16 June 2015.

35 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* (App. No. 22947/13), Judgment of 2 February 2016.

36 *Pihl v. Sweden* (App. No. 74742/14), Decision of 7 February 2017.

37 *Sanchez v. France* (App. No. 45581/15), Judgment of 15 May 2023.

The *Print Zeitungsverlag* ruling established the civil liability of the publisher for transmitting the content of an anonymous letter that targeted two persons, and the relationship between Article 10 and Article 8 became a central issue. The Court decided that establishing civil liability for the publisher did not contravene Article 10. It invoked the *Jersild* principle and indicated that the judgment did not depart from it. The key legal issue in *Print Zeitungsverlag* revolved around the relationship between Article 10 and Article 8. While the Court did not explicitly state this, it is likely that the Court saw the facts in *Print Zeitungsverlag* as sufficiently different from those in *Jersild* to justify departing from it and providing a new legal response to the issue of liability for unlawful speech by a third party. In *Jersild*, the racial statements offended an unknown number of unidentified members of a racial group, leading to the State authorities pursuing criminal prosecution. In contrast, the anonymous letter, the content of which was transmitted by *Print Zeitungsverlag*, harmed two identifiable individuals. These individuals sought and received a remedy for the violation of their privacy through civil proceedings. The facts raised the issue of balancing the right to freedom of expression and the right to protection of private life. The Court consulted its case law on establishing a fair balance between the interest of free discussion of matters of public interest and individual's interest in enjoying privacy. A decisive factor was that the Court found that the information disseminated by the anonymous letter was not based on factual circumstances. This fact may distinguish *Print Zeitungsverlag* from *Thoma*, which is comparable in other respects.

A new line of cases addressing the same legal issue – liability of an intermediary for transmission of unlawful speech by a third party, in the new factual circumstances of the Internet – was initiated by *Delfi*. In this case, the Court found that the establishment of civil liability for a news company in the case of unlawful speech posted by visitors on company's the web portal, which endangered an individual's life, was compatible with Article 10. The Court went on to establish criteria for determining whether the imposition of civil liability on an Internet intermediary for unlawful speech posted by visitors on the page was consistent with Article 10. These criteria have been applied in subsequent cases and extended to criminal liability, as seen in *Sanchez*. The factual circumstances of Internet communication are distinct from those of communication through radio, television or print media, giving rise to different legal questions. Transmission of unlawful speech by a journalist or publisher is typically an intentional act. The crucial question here is what was the purpose of the transmission. Transmission of unlawful speech via a web page is not an intentional act of the owner of the website. The central question here is what measure the website owner can take to prevent or remove such content. In addition to these factual difference,

Article 10 has been informed by international legal development concerning hate speech on the Internet. As a result, these factual and legal distinctions have guided the development of case law regarding the liability of intermediaries for transmitting unlawful speech by third parties along three branches. The two primary branches are differentiated by the distinction between non-Internet media and Internet media. The branch addressing non-Internet media further splits into two sub-branches, depending on whether the unlawful speech impacts the public interest, as in *Jersild*, or the private individual interest, as in *Print Zeitungsverlag*.

4.5. Orderly Development of Case Law

The concept of orderly development of case law might include some guidelines. The first guideline could involve the requirement of foreseeability, which the ECtHR has itself established. Looking at the means regularly employed by the Court for interpreting the Convention, relevant case law, and trends of its development, the judges should consider whether the decision could have been anticipated. The second guideline could entail the Court considering the future when formulating its precedential judgment – it should be looking at the future. It would assess how its legal findings in the judgment might be applied in future cases and take into account how its presentation of the facts might influence the use of the precedent. As the precedent appears in the practice of the Court in the form of *lex scripta*, the textual formulation of legal findings is important. It seems that there is a growing trend in the volume of judgments. It is a great question how healthy this is for case law. Too many facts presented as relevant in the precedential judgment may create problems regarding comparability and diminish the abstractness and generality of the precedential principle. The third guideline might suggest that the Court could adopt a more flexible approach to the precedent, focusing more on the *ratio decidendi* of the precedent than on its textual formulation. The fourth guideline could involve cases where doubts arise about the maturity of the condition for a change in interpretation or the comparability of facts. In such situations, judges should be guided by a broader framework composed of the values underlying the Convention and fundamental human rights doctrines. Despite the Court's reluctance to openly acknowledge departure from precedent, the fifth guideline could encourage the Court to show more willingness to overrule a problematic precedent in due time. The Court's case law is not a chaotic mass of judgments and decisions that judges randomly choose from to fit their preferences when

resolving cases. The above analysis shows that certain regularities governing the dynamic of case law may be discerned. These guidelines could, however, hopefully contribute to the better functioning of the case law.

The "orderly development of case law" concept, as outlined here, may also be helpful in situations of doubts, such as whether a European consensus has developed enough to inform precisely the Convention on a specific issue or whether the facts of two cases are sufficiently comparable. *Christine Goodwin* is an example of such development of case law. The Grand Chamber did not find that the European consensus had reached a sufficient level of coherency to answer precisely to all aspects of the disputed issue, but the Court had noted in a previous judgment the process of building European consensus, signaling thus that a change of the precedential legal finding was possible. Furthermore, the Court was motivated to change the previous interpretation by observing the growing significance of human dignity in its case law. This was quite in accordance with the fundamental values and human rights doctrines. Similarly, *Magyar Helsinki Bizottság* is an example of healthy development of case law. The change began in previous cases and was consolidated in this case. Unquestionably, the change was in keeping with the basic values underlying the Convention. In contrast to these cases, the *Savickis* case is problematic. The Court gave a great concession to the doctrine of constitutional identity, used by the Constitutional Court of Latvia to justify different treatment of citizens and permanent residents regarding the calculation of employment periods for pension accrued outside Latvia during the USSR period. It is not easy to see how the redress of the historical injustice of the occupation and annexation of Latvia by the USSR, by differentiating the accounting for the pensions of citizens and non-citizens, is compatible with building an inclusive and stabile society. Furthermore, the impact that the justification of different treatment of citizens and non-citizens, based on the "constitutional identity", may have on the practices of national authorities and the further development of case law is problematic. *Banković* also does not fit the standards of orderly development of case law. The judgment was criticized as incompatible with the basic idea of human rights (Roxstrom, Gibney, Einarsen 2005, 62) and the object and purpose of the Convention (Orakhelashvili 2003, 547; Altiparmak 2004, 226; Happold 2003, 88). The *Banković* principle was modified several times in later cases, thus diminishing its precedential value. In *Thoma* the Court approached the *Jersild* principle not as *lex scripta*, but as a general rule that leaves space for certain factual differences.

5. CONCLUSIONS

The European Court of Human Rights places great importance on the stability and foreseeability of its case law. The Court has reiterated on numerous occasions that it will not depart from a precedent without good reason. Unlike common law legal systems, the Court's precedent is a written text, *lex scripta*. The precedential principle is a sentence or a sequence of the text of the precedential judgment that the chambers and the Great Chamber cite in later cases. Given that the Court is not a lawmaking court, in substance these precedents are essential interpretations of the Convention by the Court. Despite their written form, the Court commonly designated them as "principles". In some instances, these precedential principles address specific legal issues, which, together with other legal matters, constitute the legal content of a case. Typically, such precedential principles are not closely connected to the facts of the case. When the same specific legal issue arises in a later case under significantly different factual circumstances, the Court employs the precedential principle to build a legal explanation of the latter case. In other situations, the precedential principle is intimately tied to the facts of the precedent case; it does not merely serve as one part of the mosaic of judicial reasoning but constitutes the legal holding that ultimately dictates the outcome of the case. In order for the precedent to be applied as a decisive factor in a later case, it is essential that the facts of the two cases are sufficiently comparable. The Court invokes an evolutive interpretation of the Convention as a good reason for departing from the precedent. In cases where the precedential principle is closely linked to the facts, the Court also departs from the precedent when the facts of later case are not sufficiently comparable with those of the precedent. These two forms of departure have distinct consequences. When the Court departs due to a new interpretation of the Convention, the precedential judgment is overruled, rendering the precedent obsolete. The overruling judgment becomes a new precedent, setting the legal holding for all subsequent cases. Conversely, when a departure occurs due to a lack of factual comparability, a new precedent is established in a different factual context, while the old precedent remains applicable to its original set of facts. This results in the emergence of both an old line of cases governed by the old precedent and a new line of cases guided by the new precedent, essentially creating a branching effect in the case law. As in common law legal systems, not all precedents within the Court's practice are of the same caliber. Some of them originated in the early years and remain in effect today. New factual circumstances bestowed to some of them "younger brothers", causing branching in the case law. Others have been overruled due to a new interpretation of the Convention or other reasons. While certain precedents may not be of the highest quality, the

Court refrains from overruling them for various reasons and instead utilizes specific distinctions in the facts, which results in fragmentation in the case law.

The Court's case law is not a chaotic mass of judgments and decisions from which judges pick interpretations arbitrarily to resolve cases. There are regularities within the case law that guide its dynamic and utilization. Nevertheless, the phrase "orderly development of the Convention case-law", used by the Court in the *Cossey* judgment of 1990, calls for further examination. Regarding the general doctrine on precedent and the Court's case law, this article proposes several guidelines. The first guideline is articulated by the Court itself, focusing on the requirement of foreseeability. In line with the means regularly employed by the Court for interpreting the Convention, the relevant case law and the trends in its development, the judges should assess whether the decision could have been reasonably anticipated. When shaping precedential judgments, the Court should look to the future, considering how its legal findings might be applied in future cases. Moreover, the Court should be mindful of how its presentation of facts might affect the use of the precedent. There appears to be a trend in the Court's practice where the volume of judgments is increasing. It may be a matter of debate how this affects the health of the case law. Excessively detailed facts presented in the precedential judgment can create problems related to comparability and may diminish the abstractness and generality of the precedential principle. The third guideline suggests that the Court could adopt a more flexible approach to the precedent, moving away from the concept of *lex scripta* and, instead, considering the *ratio decidendi* of the precedent or seeking its spirit. The fourth guideline proposes that in cases where doubts arise regarding the maturity of the condition for a change of interpretation or the comparability of the facts, judges should be guided by a broader framework based on values underpinning the Convention and the fundamental principles on human rights.

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A COMPARATIVE PERSPECTIVE ON THE LIABILITY OF HEIRS

Settlement of deceased's debts is one of the fundamental questions of succession. The liability of heirs for these debts is very difficult to regulate because of the need to balance several conflicting interests: the interests of heirs, the interests of estate creditors and the interests of heirs' personal creditors. Legal systems may attempt a simple, but rigid approach to heirs' liability or provide detailed and flexible, but complex rules on different scopes of liability in different situations. This article discusses the main approaches to liability of heirs for estate debts and provides a critical analysis of their advantages and disadvantages. The author concludes that complex and flexible rules on liability of heirs may ultimately lead to more just distribution of estate assets.

Key words: *Liability of heirs. – Succession law. – Estate settlement. – Estate insolvency. – Probate*.

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1. INTRODUCTION

Succession to the estate of a deceased person is often seen primarily as an economic advantage and even as an undeserved windfall. Inheritance is one of the most significant methods of acquiring property and it enables accumulation of great private wealth. But it is often overlooked, or at least relegated to the background, that succession also relates to debts of the estate. Succession law is very closely related to bankruptcy and liquidation law because the main issue at stake is the same: one legal subject has ceased to exist and the law must decide on the fate of its rights and obligations. However, unlike a company faced with bankruptcy, an individual may die regardless of his wealth and success. It is to be expected that most people leave this world with a positive balance, yet it also often happens (maybe ever more often) that a man leaves behind an indebted estate. Settlement of estate debts (debts of the decedent and debts arising in connection with his death) is therefore equally important as the just distribution of remaining property.

Providing adequate rules for settlement of estate debts is no easy task. It is an issue involving many conflicting interests. The law has to take into account the interests of estate creditors, heirs and their personal creditors. In principle, no one should be put into a worse position by the death of the decedent, but if the debts of the estate cannot be met out of its assets, or if the personal debts of the heir cannot be met out of his personal property, the law must make sure that the economic loss is justly distributed. Creditors of the estate should not suffer loss due to personal debts of the heir and the heir should not suffer loss due to debts incurred by the decedent. Just distribution of liability is also important from an *ex ante* perspective because the fate of a man's successors will usually influence the decisions he makes in his lifetime. It should be presumed that reasonable men want to avoid the situation in which their debts overly burden their heirs. Therefore, an inadequate system of liability for estate debts, which does not provide sufficient protection to heirs, will discourage people from taking on debt, even if it would be a prudent decision for business or personal finances (Đurđević 2015, 145–146).

The issue of liability for estate debts is inseparably linked to the way in which heirs succeed to the position of the decedent, i.e. to rules on devolution of the estate (the method of transferring the rights and obligations of the decedent to his heirs). National legal rules on acquisition of inheritance can be divided into two or three groups according to whether the acquisition is direct or through an intermediary and whether it is immediate upon death or delayed until acceptance or an official act which transfers the estate to

the heirs (Kroppenburg 2012). The biggest difference is apparent between civil law and common law legal systems because of different conception of the basic idea of devolution (transfer of the estate from decedent to his heirs). In common law systems the estate of the decedent is not transferred directly to his heirs, but first to a personal representative – a person who is charged with settlement of the estate (Sawyer, Spero 2015, 223 ff.). The representative must administer the estate: pay all the debts of the estate and then distribute the remaining property among the heirs (Sawyer, Spero 2015, 256 ff.). The heirs acquire their inheritance only through the representative and on the basis of *inter vivos* transactions with him. The personal representative acquires the estate, but only as a trustee of the heirs and his liability for estate debts is limited to assets belonging to the estate (Sawyer, Spero 2015, 258). The heirs are fully protected from the negative side of succession – they cannot be made liable for decedent's debts. This approach also has the important advantage of avoiding the complexities which arise in case of direct devolution to multiple persons (which gives rise to the complex relationship of co-heirship). Civil law systems, on the other hand, start from the principle of direct devolution. Rights and obligations of the decedent are transferred directly to his heirs, be it at the moment of death (immediately) or after acceptance of the inheritance. Systems which subject devolution to acceptance by the heir create a period of uncertainty in which the estate belongs to no-one (*hereditas iacens*), but it is usually placed under court or private guardianship (Kroppenburg 2012). It must be stressed, however, that direct devolution does not mean that the estate cannot be separated from the property of the heir and placed under guardianship in difficult situations, especially when the assets of the estate are insufficient to meet its obligations. Civil law systems start from direct devolution and give all power over the estate to the heirs, but they also, usually, leave the possibility of *separatio bonorum* and official guardianship over the estate.

Each regime of succession has its advantages and disadvantages with regard to settlement of estate debts and none of them is completely adequate for all individual cases of succession. When the estate is not insolvent and if heirs behave responsibly, direct devolution and immediate entitlement of heirs is the best solution because it is simple, it avoids any legal vacuum in ownership of the estate and it avoids the trouble and costs of separate administration of the estate. This is the reason why the drafters of the German Civil Code opted for unlimited liability of heirs (who acquire the estate *ipso iure* at the moment of death), but provided for ways of limiting liability through official administration, insolvency administration, convocation of creditors and also by providing a time limit after which creditors cannot enforce claims against the heirs. The regime of German law is certainly quite complex, but it aims to provide flexible solutions which can be adapted to the

circumstances of the particular case. Many continental legal systems opt for unlimited liability of heirs with the possibility of accepting the inheritance subject to inventory (*beneficium inventarii*) whereby liability is limited to the value of assets listed in the inventory (liability *pro viribus hereditatis*). This solution is similar to the German regime, but slightly simpler and less flexible. Leaving the settlement of the estate to the heirs themselves is usually the most sensible solution, however, if complications arise, all interested parties should have the right to request a special administration of the estate. If it is unclear whether the assets of the estate will be insufficient to meet the debts, or if ascertainment of debts is difficult for other reasons, the heir should be able to request *separatio bonorum* and special administration of the estate, provided, of course, that the estate is valuable enough to cover the costs of such administration. Creditors of the estate should also have this right if the heir is insolvent and his personal creditors strive to satisfy their claims out of the inheritance. Finally, if the estate is insolvent, the rights of estate creditors should be protected in a special insolvency proceedings. Put simply, the settlement of the estate should depend on the circumstances of the case. If no problems arise, settlement should be left to the heirs. If problems arise, depending on the type of problem, parties whose rights are endangered should be able to request an inventory, a convocation of creditors or even separate administration of the estate. The only problem with such flexible regime is that it is very complex and requires detailed and well aligned rules for all contingencies that might arise. In light of this, it might be said that the common law approach offers maximal clarity and certainty. Its only major drawbacks are complexity and cost. But these pains of estate settlement are sometimes inevitable and no regime of devolution, administration and liability is capable of avoiding the pains of settling large, complex and indebted estates. The main characteristic of the common law approach is mandatory administration of the estate by a personal representative of the deceased and distribution of estate property to the heirs only after all issues have been resolved. This is generally the most secure way of estate settlement, but it can be inadequate for unchallenging cases. On the basis of this general overview several tools for ascertaining and limiting the liability of heirs can be singled out as very important: inventory of the estate, convocation of creditors, separate administration of the estate (*separatio bonorum*), and insolvency proceedings over the estate. The heirs could also be protected by special time bars, independently of the rules on prescription. It should also be mentioned that all legal systems allow an heir to renounce his position and thereby exclude his liability, but this does not solve the question of liability in general because orderly settlement of an estate requires that someone should take up administration of the estate be

it only in favour of settling its debts. This position is usually reserved for the state and subject to special rules on liability which offer a counterbalance for the fact that the state cannot refuse the inheritance.

It is very interesting that some legal systems attempt to make a shortcut to limited liability of the heirs by providing that liability should be limited *ex lege*. Serbian law offers one such example, the other being Portuguese law. It seems that this solution rests on a paternalistic approach to succession – heirs are protected as a matter of principle, they do not have to earn the limitation of liability by making or requesting an inventory or special administration of the estate. Such general limitation of liability seems to offer full protection from economic loss that might be caused by accepting an indebted inheritance, but in reality the protection is much less certain than it seems at first glance. Limitation of liability depends on the value of the estate at a certain point in time (Serbian law opts for the moment of devolution), which might be difficult to ascertain or subject to change, therefore leading to financial loss for the heirs or insufficient protection for the creditors of the estate. Most importantly, however, such a rule cannot protect the interests of estate creditors when the heir is insolvent. *Separatio bonorum* remains the only adequate solution for such cases. It is also the only solution for insolvent estates because general rules on liability of heirs offer no guarantees that insufficient assets of the estate will be justly and proportionately divided among the estate creditors. Legal systems that provide no rules on insolvency proceedings for insolvent estates rudely infringe upon creditors' rights by leaving them to race for enforcement in line with the principle of *prior tempore potior iure*.

A comparative analysis of rules relating to heirs' liability is not only an interesting academic exercise, but a step towards harmonization of succession law in line with most practical solutions. It is very often stated that succession law, together with family law, derives its shape from cultural norms of a certain society and that harmonization of succession laws between different national states would be misguided and difficult. This is very far from the truth. The influence of social, cultural and economic circumstances on the law of succession cannot be denied, but this influence is not strictly national or parochial – it usually reflects much wider historical developments, such as emancipation of women, equality of extra-marital and adopted children and acceptance of same-sex relationships. Same tendencies of development can be observed in all Western legal systems (Zimmermann 2018, 11–15; Verbeke, Leleu 2011, 465–468), which means that cultural influence operates above national borders and provides no barrier to change and harmonization of succession laws. Therefore, the significant cultural influence on succession law should be regarded as nothing other but the

influence of a common European legal tradition, which not only allows, but also requires a critical re-evaluation of national rules and reform of rules which have proven less than satisfactory (Zimmermann 2018, 25–26). If comparative analysis, reception and harmonization represent viable paths to reform of basic rules of succession, such as intestate rules of succession, they are even more so in relation to more technical rules, such as the question of liability of the heirs. That heirs should be liable for decedent's debts is generally acknowledged in the European legal tradition, but there is much disparity in the details. National succession laws limit the liability of heirs in different ways and under different procedures, which makes it possible and necessary to analyse these different approaches in order to determine their strengths and weaknesses and come up with a restatement of best solutions for specific situations.

It is also important to note that the development of the common European or Western culture primarily influences material rules of succession, such as the question of the position of the surviving spouse or the equal treatment of children born outside marriage, while more technical rules remain within the confines of their national legal tradition (Verbeke, Leleu 2011, 475). Spontaneous or organic development of the rules of succession in certain areas should be complemented by a deliberate and well-argued reform of technical rules. This approach has already been applied in the domain of testamentary formalities in the Washington convention of 1973 which provided uniform rules on testamentary form (international will).[1] The limited impact of this convention (national testamentary forms remain the most popular) should not be taken as a sign that harmonization of succession law is impossible or disadvantageous, but rather a symptom of the inadequacies of the rules provided in the convention (they represent an overly complex compromise between different testamentary traditions).

2. HISTORICAL INTRODUCTION

Direct succession to the estate of the deceased in civil law legal systems stems from the rules of Roman law, which provided direct and immediate succession to closest members of the decedent's family (*sui heredes*) and direct succession after acceptance for persons who were considered more distant members of the family (*extranei heredes*) – one of these regimes remains at the heart of succession law in most European states

[1] Convention providing a Uniform Law on the Form of an International Will (Washington D.C, 1973).

(Kroppenberg 2012). Persons who were in power of the deceased at the time of death acquired the inheritance directly, immediately and without the possibility to refuse it – they were *sui heredes*, "their own heirs"; other entitled persons received the inheritance directly, but not immediately, they had the right to refuse the inheritance and until they decided on whether to accept it the inheritance belonged to no one (*hereditas iacens*) (Buckland 1968, 305–306). Since it is unjust to force someone to become an heir (this was not even possible in classical Roman law due to praetor's intervention in granting *ius abstinendi*), contemporary continental legal systems provide for immediate succession with right of refusal, or delayed succession, which leaves a period of uncertainty during which the estate belongs to no one.

Liability of heirs for decedent's debts is deeply rooted in legal history. In classical Roman law, heirs were liable for contractual debts of the *defunctus*, but not for his private delicts. Claims based in delict were pursued by way of *actiones poenales*, which primarily served to effect vengeance against the wrongdoer, and were, therefore, tied to the person of the wrongdoer – they were passively intransmissible (Zimmermann 1996, 914–916).[2] Roman law never made a clear distinction between punishment and compensation in the context of delictual liability: even if amounts claimed were calculated on the basis of pecuniary loss, as in the case of *actio legis Aquiliae*, the claim remained penal and primarily meant to exact revenge (Milošević 2014, 394–396). Liability for wrongful acts of the deceased was limited to the amount by which the heir has been enriched by such acts,[3] unless the deceased died after *litis contestatio*, in which case the heir was liable for the full amount of the delictual claim (Dondorp 2018, 81–82).

In classical Roman law, the liability of the heir for decedent's debts was unlimited and this difficult position was later improved by Justinian who provided for the *beneficium inventarii*: if the heir made an inventory of the estate within a certain period, his liability was limited to the assets of the estate and creditors who claimed first could secure an advantage over those who came later (Buckland 1968, 316–317). Roman law did not privilege creditors with solidary liability of heirs: if there was more than one heir, each was liable only in proportion to his share of the estate (Buckland 1968, 317). Creditors could, however, request *separatio bonorum* from the praetor if their interests were endangered by insolvency of the heir, but it was disputed whether *separatio bonorum* limits liability (so that creditors may satisfy their claims only out of assets belonging to the inheritance)

2 Inst. 4. 12. 1.

3 D. 50. 17. 38.

or whether liability of the heir remains unlimited (so that creditors may satisfy their claims out of personal property of the heir if the assets of the inheritance are insufficient) (Buckland 1968, 317–318).

Mediaeval jurists considered heirs liable in all contractual claims, but delictual claims could only be brought against them for the amount of their enrichment. Such restrictive approach could not be justified with regard to claims relating to compensation for loss. A decisive change came about through the work of canonists, who considered it a question of Christian moral duty of the heirs to make amends for sins committed by the deceased. They explained passive transmissibility of delictual claims by converting them into contractual claims – the promise of the wrongdoer that he will atone for his sins, made to his confessor on his deathbed, was construed as a contract in favour of third parties i.e. the victims of the wrongdoing (Dondorp 2018, 94–102; Zimmermann 1996, 1020–1021). Canonists thus made the first important step towards unlimited passive transmissibility of delictual claims aimed at compensation for loss.

In contemporary legal systems it goes without saying that heirs are liable for all private law obligations of the deceased, including those arising out of wrongdoing. Heirs are protected only against penal sanctions imposed against the deceased under public law as they aim at personal retribution against the wrongdoer. Private law obligations may also be bound to the person of the debtor, by their personal nature or agreement of the parties who created the obligations, but for the vast majority of debts this is not the case. It is generally presumed that claims and debts arising under the law of obligations are transferrable upon death.

3. BENEFICIUM INVENTARII

In most European legal systems the main tool for limiting the liability of heirs is a conditional acceptance of the inheritance – acceptance subject to inventory, which either limits liability to assets belonging to the estate (liability *cum viribus hereditatis*)[4] or limits liability to the value of the assets beloning to the estate, but the heir remains liable with his personal property up to the value of the inheritance (liability *pro viribus hereditatis*)[5] (Kroppenburg 2012). Taking inventory of the estate plays two important

[4] This is the case, *inter alia*, in Italy (Art. 490 *Codice civile*), Spain (Art. 1023 *Código Civil*) and Portugal (Art. 2071 (1) *Código civil português*).

[5] This is the case, *inter alia*, in France (Art. 791 (3) *Code civil*).

roles: it enables an overview of assets belonging to the estate (with their estimated value), which makes it easier to distinguish them from assets belonging to the heir's personal property; it also has the legal consequence, if all rules relating to taking of inventory have been respected, of limiting the liability of the heir (by value or by assets). In German law, however, the primary role of the inventory is to provide clarity with regard to the composition of the estate, because it does not lead to any limitation of the liability of the heir. Taking of inventory can only have negative consequences for the position of the heir if he failed to prepare the inventory in time[6] or knowingly provided false information[7] – he then loses the right to limit his liability by requesting special administration of the estate. Under Austrian law, liability of an heir depends on whether he accepted the inheritance unconditionally, which leads to his unrestricted personal liability, or subject to inventory, in which case his liability is limited to the value of the estate at the time when the court order transferring the estate was made (Welser 2019, 232). In Spain, an heir may accept the inheritance *cum beneficio inventarii* (this is possible even within a short time after simple acceptance) which leads to liability which is limited to assets of the estate and entails administration of the estate as a separate entity, but administration may be left in the hands of the heir (Cantero *et al*. 2012, 292–294).

Serbian law belongs to a small group of legal systems which have opted for automatic, *ex lege*, limitation of liability for estate debts. This regime was first introduced in 1955 after significant social, political and legal changes. The system of private law which existed before the Second World War was completely abolished in order to be replaced by new socialist legislation. The shift towards automatically limited liability should surely be seen as a reflection of a generally more paternalistic approach to civil law under socialism. The intention was to simplify succession by limiting liability of heirs even if they took no steps to determine the indebtedness of the estate. This new regime replaced rules which corresponded with the dominant approach in European law – limitation of heir's liability by an acceptance subject to inventory. Civil law in the Kingdom of Yugoslavia was highly fragmented, but the most important legal sources were the Austrian Civil Code and the Serbian Civil Code of 1844[8] and their solutions were generally aligned – which is no wonder since the Serbian Code was drafted on the basis of the Austrian Code. This legal tradition should play a part when time comes for a reform of the current rules of Serbian succession law. One of its biggest failures is the fact that heirs are left

6 § 1994 (1) BGB.

7 § 2005 (1) BGB.

8 *Beneficium inventarii* is provided in §§ 485 and 488 of the Serbian Civil Code.

with no possibility of restricting their liability to the assets of the estate, which is the only solution when limitation by value leads to uncertainties. Having in mind that a system like the one in German law would probably seem too complex for Serbian legislation and judicial practice, it seems appropriate to suggest a new rule according to which the taking of inventory of the estate would lead to liability being restricted to the assets of the estate (*cum viribus hereditatis*). Such a rule would fully protect the interests of the heirs as well as the interests of the creditors (they would not be in a worse position compared with the situation that would have obtained if their debtor had not died). It would also be appropriate to assign more significant legal consequences to the inventory because its drawing up is placed in the hands of highly trained legal professionals with public authority – public notaries.[9] *De lege lata*, taking of inventory, even if it is placed in the hands of public authorities and regulated with fairly detailed rules, produces no immediate legal effects for the liability of heirs. The main purpose of the inventory is to provide clarity as to which assets belong to the estate, which is indispensable in case of *separatio bonorum*, but also extremely useful for determining the scope of heir's liability. Serbian law does not make the limitation of liability to the value of the estate conditional on the inventory, which means that the value of the estate can be determined on the basis of other evidence, but taking of official inventory is certainly the most reliable way. It should be mentioned that Serbian law requires debts of the decedent to be "noted" in the inventory.[10] The scope of this provision is not entirely clear. It seems that the public notary has to take into account decedent's debts on the basis of information he acquires in the process of taking inventory of the assets. No special procedure for convocation of decedent's creditors is provided for, which means that an inventory could easily be incomplete with regard to decedent's debts and there are no rules on registration of claims which would limit liability towards creditors who fail to register their debts in good time.

4. CONVOCATION OF CREDITORS

According to the dominant solution in European legal systems, a procedure for convocation of creditors is provided in which each creditor of the decedent has to register his claim under pain of losing it or being disadvantaged

[9] Art. 96 of the Law on Non-contentious Proceedings (*Zakon o vanparničnom postupku*).

[10] Art. 97 (2) of the Law on Non-contentious Proceedings (*Zakon o vanparničnom postupku*).

in relation to creditors who duly registered their claims. Procedure for convocation of creditors is an important tool for ascertaining the value of the estate and deciding on appropriate steps for its settlement. It is a counterbalance to the duty of heirs to take inventory. Just like the heirs (with the help of authorities) have to provide an account of assets belonging to the inheritance, so too must the creditors of the decedent make an application to inform the heirs of their claims. The need for a convocation of creditors naturally stems from the fact that heirs are not required to know of all the legal relationships of the decedent and they have an interest in quick and reliable clarification of debts in order to decide on whether they will accept the inheritance and how they will proceed to distribute it. It should also be kept in mind that convocation also serves the needs of estate creditors who may be unaware of the succession. It also gives them a guarantee that their claims will not be disregarded during settlement of the estate.

Protection which convocation gives to creditors is a natural counterbalance of the restricted liability of heirs. It is in this light that Austrian legal theory underlines that conditional acceptance of inheritance (subject to inventory) provides full protection to heirs only in connection with a convocation of creditors (Welser 2019, 233). This is so important that the Austrian Law on Non-contentious Proceedings provided that a convocation should be ordered *ex officio* in cases of conditional acceptance of inheritance,[11] even if the Austrian Civil Code provided for convocation only upon request of the heirs. Convocation consists in the publication of an official notice by the probate court addressed to any and all creditors (*Edikt*), calling them to register their claims within a stated deadline.[12] It must include a warning that creditors who fail to register their claims will be satisfied only after all registered claims have been met. If the estate is insolvent, failure to convoke creditors or preferential treatment of certain creditors to the detriment of others may lead to unrestricted personal liability of heirs towards disadvantaged creditors for the amount they would have received had the estate been properly settled.[13] Without convocation, an heir will escape unrestricted personal liability only if he manages to distribute assets of the estate in line with rules on estate insolvency proceedings (Sauper 2013, 87–88). Convocation is, therefore, a procedure which safeguards both the interests of the heirs as well as the interests of the creditors. It provides a basis for a just distribution of estate assets. This is a very important point to keep in mind when discussing rules of Serbian law. We have seen

11 § 165 Abs. 2 AußStrG.

12 § 813 ABGB.

13 § 815 ABGB.

that liability of heirs is automatically limited to the value of the estate, but there are no special provisions which protect estate creditors against unconscionable behaviour of the heirs. Preferential treatment of one creditor may lead to his liability towards disadvantaged creditors on the basis of general rules of *actio Pauliana*[14] or on the basis of general rules of liability in tort,[15] provided, of course, that he acted unconscionably. Unconscionable heirs would likewise be liable in tort and their liability would be personal and unrestricted since the claims of disadvantaged creditors arose on the basis of the activity of the heir – they are not claims against the estate, but against the heir personally. However, even if the law provides general rules as a safety net for wronged creditors, it would be advantageous to provide a special procedure for registering estate debts because such a procedure would provide transparency and discourage heirs from acting irresponsibly towards estate creditors.

The importance of convocation is even greater under German law since it does not provide for limited liability of heirs in normal circumstances. Liability is limited to the assets of the estate only if the estate is subjected to special guardianship or if insolvency proceedings are opened. In order to decide on whether to request guardianship or insolvency, the heir may request a convocation of creditors (*Aufgebotsverfahren*).[16] Apart from providing information on the indebtedness of the estate, convocation limits the liability of heirs to assets belonging to the estate with regard to creditors who have failed to register their claims (Joachim 2018, 215–216).[17] The procedure is similar to the one in Austrian law: the convocation is made by the probate court, it contains a warning of consequences for creditors who fail to register their claims, but unlike Austrian law, it cannot be ordered *ex officio*, but only upon request of an heir or guardian of the estate (Joachim 2018, 216–223).

In both Austria and Germany a convocation of creditors has no direct effect on the existence of claims. If assets belonging to the estate appear, which were unknown at the time of convocation, creditors will be able to satisfy their claims out of these assets even if they omitted registration (Welser 2019, 234; Joachim 2018, 224).

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14 Art. 280 sqq. Law on Obligations (*Zakon o obligacionim odnosima*).

15 Art. 154 sqq. Law on Obligations (*Zakon o obligacionim odnosima*).

16 § 1970 BGB.

17 § 1973 BGB.

Common law systems also provide protection against debts which were unknown to the personal representative during his administration. He is required to make an advertisement to creditors to come forward with their claims and if they fail to do so within a specified period, they are barred from enforcing their claims and the distributions made by the personal representative remain undisturbed (Sawyer, Spero 2015, 258–259).[18] This may apply

5. SEPARATIO BONORUM

Ideally, creditors of the deceased should suffer no loss nor gain as a result of the death of their debtor. Their claims should primarily be focused on the estate of the deceased and not on the property of his heirs. The fact that many legal systems provide for personal liability of heirs stems from the principle of direct devolution of the estate – the heir acquires the inheritance directly, without intermediaries, which leads to merger of the inheritance with the heir's personal property (*confusio bonorum*). Personal liability of the heirs provides a balance in favour of decedent's creditors because *confusio bonorum* makes it impossible to distinguish between personal and inherited assets and to determine the ultimate fate of the inheritance. When the estate dissolves into the property of the successor, the liability of the heir can only be limited in value, but it cannot be limited to assets of the estate, since the estate no longer exists independently of the heir's property.

Personal liability of an heir may prove to be insufficient protection for creditors in cases when they cannot rely on the heir's business proficiency or on his solvency (Đurđević 2015, 146–147). If the heir is incapable of administering the estate with the same success as the deceased, or if the heir's personal creditors seek to satisfy their claims out of inherited property, the creditors of the deceased have an interest to request separation of the estate from heir's personal estate and its special administration by a court appointed guardian – *separatio bonorum*. This possibility is especially important when difficulties arise either because of complicated legal relationships, indebtedness of the heir or insolvency of the estate. *Separatio bonorum* should not be seen as a rule which is exclusively aimed at protection of estate creditors: it also protects the interest of the heir to fully limit his liability for estate debts to assets belonging to the estate. Heirs should be able to request *separatio bonorum* if they feel unprepared or incapable of

[18] S. 27 Trustee Act 1925.

settling the estate and do not wish to risk being personally liable for estate debts. Insolvency of the estate should not be the only reason for heirs to request *separatio bonorum*, but if the estate is insolvent a special insolvency proceedings should be available and it should be mandatory. Creditors of an insolvent estate should not have to race each other for individual enforcement of their claims – their claims should be satisfied proportionally, in line with the insolvency principle of *par condicio creditorum*.

It should be noted that *separatio bonorum* cannot protect estate creditors against dishonesty of the heirs. Đurđević mentions that a dishonest heir may easily make misrepresentations with regard to estate assets and thereby damage the interests of estate creditors (Đurđević 2015, 146–147). Such behaviour certainly gives rise to heir's liability in delict, but separation of estate and its placement under special administration provides no additional direct protection against unconscionable dispositions or misrepresentations with regard to estate property. If an heir is determined to defraud estate creditors he may attempt to do this regardless of *separatio bonorum*, which provides protection only after assets have been determined as belonging to the estate of the deceased.

Separatio bonorum entails administration of the estate by a specially appointed guardian. It is his role (his private duty) to settle the estate: to ascertain the composition and value of the estate, to ascertain the debts of the estate, to settle the debts of the estate and pay out legacies and then, finally, to distribute the remaining assets among the heirs. The guardian of the estate is entitled to remuneration and compensation for expenses, which is the main drawback of all estate settlement regimes which involve special administration. Because of these administrative costs, *separatio bonorum* is not recommended when it is not overly difficult to settle the estate and it is not possible when the estate is of such small value that it would not cover even these costs of administration.

German law offers an interesting example among continental legal systems because it uses *separatio bonorum* not only in favour of concerned creditors, but also as the main tool for limiting liability of the heirs. German succession law provides a very detailed and highly complex set of rules on the liability of heirs: in principle, liability is personal and unlimited, but there are various methods for limiting liability, either provisionally or finally, towards all or towards certain creditors of the estate; furthermore, special rules are provided for liability of co-heirs (Schlüter, Röthel 2015, 260 ff. and 339 ff). There are two main methods of conclusively limiting liability towards all creditors: separate administration of the estate in order to settle the debts (*Nachlassverwaltung*) and estate insolvency proceedings (*Nachlassinsolvenzverfahren*). Both of these procedures involve special

administration of the estate and its separation from the personal property of the heir. As a result, the heir must give up his right to administer the estate and satisfy himself with any property that remains after all debts of the estate have been settled. Administration of the estate is transferred to a special guardian or insolvency trustee by court order and this person has a private duty to take care of the estate, primarily in the interest of estate creditors. Since it is generally not possible for heirs to limit their liability while remaining in control of the estate, it is said that German law shows a high degree of suspicion towards heirs and that it is not very far from the conception prevailing in common law legal systems (Schlüter, Röthel 2015, 296). Furthermore, German law does not allow for private administration of the estate or private taking of inventory, but provides for mandatory participation of probate court or other public officials (Schlüter, Röthel 2015, 296). The only case in which an heir may finally limit his liability towards all creditors without special administration of the estate under German law is the case of an estate of meagre value. If the value of the estate is insufficient to cover the costs of special estate administration or insolvency proceedings, the heir can raise an objection which limits his liability to the assets of the estate. However, this should not even be possible without *separatio bonorum*. How can liability be limited to an estate which no longer exists, which has dissolved itself into the personal property of the heir? German law provides the answer in the form of a fictitious *separatio bonorum*: the heir is deemed to be in the position of trustee of the estate creditors, he is liable to them to administer the assets which belonged to the estate (before it merged with his property) in their favour and to distribute these assets in line with statutory priority rules (Schlüter, Röthel 2015, 291–293).[19] The objection of meagre value also leads to revival of claims which have been extinguished through succession, but only for the purposes of the relationship between the heir and estate creditors.[20]

Separatio bonorum is unthinkable under the common law conception of succession through a personal representative of the deceased. The estate remains a separate entity until it is finally settled and heirs receive only the assets which remain after all debts have been paid. If the estate is insolvent, a special insolvency proceedings may be initiated and the estate placed under administration of an insolvency trustee (Sawyer, Spero, 261–262). Insolvency proceedings entail settlement of debts according to the statutory order which cannot be varied by the deceased's will.

19 § 1991 BGB.

20 § 1991 Abs. 2 BGB.

6. LIABILITY OF CO-HEIRS

Direct devolution also means that several persons may succeed the deceased, which significantly complicates all aspects of succession, including the question of liability. In order to protect the creditors of the deceased and of the estate, some legal systems provide for solidary liability of the heirs. However, many systems uphold, at least formally, the Roman law solution of divided liability. It is important to note, however, that in those systems, the creditors have a right to influence the distribution of the estate (Helms 2012). Division of liability between the heirs puts creditors at a disadvantage and gives them an incentive to obtain satisfaction before the estate is divided. This may be taken as another example of how debts stand in the way of direct devolution and limit the rights of heirs to dispose of inherited property. It shows that a practical approach to succession requires settlement of estate debts prior to distribution of the estate among heirs. Thus, under Spanish law, if an estate is distributed before all debts have been paid, assets need to be reserved for his purpose (Cantero *et al*. 2012, 298). Furthermore, even in legal systems which provide for solidary liability of heirs, the creditors of the estate have an incentive to prevent or reverse *confusio bonorum* when personal liability of the heirs offers little confidence that debts will be fully satisfied.

In addition to the question of the scope of liability (whether liability of co-heirs is solidary or divided), the question of the object of liability must also be answered: are co-heirs liable with their personal property (including their share of the estate) or only with assets belonging to the estate? This question arises because the existence of multiple heirs prevents immediate merger of the estate with the personal property of the heirs. Legal systems which recognize direct devolution have to distinguish between two very different legal situations. One regime exists from the moment of devolution until distribution of the estate and during this time the estate belongs to all co-heirs as their common property, which means that it remains distinct from their personal property (as in the case of *separatio bonorum*). After distribution of the estate, the estate no longer exists and whatever each heir received from the inheritance becomes part of his personal property and, thus, the legal situation becomes much simpler.

Under German law, co-heirs are solidary debtors,[21] which means that an estate creditor can sue any co-heir for the full amount of his claim. However, German law grants co-heirs the possibility to limit their liability

[21] § 2058 BGB.

to their share in the estate so long as the estate remains undivided.[22] The explanation of this privilege lies in the fact that an undivided estate is subject to common administration of all co-heirs and is thus separated from their personal estates (Schlüter, Röthel 2015, 342). This means that a creditor who obtains judgement against one co-heir will only be able to enforce it through attachment of his share in the inheritance (if objection of undivided estate is raised, *Teilungseinrede*). A creditor who wishes to enforce his claim in the assets of the estate has to sue all co-heirs jointly and obtain judgment against all of them (*Gesamthandsklage*) (Schlüter, Röthel 2015, 340–341). Co-heirs are also privileged by divided liability (in proportion of their shares in the estate) in case they did all in their power to determine and settle estate debts prior to distribution of estate assets between them: if they requested convocation of creditors prior to distribution and if creditors failed to register their claims they will only be able to rely on divided liability of heirs and the same applies to claims raised five years after devolution and claims made after insolvency proceedings have been closed (Schlüter, Röthel 2015, 344–345).[23] These rules clearly show that in case of co-heirs settlement of estate debts prior to distribution of the estate is the preferable solution. It is also in line with the general idea that the estate is the primary object of liability for estate creditors as long as it is separated from the estate of the heirs.

Solidary liability of heirs is a privilege for estate creditors and a protection against the unfavourable situation they would find themselves in if they had to claim against each heir individually for his share of liability. Estate creditors, in general, deserve such protection since they are not expected to keep track of their debtor's possible heirs and they should not be disadvantaged by the fact that many persons inherited their debtor. However, this protection is justifiable only to a certain extent and to a certain point in time. If creditors seek to enforce their claims after a long time has passed since devolution of the estate, their claims should be directed against the heirs individually and only for the amount corresponding to their part in the liability. Time limitation of the solidary liability of heirs is accepted in German law, as we have seen, and also in Swiss law. Under Swiss law, solidary liability of heirs exists for five years after distribution of the estate or five years after an obligation becomes payable, if this occurs after the distribution (Sandoz 2006, 212).

22 § 2059 BGB.

23 § 2060 BGB.

Serbian law provides for solidary liability of co-heirs, but this liability is automatically (*ex lege*) limited by the value of each co-heir's share in the estate. This does not mean that the liability of co-heirs is divided: a creditor may claim and enforce his claim in full against one co-heir as long as the value of that claim is less than the value of the co-heir's share in the estate and then the co-heir will be entitled to regress from other co-heirs in proportion to their shares in the estate. Even before distribution of the inheritance, the liability of co-heirs is not limited to their share in the estate, but also extends to their personal property.[24] As in the case of sole heir, the Serbian legislator deems the *ex lege* limitation of liability by value to be adequate protection for the interests of co-heirs.

However, decisions against one co-heir may only be enforced against his personal property or his share in the estate. If a creditor wishes satisfy his claim out of the assets of the estate, he will have to sue all co-heirs together and obtain judgment against them all. This stems from the fact that assets of the estate do not belong to any of the co-heirs individually, but they belong to all co-heirs jointly, as their undivided common property, which means that every co-heir is directly entitled only to his share in the estate, but not to particular assets of the estate. If judgment is obtained against one co-heir only, other co-heirs can object to enforcement in estate assets. This is regulated by rules of objections of third parties to enforcement (Jakšić 2021, 945–947). However, creditors of the estate are not precluded from suing each co-heir independently of the others if they intend to rely only on enforcement against their personal property. It is interesting to note that Serbian law prevents co-heirs from transferring their shares in the estate to persons who are not their co-heirs.[25] The aim of this rule is to motivate co-heirs to divide the estate and to prevent an expansion of the community of co-heirs which might make the relationship between them more complex. Serbian law tolerates co-heirship which results from the rules on direct devolution of the estate, but prevents co-heirs from complicating the relationship any further – they are incentivized to divide the estate in order to be free to dispose of inherited assets. In light of this rules it may be questionable whether creditors of the estate may request enforcement against a share in the undivided estate. This should not present a problem as long as enforcement against the share in the estate is effectuated by transfer of the share to one of the co-heirs, or through division of the estate.

[24] Art. 224 Serbian Law on Succession.

[25] Art. 231 (1) Serbian Law on Succession.

The common law approach to succession through a personal representative has a manifest advantage in situations with more than one heir. Since the estate passes first to the personal representative, who is charged with settlement of estate debts, the question of solidary or divided liability of the heirs cannot arise at all. Succession in common law systems never leads to personal liability of heirs and the relationship of co-heirship cannot arise. The system is simple in that one person (the deceased) is replaced by just one person (the representative) and succession remains undivided. The same idea exists in continental legal systems that provide for direct devolution, but in order to preserve singularity of succession, multiple heirs are considered as if they were just one person, which then leads to further questions.

7. TIME LIMITS ON CLAIMS AGAINST HEIRS

Unlike rights in immovable property, rights to demand performance of obligations are usually not made public in any way. It is therefore impossible to determine the exact scope and value of estate debts with certainty. Claims which were unknown at the time of settlement of the estate may be brought against heirs at a later date and put them under unforeseen financial pressure. This is especially problematic if heirs are protected only by a limitation in value, since they may dispose of inherited assets believing that all debts have been paid only to find out that this is not the case and that they are still liable. This risk can be mitigated, as we have seen, by a special procedure for convocation of creditors, but also by simple time limits after which estate creditors are precluded from demanding payment from heirs, or limited to assets of the estate.

Under German law, creditors who raise their claims more than five years after the moment of death are faced with an objection of "keeping silent" (*Verschweigungseinrede*): the heir can refuse to satisfy their claims if the assets of the estate have been exhausted in order to pay other estate debts.[26] The objection is, of course, not available if heirs were aware of the claim or if the claim was duly registered in the convocation procedure. This kind of protection is useful because it offers an important degree of legal certainty in cases in which heirs have no reason to request convocation of creditors or separate administration of the estate because they are completely unaware of certain debts. It would be manifestly unfair to hold heirs liable

[26] § 1974 BGB.

for claims which are raised after a long time has passed from the moment of succession. General rules on prescription provide limited protection in this context because periods of prescription are very long in some cases.[27]

It is interesting that the Serbian legislator, or Yugoslav legislator, to be more precise, decided not to include time bars on claims of estate creditors, even though legal theory supported such a solution. In his Theses for a Draft of the Law on Succession, Mihailo Konstantinović, one of the most influential jurists of the day, proposed that claims of estate creditors against heir should be time-barred after three years have passed from the death of the deceased (Konstantinović 1947, 332). Such a rule would greatly increase legal certainty and predictability for heirs and it should be considered *de lege ferenda* as a valuable addition to the general rules on liability for estate debts.

8. SHORTCOMINGS OF SERBIAN LAW

Liability of heirs is limited under Serbian law to the value of the inheritance (the value of the assets belonging to the estate of the deceased). The limitation of liability takes effect *ipso iure* and immediately upon succession. It may seem that this rule offers more than adequate protection to the heirs, but this is not the case. The problem lies primarily in the valuation of the estate, which is bound to the moment of devolution (moment of decedent's death), and in the fact that heirs have no means to further limit their liability to inherited property (Đurđević 2015, 148–149). *Separatio bonorum* may be requested only by creditors of the estate and not by the heirs themselves. Changes in the value of the estate after devolution may unjustly prejudice the interests of the heirs (if the value of the estate becomes significantly lower) or the interests of the creditors (if the value of the estate becomes significantly higher). Apart from this inflexible method of valuation, the heirs run the risk of not being able to prove the value of the estate and thus to limit their liability. One of the main shortcomings of the Serbian solution is the fact that liability is limited even if no valuation of the estate and of the debts has been carried out. It stands to reason that heirs must prove the value of the estate and the value of debts that they have satisfied in order to limit any further liability. Portuguese law offers a similar solution (limitation

[27] For instance, under Serbian law the general period of prescription is 10 years (Art. 371 Law on Obligations). In Austrian law it is 30 years (§ 1479 ABGB). Under German law the period of prescription for some claims is also 30 years (§ 197 BGB).

of liability *ex lege*) but it explicitly lays the burden of proof on the heirs.[28] Unlike Serbian law, Portuguese law retains the possibility of accepting an inheritance *cum beneficio inventarii*, which limits liability to property listed in the inventory.[29] Such a rule should be accepted in Serbian law as well in order to give heirs a stronger, i.e. more clearly defined, protection against estate debts.

Inadequate protection against liability for estate's debts influences not only the position of heirs, but also the decisions which the deceased made in his lifetime. Since death is certain, reasonable men, especially when they reach old age, start planning for their succession and reflecting on the position that their heirs will find themselves in. If a man knows that his heirs will have a hard time limiting their personal liability for estate debts, he will be inclined to settle all his debts before death and discouraged from taking on liabilities, even if it would have been a prudent decision. Đurđević gives an example of a 60 years old entrepreneur who decides not to take a loan which would enable him to develop his business in fear of his heirs becoming personally liable for it (Đurđević 2015, 145–146). This problem should be considered outside business context as well: a man who knows that his heirs will be fully protected against his debts only if they refuse the inheritance will be inclined to limit his debts and restrict his activity in order to spare his heirs from complication in estate settlement.

Heirs, of course, have the right to renounce their inheritance, which completely excludes their liability for deceased's debts, but this is a crude method of protection because it may lead to heirs giving up their position at first sign of trouble since it is impossible to determine with certainty whether an estate is over-indebted (Đurđević 2016, 174). It must also be kept in mind that the state as the final and mandatory heir cannot refuse the inheritance, which means that its liability must be adequately limited in order to protect public finances (Đurđević 2016, 174–175). Limitation of liability through inventory procedure or special administration of the estate is the only way of solving these problems. Heirs should be given the possibility to accept their inheritance conditionally, subject to limitation of their liability for estate debts.

Serbian law does not recognize individual insolvency and it does not provide for special insolvency proceedings for indebted estates – insolvency rules are strictly reserved for companies and creditors of individuals are referred to general enforcement proceedings. Priority of creditors depends

[28] Art. 2071 (2) Código civil português.

[29] Art. 2071 (1) Código civil português.

on the time when they acquired an enforceable title against the debtor (*prior tempore, potior iure*). This means that the position of creditors will largely depend on chance, rather than on a just and proportional distribution of available assets. Lack of individual insolvency proceedings and estate insolvency proceedings have long been criticized as a serious flaw in the Serbian legal system. There are no justifiable reasons for the omission of these procedures. Introduction of insolvency proceedings for indebted estates would allow equal treatment of estate creditors, better (more flexible) rules on sale of estate assets and full protection of heirs against personal liability (Đurđević 2012, 33–36).

9. CONCLUSION

The question of heirs' liability for debts of the deceased is one of the central and most difficult questions of the law of succession. It is an area of law which shows a convergence in general principles (transfer of liability to heirs, subject to limitations) and divergence in details which regulated the exact scope of heirs' liability in the individual case. A visible rift exists between common law and civil law approach to liability, which stems from different methods of estate devolution, with the common law approach providing more clarity and certainty, albeit at the price of increased costs and complex estate settlement. Civil law approach offers more flexibility, but also creates less legal certainty. Direct devolution of estate and personal liability of heirs must be counterbalanced by detailed and flexible rules which allow for modification of liability, primarily in order to safeguard the interests of the creditors and to protect heirs against economic loss due to indebtedness of the estate. Administration of these rules may be quite burdensome for probate courts and other officials involved with settlement of the estate (public notaries), but there is no other way to achieve a just distribution of estate assets. Legal systems which attempted to create a simple limitation to heirs' liability – like Serbian law – fail to provide adequate protection because the simple approach to heirs' liability lacks flexibility and cannot be adapted to different situations that heirs might find themselves in.

In order to achieve a just system of liability for estate debts, a legal system must provide protection to heirs against over-indebted estates and protection to estate creditors against over-indebted or less than competent heirs. In the interest of transparency, a special procedure for registering estate assets and estate debts should be provided, with significant legal consequences for parties who fail to take part in these proceedings. Special time bars should be enacted in order to protect heirs against claims which

are raised with undue delays and, most importantly, individual insolvency proceedings should be provided for insolvent estates in order to allow just distribution of assets among estate creditors and spare them the trouble and injustice of having to race each other to satisfy their claims in individual enforcement proceedings.

A balance between simplicity for easy cases and flexibility for difficult cases should lie at the heart of rules on heirs' liability for deceased's debts. Heirs should be able to take charge of inherited assets and they should be personally liable to estate creditors when there are no signs of difficulties on the horizon – when there are no insolvency issues. On the other hand, detailed rules should be provided for various complex situations that may arise, like insolvency of the estate or insolvency of the heirs. In any event, both sides (the heirs and the estate creditors) should have legal means at their disposal to request preventive protection through special proceedings for ascertainment of the composition and value of the estate. Since the administrative cost of such preventive measures is usually much lower than the cost of special administration over the estate, availability of preventive measures should not be subject to strict conditions.

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METHODOLOGICAL PREDECESSORS OF CONTEXTUALIST POLITICAL REALISM

In order to gain a better understanding of contemporary political realism, as well as of the theories of two classical political philosophers, this paper argues that the methodological roots of a contextualist model of realism can be found, among others, in the writings of Aristotle and Machiavelli. It is argued that the methodological assumptions of contextualist political realism can be formulated through two main notions: 1) the experiential basis – analysis of politics through reliance on experience from political practice; and 2) contextualism – avoiding universal claims as much as possible, i.e., making claims about politics always within a socio-historical context. Using those lenses, the paper points out the methodological elements of Aristotle's and Machiavelli's political theories that are in line with this version of political realism, claiming both of them could be perceived as forerunners to a certain degree.

Key words: *Political Realism. – Aristotle. – Machiavelli. – Methodology. – Political Theory.*

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1. INTRODUCTION

The subject of this paper is realism as an approach within political theory, or more precisely, the common methodological elements of one type of contemporary political realism, along with the analysis of two classical authors who seem to have elements of "a realistic worldview". Although the term political realism in fact refers to a theory of politics that arose in the 20th century, it is nevertheless not rare to consider certain classical and modern thinkers as political realists – given the similarities in the understanding of man and politics. Beginning with Thucydides, through Niccolò Machiavelli and Thomas Hobbes, realism was founded as a pessimistic theory of politics, in which only selfish human interest rules. History and experience tell us that politics is a way of ruling and maintaining power relations, which are most often understood as a mere reflection of basic and natural human drives. Namely, in the substantive sense – politics is about power and conflict, while from the methodological perspective, real experience should be the source of knowledge.

It should be strongly emphasised in the beginning that it is difficult to pinpoint an explicit "realist methodology", since there are various forms of it – mostly reducible to two main currents within political theory: structuralism and historicism (Walker 1987, 66). The former accepts certain atemporal and universal claims, while the latter is based on the premise of constant change through time. In this paper, an attempt will be made to draw assumptions that could be a connection between realists that lean toward historicism, which will be (for the purposes of this paper) called a "contextualist" model, mostly relying on the work of Bernard Williams and Raymond Geuss, as two of the most prominent proponents (Philp 2012, 630; Rossi 2010, 504). Even in the case of substantive claims, it is difficult to say whether realism is a coherent line of thought in politics. Therefore, the paper will proceed with caution, both regarding the interpretation of contemporary political realism, as well as a retrospective reading of classical authors through contemporary lenses. Nevertheless, these restrictions do not seem to render such an endeavor meaningless.

Even though political realism can encompass a multitude of diverse views of the world and politics, the hypothesis of this paper is that we can find methodological roots of contextualist political realism in the works of Aristotle and Machiavelli, who both attempted to get closer to reality than other political philosophers of their time (and later). This statement should not be confused with the claim that the two of them are full-fledged realists in the contemporary sense, nor would it be fair to conclude that they are predecessors only if they fulfill the necessary criteria to the highest

extent. Also, this does not imply that they are the only ones who deserve to be assessed as possible candidates. The objective of the research is to gain a better understanding of possible methodological approaches of contemporary political realism, through a historical analysis of its roots, and of Aristotle's and Machiavelli's theories from a somewhat neglected perspective. It will be assessed whether these classical authors could be perceived as methodological forerunners, with the stated mitigations. Although we associate "Machiavellianism" with an ethical worldview almost opposite to that of the Greeks, the paper will try to show that, despite substantive differences, Machiavelli follows Aristotle's methodological assumptions. Precisely because of this connection, as well as because Machiavelli is usually perceived as the most prominent forerunner of political realism – these two philosophers have been chosen. It should also be noted that in this paper we are not going to delve into the question of whether Aristotle's and Machiavelli's views, or the views of contemporary realists are justified and how valuable their theories are in general.

The work consists of three parts. The first part will try to underline the main methodological assumptions within contextualist political realism. The second part of the paper will deal with Aristotle's theory, while the last will deal with Machiavelli's theory – from the perspective of those assumptions.

2. CONTEXTUALIST POLITICAL REALISM

With the preceding remarks in mind, we can move on to explore what it means to be a contemporary political realist. Even though the methodological framework is what we are concerned with, firstly a few words will be said about the substantive aspects of political realism, since those two aspects cannot be separated too sharply. Also, as was noted, the focus will be on a contextualist form of realism that relies on the insights of Bernard Williams and Raymond Geuss, who are considered to be some of the most influential authors in this field (Sleat 2010; Rossi 2010).

As is well known, political realists generally[1] start from the claim that the basis of all international relations is the struggle between nations that want to optimise their power, i.e., that concern for power optimization is a necessary and sufficient element of every policy (Fozouni 1995, 480). Every country has a natural geopolitical sphere of influence, which determines

[1] With regard to substantive claims of political realism – there is a stronger consensus among its proponents.

its foreign policy. If that influence is insufficient, then it will tend toward imperialism; if it is satisfactory, then it will strive to maintain it. Also, ideology is only an instrument of power – it is never an end in itself (Morgenthau 1948, 13). Therefore, it rejects both models of political moralism: both the enactment model, which emphasises politics as an instrument of morality, and the structural model, which considers that morality limits (creates a framework for) politics (Williams 2005, 2, 8, 77). In other words, being a realist traditionally means expelling morality from political relations. When talking about politics as "applied ethics", it can at best mean that, through contact with reality, people try to find forms of action that suit them better and evaluate what is more or less good (Geuss 2008, 6). Therefore, political moralism is opposed to political realism, since the latter does not place morality prior to politics, while the former does (Galston 2010, 387).

Political philosophy is hence distinctive from other branches of philosophy (legal and moral) and uses specific concepts, such as power and legitimacy (Williams 2005, 3). Since morality is not prior to politics, the question of legitimacy cannot be answered in general, but comes from the practice of politics itself (Sleat 2010, 487). This is an important methodological point as well. Legitimacy as a category remains relevant, even in our understanding and interpretation of the past, but always in a given context (Williams 2005, 69). So, for Williams, the question of justification is not completely pushed out of the realm of politics. A government is legitimate and authoritative if it can be justified according to the dominant societal beliefs in a given period. This criterion is not the same as the claim that legitimacy depends on the effective support or acceptance of the government by the governed, although it usually overlaps (Sleat 2014, 327). This allows for the flexibility of realism and correspondence to the nuances of reality. The belief that our political decisions are a reflection of simple morality is illusory – everything is a consequence of a multitude of factors, which is dependent on the context (Philp 2012, 636; Rossi 2010, 509). When someone is in the minority (in a democratic order), e.g., when the opposing political position prevails, it does not mean that the other side is morally wrong – it just means that one side has lost (Williams 2005, 13).

When it comes to methodology, in the case of ancient thinkers, political realism is primarily reflected in the historical method of research, which is characteristic of authors such as Thucydides and Polybius. The functioning of states is understood through the real circumstances in which they are situated and developed, and theoretical claims about politics arise from historical examples (Polybius 2002). This is especially important when assessing Aristotle and Machiavelli.

Montesquieu tries to do a similar thing when writing about the relativity of the spirit of laws. For example: in cold climates, people are stronger and braver because of the cold air that tightens and shortens the fibers of the body and directs the blood to the heart, which further affects warfare, as well as the sluggishness of southern peoples who rarely and hardly change their customs, laws and traditions (Montesquieu 2011, 232). Or: "Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners [...] Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan [...] in Rome it was set by the maxims of government and the ancient mores," while when he investigates the sources of slave ownership law, he explicitly says "the true origin [...] should be founded on the nature of things" (Montesquieu 2011, 310, 251). All of this points to experience as a source of knowledge of the causes of a social (even political) reality. David Hume moves in the same direction when he criticises reason as an uncertain guide and refers to practice and experience for solving social and moral problems (Hume 1994, 78–92, 208). He points out that the more repetitions and examples there are in experience, the more likely it is that they can be explained scientifically. He also offers a framework formula for the scientific study of the causality of social events. "What depends upon a few persons is, to a great measure, be ascribed to chance, or secret and unknown causes: What arises from a great number, may often be accounted for by determinate and known causes" (Hume 1994, 58). In other words, individuals can be influenced by many, often contradictory factors, while mass movements are easier to follow.

As one possible consequence, experience from practice becomes a methodological basis that tends to avoid firm universal arguments. Geuss tries to underline this as a genuine "realist approach" to political philosophy:

> First, political philosophy must be realist. That means, roughly speaking, that it must start from and be concerned in the first instance not with how people ought ideally (or ought "rationally") to act, what they ought to desire, or value, the kind of people they ought to be, etc., but, rather, with the way the social, economic, political, etc., institutions actually operate in some society at some given time, and what really does move human beings to act in given circumstances. [...] Second and following on from this, political philosophy must recognise that politics is in the first instance about action and the contexts of action, not about mere beliefs or propositions. (Geuss 2008, 9–11)

This much is probably in line with any intuition about political realism in general.[2] On the other hand, Geuss adds a third thesis as an important insight into his understanding of political realism, which is crucial for the variant of realism that is offered in this paper. Namely:

> The third thesis I want to defend is that politics is historically located: it has to do with humans interacting in institutional contexts that change over time, and the study of politics must reflect this fact. This is not an objection to generalising; we don't even know what it would be like to think without generalising. Nevertheless, it simply turns out as a matter of fact that excessive generalising ends up not being informative. There are no interesting "eternal questions" of political philosophy. It is perfectly true that if one wishes, one can construct some universal empirical truths about human beings and the societies they form, e.g., it is correct that people in general try to keep themselves alive and that all humans have had to eat to survive, and that this has imposed various constraints on the kind of human societies that have been possible, but such statements, taken on their own, are not interestingly informative for the purposes of politics. [...] Such statements have clear meaning at all only relative to their specific context (Geuss 2008, 13–14).

For a realist, these statements imply the importance of avoiding universal claims that tend to be presented as applicable to any context, especially if they are devoid of empirical insights. In this sense, realism acknowledges a fragmented world in a constant flux of change, as opposed to idealism, which relies on universalities (Walker 1987, 79; Rossi 2010, 505). On the other hand, as Geuss states, such a methodology does not exclude general assessments (because that is most likely impossible), but tries to keep them to a minimum – only as a framework for the input of the facts and particular circumstances. It is compatible with Ludwig Wittgenstein's view of the world, which implies that we cannot judge and justify practices, but simply be in them; everything is a matter of practical action, and there is nothing abstract. One example of a "non-realistic approach" that ignores particularities and history is the discourse of human rights (Geuss 2008, 59). It is not a good starting position to assert that all humans evidently have rights, but rather one should ask, e.g., whether it is possible to organise a society based on universal rights, what are the benefits of it, or why do we

[2] Meaning: independently from different types of realism.

find human rights appealing (Geuss 2008, 68).[3] Different cultures obviously accept different rights as valid. Politics is about making decisions within a set of contingent and non-ideal circumstances that limit one's choice (Philp 2010, 468).

Nevertheless, it should be noted that such an approach does not exclude the epistemological possibility of truth,[4] but only requires particularization. Interestingly, Hans Morgenthau, as a proponent of a different kind of political realism, emphasises that political science should isolate truth from experience, giving it meaning (Molloy 2006, 80). Although he is aware of the complexity of such a task, he nevertheless did not give it up and held power to be the truth of politics (Morgenthau 1948, 13). A critical remark is evident:

> If truth is socially conditioned by the perspective of the theorist, then surely the same applies to Morgenthau's version of the truth? Morgenthau, however, states that his truth is universal and valid for all times and circumstances (Molloy 2006, 81).

Morgenthau claims that realism lies somewhere between the fact that human experience and historical occurrences are always unique and the fact that there are similarities between them – caused by human nature which drives social forces (Morgenthau 1948, 4). In this sense realism seems to be torn between potentially opposing inclinations (Walker 1987, 79), neither of which excludes Aristotle and Machiavelli. On the other hand,

> a weakness of approaches to politics through "intuitions" is that such intuitions present themselves at any given time as if they were firmly fixed, deeply rooted in the bedrock of human nature, and utterly unchanging, although even a minimal amount of historical (or ethnological) research reveals that many of the most politically significant of these intuitions are in fact highly variable and change in ways that seem to some extent to reflect other social changes (Geuss 2008, 91).

Having that in mind, the suggestion is to solve this problem in the following way: universal claims should be avoided as much as possible, and when they are necessary (as a framework for the input of context) – they should rely on

[3] It would be interesting to compare this form of realism with pragmatism, however that is beyond the scope of this paper.

[4] For more on the problematisation of the concept of truth in realism, see Molloy 2006.

experience (be "realistic"). Even if we do not want to give up the usual aims of theory, or science in general – to predict future events based on previous ones – contextualist political realism still adds caution to it, because context can always affect and disappoint our predictions. Hence, Horton (2010, 438) asserts that the general features of contemporary political realism are: anti-utopianism (negation of constant progressiveness and rejection of principles that are inapplicable in the world as it is), anti-universalism (even when there are valid general principles, they must be determined within a context), and the necessity of conflict (therefore the goals of politics are stability and order). Criticism of rational consensus could also be added to the list (Galston 2010, 394–400).

Now it is possible to move on to the analysis of the working hypothesis. The following *methodological* criteria of the contextualist model of contemporary political realism will be taken into account through the analysis of Aristotle's and Machiavelli's theories: 1) the experiential basis – the analysis of politics through reliance on experience from political practice, as well as in the case of classical philosophers, a comparative study of states in history; 2) contextualism – avoiding universal claims (allegedly applicable to any context) as much as possible, i.e., making claims about politics always within a socio-historical context. It is obvious how interconnected these elements are.

Of course, there are some other potential methodological candidates that could be taken into account as relevant criteria. One of them is descriptiveness, i.e., the ability to describe things as they are, with restrained use of normative claims ("what ought to be"). A problem encountered with such a criterion is the complication of the existence of different types of normative claims, such as instrumental (as is mostly the case with Machiavelli) and ethical (Aristotle) normativity. Another reason for avoiding this element is that most realists are aware of the strong connection between politics and action, which leads them to frequently use normative claims. Hence, the only thing they insist on is the aforementioned contextualisation, which encompasses the need for experience. Geuss tells us something in a similar manner:

> The attentive reader will notice that I use the terms "political theory" and "political philosophy" [...] almost interchangeably, and that I do not distinguish sharply between a descriptive theory and a "pure normative theory" [...]. This is fully intentional, and indeed part of the point I am trying to make. I want precisely to try to cast as much doubt as I can on the universal usefulness of making these distinctions. Kantians, of course, will think I have lost the plot from the start; and that only confusion can result from failure to make these essential,

> utterly fundamental divisions between Is and Ought, Fact and Value, or the Descriptive and the Normative in as rigorous and systematic a way as possible, just as I think they have fallen prey to a kind of fetishism, attributing to a set of human conceptual inventions a significance that they do not have. By doing this, in my view, they condemn themselves to certain forms of ignorance and illusion [...]. Politics allows itself to be cut up for study in any one of a number of different ways, and which cuts will be most illuminating will depend very much on the context, on what one is interested in finding out. There is no single canonical style of theorising about politics. (Geuss 2008, 16–17)

He then goes on to analyse the possible roles of political philosophy, by firstly pointing out the human need to understand how "the organised forms of acting together in a given society actually work, and to explain why certain decisions are taken, why certain projects fail and others succeed, or why social and political action exhibits the patterns it does", as well as to evaluate things the world around us (Geuss 2008, 37–38). Besides understanding and evaluating, "it is often claimed that humans' need for general orientation in action is at least as important" (Geuss 2008, 40). Meaningfulness leads to action and interaction, rather than theorising. And last, but not least, political philosophy might make a constructive contribution to politics by conceptual invention – combining normative, descriptive and analytical methodologies. Each step helps, because "people [...] can be at a loss what to do or fail to know what they want because they are confused about what is wrong or what the problem precisely is" (Geuss 2008, 43).

Therefore, in a society, understanding, evaluating and orientating are all wanted and needed human activities. They sometimes imply a descriptive approach, but other times – a normative one. In other words, different methods may be appropriate for different kinds of questions (Williams 2005, 155). However, Williams notes that some remarks are nevertheless generally important, such as the danger of "wishful thinking" and, Geuss would add, the danger of generalising. This is why these two points seem to be the only plausible common methodological denominator for this model of realism – which will be used in the following chapters as lenses for examining philosophers who might be seen as their forerunners.

3. ARISTOTLE

As stated in the introduction of the paper, Aristotle was chosen because Machiavelli appears to show similarities to Aristotle's historicist method of studying politics, despite the fact that their substantive claims differ. Aristotle is one of the paradigmatic examples of an author who built their theory (explicitly) through the critique of the idealism that immediately preceded it as the dominant discourse – Plato's in this case.[5] Given that the work focuses on the issue of realism in political philosophy, there is no space for a detailed consideration of realism in other areas of philosophy, within which Aristotle has much to say. Accordingly, here it is only necessary to recall that Aristotle's ontology denies the transcendental world of ideas, returning Plato to the framework of the sensory experience. However, as a creator of logic and practical reasoning, he also relies heavily on the power of the human mind (which is usually the main characteristic of idealism), but takes a more moderate view of the world than his predecessor.[6] Aristotle's worldview is very layered and it is not easy to see it through the lenses of contemporary political realism, although the paper will try to argue that his *political methodology* indeed shows a realist tendency. In that sense, Aristotle's ethics are usually seen as idealistic, especially when compared to Machiavelli's instrumentalism and pragmatism, while there are many possible ways to interpret his theory as a whole.

Before going into the analysis of politics, it is important to briefly highlight some important points of Aristotle's general methodology and his schematization of knowledge. First of all, Aristotle is generally convinced that the facts about the world determine the truth of statements (Irwin 1988, 5). Secondly, truth is arrived at in several ways: through scientific knowledge, intellect, practical wisdom, and wisdom (Aristotle 2000, 1139b). All knowledge is based on the so-called primary/first principles, which represent universalities that are not based on anything other than themselves (Aristotle 1997, 100a–100b). They should not be questioned as to why they are what they are, but it is enough to determine them (Aristotle 1997, 100b) inductively or deductively, using intellect (Aristotle 2000, 1139b, 1141a). For example, the first principle of free action is man as a being, and the first principle of ethics is happiness (Aristotle 2000, 1102a, 1139b). Scientific knowledge refers only to claims that cannot be different, i.e., to the

[5] Although there are indications that the methodology used by Plato in the Phaedrus is not alien to Aristotle, especially with regard to the concept of *techne* (Schütrumpf 1989, 209–218).

[6] More about that: Tweedale 1988, 501–526.

eternal and unchanging that cannot be discussed (*episteme*, Aristotle 2000, 1139b), as is knowledge about the cosmos, god, and mathematics. It implies a true understanding of first principles, i.e., the state of demonstration – when conclusions are drawn by logical deduction starting from necessary true premises (first principles). Therefore, reasoning based on debatable first principles (as is the case of practical wisdom) cannot be scientific knowledge, although this does not mean that it is completely devoid of any truth (Aristotle 2000, 1140b).

Consequently, there is also a special type of deduction: dialectical deduction, which searches for conclusions starting from positions that are considered acceptable (*endoxa* – founded beliefs) – either to everyone, to the majority, or to the wise – without being paradoxical at the same time (Aristotle 1997, 100a–100b, 104a). If even just one wise person (philosopher, authority) disagrees with a claim, then it is not an unproblematic one. It is important to emphasise that both types of starting premises (those that are true in themselves and those that are conventionally accepted) are universal, and that dialectics for Aristotle is a logical method based on probable premises. A dialectical problem is a speculation aimed at a decision or knowledge about which people have no opinion or the majority think differently than the wise, where the dialectical process itself (examination of the opinions of both sides) helps to arrive at the truth and purify the *endoxa* (Aristotle 1997, 104b). In other words, in such a process, one can come to the rejection of one of the accepted opinions that seemed true at the beginning, which is why Aristotle most often starts from the positions that his predecessors had on a certain issue, as well as often taking a position between two opposing sides. It can be particularly useful when assessing certain first principles, by questioning the *endoxa* about them (Aristotle 1997, 101b). Empirical inquiry (*historia*) begins with the appearances (which include the *endoxa*), while experience should be a criterion for the appearances that are "proper" (*oikeia*) (Irwin 1988, 31–32). Thus, the true "puzzles" about our knowledge of things are discoverable through experience.

Practical wisdom, on the other hand, implies the concept of good and concerns human relations (ethics, politics, economics) and useful actions. Every action is directed toward a certain goal or good (Aristotle 2000, 1094a). Since every goal relies on some other goal (value), the infinite regress stops at the greatest good, and the point is to make some kind of voluntary decision. The path to first principles within practical wisdom is inductive, i.e., it goes in the opposite direction of science: from particularities

(factual human relations) to universals[7] (Aristotle 2000, 1143b). Therefore, it is aimes at action and cannot be scientific knowledge, because it implies deliberation (dialectical process). It starts from particularities (experience), and regards what could have been different (Aristotle 2000, 1140a). Since it deals with action, its focus is on the last point of the cognitive process, which is something that Geuss also points out. Practical wisdom is strongly interwoven with political "science", although they are different beings. Political science is part of practical wisdom that deals with particularities and concerns the community (Aristotle 2000, 1142a). This is the crux of the argument in favor of realism – inferences concerning politics are not universally binding, i.e., they have to start off from real cases that differ between themselves. On the other hand, people who know how to consider and discuss what is good and useful for life as such are practically wise (Aristotle 2000, 1140a). Therefore, a practically wise person discusses first and foremost the universal and only afterward the particular (such as what would be beneficial for health). Besides practical wisdom, there are skills (medicine, shipbuilding, agriculture, arts, etc.) and theoretical sciences (first philosophy, mathematics, and natural sciences, such as astronomy).

The key difference between theoretical and practical disciplines is that the former deal exclusively with universal things and scientific knowledge (that which is immutable), and the latter with practical and mostly particular (Aristotle 2000, 1095a), which makes politics dialectical and difficult to fit into formulas. Judgment about particularities depends on perception, and not everyone's perception is the same, in addition to there being an infinite number of individual cases. Thus, politics is directly aimed at experience and therefore has first principles that could be different.[8] Accordingly, the subject of Aristotle's political research is political practice, with the goal being to analyse the stability of a political order, which is a methodological approach uncommon for the (in the rough sense) idealistic tradition.[9] The entire *Politics* is imbued with the issue of the stability of different political orders, while the fifth book (Aristotle 1998, 1301a–1317a) is fully and directly dedicated to this: "for a legislator, however, or for those seeking to

[7] Which should not be confused with scientific statements that are unchangeable. Universals are just general claims.

[8] On the other hand, he often refers to human nature when reasoning about politics, while in doing so resting on a mixture of empirical and ethical claims (Irwin 1988, 358).

[9] Here we mean the usual normativist and universalistic perspectives of politics assumed by authors such as Plato, Cicero, Thomas Aquinas, Jean-Jacques Rousseau, Hegel, Kant, etc. This could also encompass Hobbes' theory of social contract and state, although he shows strong substantive elements of realism.

establish a constitution of this kind, setting it up is not the most important task nor indeed the only one, but rather ensuring its preservation" (Aristotle 1998, 1319b).

As an example of Aristotle's integration of experience into the analysis of political stability, we can first point out that he begins the second book of *Politics* by rejecting the idealistic possibility of unity in Plato's state. The pursuit of complete unity must lead to the disintegration of the state, since by the nature of things it implies some kind of pluralism (Aristotle 1998, 1261a–1261b). It is not only about the pluralism of people, but also their characteristics, i.e., types of persons. Further, building on the Platonist thesis about the necessity of common property of all members of a state[10] (including the sharing of wives and children), as conditions for factual equality – Aristotle responds in a similar manner. He refers to practical circumstances that would undermine the possibility of establishing such an idealistic society, arguing, for example, that there must be a problem of unequal income according to merit. He asks – what if someone works less and gets disproportionately more? (Aristotle 1998, 1263a) Selfishness is in human nature, so the absence of private property could hardly be truly accepted. It is illusory to consider private property as the cause of private disputes, since we can see in practice that disputes arise primarily among the poor classes, and not according to the form of property (Aristotle 1998, 1263b). The layering and compromise of his worldview are also shown to be a reflection of realistic moderation that rejects black-and-white divisions. Jumping a bit forward: we will see that even when searching for an ideal constitution, Aristotle tries to find how each type of political system should be organised to reach its best condition[11] (Irwin 1988, 355).

Aristotle also relies on the comparative method in studying the constitutions of his time (such as Sparta, Athens, Crete, etc.) and all possible forms of states, which he analyses according to the circumstances that are necessary for each of them to survive individually.

> Since, then, our predecessors have left the question of legislation unexamined, it is presumably better that we study it and the question of political systems in general, so that our philosophy of humanity might be as complete as possible. First, then, if any part of what has been said by those before us is plausible, let us try to go through it. Then, in the light of the

[10] Which, coincidentally, is a misquote of Plato, bearing in mind that the absence of private property only concerned the governing and guardian class.

[11] More on this in the following chapter.

> political systems we have collected, let us try to consider what sorts of things preserve and destroy cities and each type of political system, and what causes some cities to be well run, and others badly run. For when these issues have been considered, we shall perhaps be more likely to see which political system is best, how each must be arranged, and what laws and habits it should employ. Let us, then, discuss these matters from the beginning (Aristotle 2000, 1181b).

The general rule for Aristotle is that one must take into account the characteristics of people (according to virtue and wealth), i.e., the structure of society, leading us toward contextual claims of political realism.

> For what is by nature both just and beneficial is one thing in the case of rule by a master, another in the case of kingship, and another in the case of rule by a statesman (Aristotle 1998, 1287b).

It is not good to establish a kingship where there is factual equality and similarity between people, but rather where one family spontaneously stands out by its virtue (Aristotle 1998, 1288a). Also, the aristocracy is subject to the people who, by the nature of things, can bear the power "worthy of free men", while militant peoples are suitable for the *politeia*.[12] In other words, the quality of a political order depends on the actual context, i.e., constitutions must be adapted to different types of people and cultures. Similarly, the realism and nuance of his approach are expressed when he talks about the differences in the natural qualities of descendants belonging to different natural classes (free people, slaves, and foreigners), because he reminds us that there are always exceptions (Aristotle 1998, 1254b–1255b, 1283a).

Also, for Aristotle the conflicts between the rich and the poor are the most important basis for understanding politics, since different interests are formed according to social status – which can be confirmed throughout history. Interestingly, Polybius, Machiavelli, and Hume also believed that conflicts in general, and especially between plebeians and patricians, were inevitable in any society, with the addition that they were even sometimes desirable (Whelan 2004, 63). Each pull to his side, Aristotle continues: some emphasise equality in numbers, others equality in merit or value as relevant,

[12] Politeia, in this context, is a form of government that represents a combination of oligarchy and democracy, although Aristotle uses the term both for proper democracy and legal order.

according to what suits them. The pursuit of happiness shows itself as the cause of conflict. However, "it is a bad thing for a constitution to be organised unqualifiedly and entirely in accord with either sort of equality" (Aristotle 1998, 1302a). So, practice is again referred to as a crucial factor of evidence, along with moderate normative judgments that rely on historical research.

Another interesting insight regarding his methodology could be given by the fact that he gives an equal place (importance) to the analysis of bad orders, and even to ways of preserving them. This seems like a clear indication of his effort to view politics in its reality and in a non-idealised way. He says that tyranny is a perverted form of monarchy, because the rule of one man that is not in the general interest, but rather exclusively in the interest of that individual (Aristotle 1998, 1279b). It is absolute despotism that is not based on law, but only on the will of the tyrant (Aristotle 1998, 1295a), and despite this – he pays attention to the issue of its preservation. One of the rules for the survival of tyranny is to remove prominent people and people of strong character, to prohibit association and schooling, more precisely everything that could somehow bring people together (Aristotle 1998, 1313b). Furthermore, it is necessary to constantly keep an eye on the citizens, give them as little independence and privacy as possible, sow discord, slander, impoverish, and do everything else that a realistic attitude toward politics can dictate. Power is the foundation of tyranny, and to provoke rebellions as little as possible, the tyrant must take care of how he presents himself to the people and convince them that his rule is beneficial for everyone (Aristotle 1998, 1314b). So, although it is clear that this way of ruling is wrong and that politics, according to Aristotle, must not be seen as an instrument of personal interest or a mere power relationship – he still goes into describing the practical prerequisites for preserving such power.

On the other hand, it is a well-known fact that Aristotle's ethics correspond to a large extent to the view of the world that is characteristic of the time in which he lived. He uses full-fledged normative claims that often have a universalistic connotation to them, which undoubtedly points toward his "non-realist" side. The brief analysis of the substantive notions in Aristotle will only be conducted in regard to the main subject of the paper, i.e., his methodology. Nevertheless, the paper will attempt to show that even such statements do not undermine his methodological realism when approaching politics.[13]

[13] The metaethical questions of the origins and nature of moral claims are not of great importance for this topic, since realists do not delve around such quandaries. Whether or not there are objective moral values does not affect the approach a realist takes.

Aristotle says that an individual should have civic virtue, which can only be realized through participation in political life and concern for the common good (Held 1987, 17). The state represents an entity that exists by the nature of things, as the end product of man as a community being, i.e., a political animal. When asked why the state is formed, he answers that the ultimate goal is a happy and noble life (*eudaimonia*, Aristotle 1998, 1278b, 1281a), and that the good is an ultimate goal of all practical "sciences" (Aristotle 1998, 1282b). As noted at the beginning of this chapter, in Aristotle, ethics and politics are directly linked through practical wisdom, so one cannot be achieved without the other. Happiness is an activity by virtue, while intellect is the most divine human asset (Aristotle 2000, 1177a). Aristotle asks himself what the best choice of life for each person and states is, so that the conclusions for individuals can also be transferred to states (Aristotle 1998, 1323a). The virtues of the soul are incomparably more valuable than the possession of material things, and happiness depends on virtue, practical wisdom, and action.[14] States are good to the extent that their citizens are happy, and in order to arrive at the best constitution, statesmen must understand what happiness is (Aristotle 1998, 1323a–1324a). Consequently, states must be brave, just, and wise, and a good economic condition, as well as good state regulation, is a prerequisite for that.

Aristotle believes that there are right and wrong answers to the question of what is good, whereby those who achieve practical wisdom will be able to reach the right answer (McDowell 1995, 202; Williams 1995, 16). Although he does not ignore the context (not even when analysing ethics), it can still be said that for him there are virtues that should be cultivated independently of our habits, nature, or feelings – just as moderation is shown to be always good (Aristotle 2000, 1109a). For example:

> Actions done in accordance with virtue are noble [...] So the generous person will give for the sake of what is noble and in a correct way – to the right people, in the right amounts, at the right time [...] And this he will do with pleasure (Aristotle 2000, 1120a).

At the same time, Aristotle holds that moral concepts cannot be comprehended without external experience, or more precisely without the exposition to a range of different situations and actions (Everson 1995, 197). In that sense, there is a good to be known, but the process is

[14] He finds confirmation of this in a god as a perfect being who derives his satisfaction from himself.

not transcendent (Aristotle 2000, 1095a). So, when he claims that a good person is the measure of what is good, it is generally accepted that he does so differently than Plato or Protagoras (Charles 1995, 136).

> The nature of Aristotelian ethics itself shows why more detailed empirical study is needed. Ethical argument should rest on facts about human nature; when it is extended into political theory it should rest on further facts about human nature, and about human beings in relation to each other and to external circumstances. Appreciation of these circumstances shows us why a community with specific institutions is needed to realize the human good (Irwin 1988, 355).

On top of that, despite distinguishing between natural and legal justice (the former has the same force everywhere, the latter does not), he nevertheless claims – once again in a complicated way – that in the human world, even natural things can be changeable[15] (Aristotle 2000, 1134b). As he says, "[f]or we each have different natural tendencies and we can find out what they are by the pain and pleasure that occur in us" (Aristotle 2000, 1109b), as well as that things just by nature are the constant in the highest number of cases (Fassò 2007, 62). Human experience, therefore, can influence the nature of things in the domain of politics and ethics, where justice is a political issue, i.e., it concerns the organization of the state community (Aristotle 1998, 1252a). In this regard, when discussing the preservation and decay of the political order, Aristotle reminds us of the relativity of justice and the causes of political change. Everyone has their interpretation of who is considered equal and who is unequal, with factions arising when one group feels that it is not getting what it (according to its assumptions) is justly due (Aristotle 1998, 1280a, 1301a–1301b). It is interesting to point out that such an interpretation of justice in a certain way reflects the place of practical sciences in the system of knowledge. Namely, just as one can arrive at a universal formula for justice, but never separate it from the real circumstances against which it is interpreted – in the same way, political science can rely on the universal claims of ethics, but never free itself from particularity.

In that sense, Aristotle gives us a practical illustration of his methodology with regard to the question of the best constitution:

[15] As the nature of things is that one hand is dominant, yet a person can become ambidextrous.

> What the best constitution is, that is to say, what it must be like if it is to be most ideal, and if there were no external obstacles. Also which constitution is appropriate for which city-states [?] For achieving the best constitution is perhaps impossible for many; and so neither the unqualifiedly best constitution nor the one that is best in the circumstances should be neglected by the good legislator and true statesman. Further, which constitution is best given certain assumptions [?] For a statesman must be able to study how any given constitution might initially come into existence, and how, once in existence, it might be preserved for the longest time. [...] Besides all these things, a statesman should know which constitution is most appropriate for all city-states. Consequently, those who have expressed views about constitutions, even if what they say is good in other respects, certainly fail when it comes to what is useful. For one should not study only what is best, but also what is possible, and similarly what is easier and more attainable by all (Aristotle 1998, 1288b).

Then he continues by saying that the best constitution, from the general perspective, is the one governed by people distinguished by wealth and virtue, i.e., where the citizens are also good people (Aristotle 1998, 1288a, 1293b).[16] It is evident why such a general claim does not fit into realism. However, Aristotle does not allow himself to drift into unattainable ideals and soon warns that such an order is rare, because education requires a natural gift and fortunate circumstances, meaning that virtue eludes ordinary people (Aristotle 1998, 1295a). This is why he further asks what kind of

[16] Aristotle distinguishes between virtue in people, citizens, and rulers. Namely, citizens have the task of taking care of the community in which they live, and the community is reflected by the state system, so their virtue must correspond to the system itself (Aristotle 1998, 1276b). Since there are many different political arrangements, then there must be as many different virtues of citizens (political wisdom), while a good man (non-citizen) possesses a complete (one) virtue. Therefore, a person can be a good citizen (politically wise) and at the same time a bad person. Likewise, the virtues of citizens in a community can differ according to the differences that exist between them (according to the social status and role they have) – just as bravery is evaluated differently according to sex, for example. However, it is the ruler who must be both a good man and a good citizen, while citizens do not have to fulfill the first condition, but should know how to obey and rule (Aristotle 1998, 1277a). Of course, the best option is for a good citizen to be a good person at the same time, and for the virtues to complement each other. This is required in the best constitutional order (Aristotle 1998, 1277b, 1288a), whereby this description gives reason to nearly equate civic virtue with skill (Mulieri 2021, 505).

arrangement can be accepted by the majority of states in real circumstances, in which the majority of people can take part. He then adds that states must rest on a strong and broad middle class,[17] because then there is the least envy and conflict, as well as because the division of strata into the rich, poor, and middle class is common to all contexts (Aristotle 1998, 1295b). This is where his reliance on experience is explicitly shown, given that the rich/poor dichotomy plays a large role in his reasoning – which is experientially based. A country with great differences in wealth is a state of economic-slave relations, which entails contempt, not friendship and freedom. Therefore, the best order is one in which both the rich and the poor are satisfied, so that everybody rules, but the most competent actually make decisions (Aristotle 1998, 1309a).

This paradox is resolved, in his opinion, by the fact that the rich (who are often the most competent, because they are more educated) would have the actual decision-making power, but would have to be accountable to the people for their actions, while the people would make judgments and sometimes choose officials (Aristotle 1998, 1318b). The best citizens (he actually refers to the poor) are those who are engaged in animal husbandry and farming, and live far from the city, which enables them to have very little involvement in politics. They are satisfied with their work and the opportunity to supervise the work of the government, while at the same time having no incentive to be in the government – since public service should not be paid. A practical way to achieve the aforementioned balance between the classes is for the rich and the poor to decide together, but for the rich to have a plural vote, so that the votes of the few rich have the same value as the votes of the many poor. If they vote differently, the will of the group that has more property in total should prevail (Aristotle 1998, 1318a). The groups would be made up of part rich and part poor, depending on the results of the vote. Of course, with such a solution, Aristotle made equality only apparent because the majority of citizens were, due to living conditions and lack of interest, detached from the assembly. Consequently, the lack of their presence in voting leads to the predominance of the rich.

Although the main argument in favor of such a suggestion lies in his struggle to find a solution for a virtuous polity in general, it still retains realist elements. Virtuous political communities have shown themselves to be more stable throughout history, which makes them better. In order to achieve a virtuous polity, quality people are needed, and reality shows us that having a good education and enough free time amounts to having

[17] We should add to this the necessity to respect quality laws, as well as invest in moral education, since virtue is acquired throughout life, not by birth.

better odds. Therefore, the rich, i.e., those who fulfill such conditions, are more likely to be virtuous and should have more power. In other words, on the one hand – Aristotle is searching for generally applicable solutions (contrary to our understanding of contextualist political realism), but on the other – he is trying to do so within realistic circumstances, i.e., within the most common context of human societies. As we have seen, different types of peoples are suited for different types of political arrangements, so the universal in Aristotle is only universal in the sense of what is most common.

What can be concluded from this? The layeredness of Aristotle's worldview cannot be neglected, although he shows strong realist efforts in the methodological sense. First, in his system of sciences, experience plays an important role, although the knowledge of the first principles of science can also take place beyond it. Regardless, politics is a part of practical wisdom, and it does not concern scientific knowledge. The goal of politics is action and deals with particularities, which directly refers to the experience from practice (the comparative-historical method). Considerations of the best polity take into account power relations in a society, as well as the natural aspirations of different classes and cultures, while no theoretical solution for the generally best order is ever fully achievable for every context. This enables a nuanced understanding of social reality. Nevertheless, Aristotle often expresses universalistic claims – especially since he does not view politics as a sphere independent of ethics, within which there are answers to what is right in general. On the contrary, for him, these two elements are inevitably united, since a quality state organization is directly dependent on the virtue of the people. Despite that, his

> [e]mpirical analysis seeks to understand the varieties and structures of cities and their constitutions, and the sources of change and stability; and, in Aristotle's view, we understand these things best from the correct conception of happiness and justice. Different cities pursue happiness and justice in different ways; and they are stable or unstable partly because of their degrees of success and failure in achieving justice and happiness. A correct ethical theory, as Aristotle understands it, will describe the psychological and social effects of the different virtues and vices and in doing so will allow us to form new causal hypotheses that we can test against the empirical evidence (Irwin 1988, 355).

From all of these insights, we can draw the conclusion that the most plausible way to interpret potentially conflicting elements is the following: some general arguments regarding the best polity could be drawn from

the common denominators of every society (happiness, virtues, and the relationship between different social-economic classes and the goal of stability), which can be complementary with and should take into account all other contingent facts that concern cultural, moral, historical and geographical determinants. It could be said that certain truths can be arrived at, but that they do not apply in the same way to every context. Do Aristotle's ethics and general suggestions within politics alienate him to some degree from our methodological assumptions? Of course they do. Do they do it to a high degree and prevent us from calling him a predecessor? This paper tries to argue otherwise – he is aware that general claims, neither in the domain of ethics nor of politics, cannot fully suffice for our need to orientate in action (as Geuss would state it). Hence, even though we can safely say that Aristotle does not keep universal claims to a minimum – which would mean something that could be referred to as a strong notion of contextualism – his methodology still seems to qualify him to some extent as the predecessor of contextualist political realism.

4. MACHIAVELLI

Now we can turn to Niccolò Machiavelli and look at his resemblance from a methodological perspective. It is a well-known fact that Machiavelli, the sixteenth-century Florentine writer, became famous precisely for his steadfast pragmatism and realism, which he first exhibited in *The Prince*, therefore radically breaking the thread of the previous political philosophy and paving the way for modern thought. On the other hand, in his work *Discourses on Livy*, his strong and enthusiastic republican spirit comes to the fore, providing a basis for the layered understanding of his theory, although this paper argues that it does not make it incoherent.[18]

For Machiavelli, as was also the case for Aristotle in most respects, politics is a practical discipline where experience and context determine outcomes, or rather where there are no *a priori* rules. "[...] it is very difficult to generalise [...] since men and circumstances vary" (Machiavelli 2019, 72), and our best predictions can only rely on historical experience as a guiding thread, which can be indirectly and directly acquired. It is acquired indirectly by studying the past, and directly by engaging in politics, while Machiavelli experienced both types (Simendić 2022, 14). He speaks primarily to people of action, but also to others who are trying to understand how the world functions.

[18] This is especially the case bearing in mind that both works were written approximately at the same time, although both were published after his death.

Therefore, his teaching combines both practice and general knowledge, but also takes particularities (experience) as the starting point, which should provide the necessary nuance in understanding general things (Strauss 1958, 233). It closely resembles Aristotle's method of study in the domain of practical wisdom. For Machiavelli, conclusions about politics must contain something normative, that is, they must be of practical use. He does not contrast the descriptive with the normative, but the wrong normative with the right (achievable, experiential, "realistic") one (Strauss 1958, 234). In other words, *The Prince* is imbued with just such practical instructions for ruling based on experience, not abstracted solely by the principles of the mind. For example, when discussing the building of fortresses, Machiavelli says:

> Rulers have been accustomed to build fortresses to strengthen their power. These serve as a bit and bridle for those who might plot against them [...]. I praise this practice, because it has been used since ancient times. Nevertheless, in our own times, Niccolò Vitelli destroyed two fortresses in Città di Castello, so that he could maintain his rule over it. [...] Fortresses are sometimes useful, then, and sometimes not; it depends on the circumstances. Moreover, if they help you in some respects, they will be harmful in others (Machiavelli 2019, 73).

Likewise, in the chapter on the praises and commands of the ruler, he explicitly states his view on politics:

> But having the intention to write something useful to anyone who understands, it seems to me better to concentrate on what really happens rather than on theories or speculations. For many have imagined republics and principalities that have never been seen or known to exist. Because there is such a great distance between how we live and how we ought to live, anyone who sets aside what is done for what ought to be done learns more quickly what will ruin him rather than preserve him, since a man who wishes to make a profession of doing good in all things will come to ruin among many who are not good (Machiavelli 2019, 53).

All relevant epistemological assumptions can be observed in the given passage. First, the emphasis on reality, i.e., the state of things as they are ("what really happens", not "theories and speculations") – through the study of past and present experiences. This leads to a nuanced understanding of the world, which has the effect of viewing morality instrumentally and

pragmatically ("a man who wishes to make a profession of doing good in all things will come to ruin"), as well as avoiding universal claims. According to Machiavelli, any faith in practical rationality leads to illusions and bad government.[19] The part on the perishing of those who live driven by an *ought* that has seceded from reality is exactly the aforementioned wrong normative approach. Being loyal to reality seems to present itself as a core value, along with the general idea of success (in this case – of the ruler), which leads him to establish a fundamental relation between the two.

As was pointed out in the beginning, one of the frequent substantive claims of realism that is grafted onto such methodological assumptions is anthropological pessimism, as a response to the actual state of affairs. In that sense, it is worth briefly mentioning Machiavelli's take on that:

> For this may be said of men generally: they are ungrateful, fickle, feigners and dissemblers, avoiders of danger, eager for gain. While you benefit them they are all devoted to you (Machiavelli 2019, 57).

People see only the short term and do not deal with political issues, because they are superficial and evil beings who will betray you as soon as they get the chance – "men never work any good unless through necessity" (Machiavelli 1996, 15). It is obvious that Machiavelli is more insistent, blunt and "realistic" compared to Aristotle when it comes to human nature, although both share the opinion that good laws and religion are needed to restrain men and teach them good behavior. In other words, the experientially determined evil human nature, which comes to the fore again and again throughout history, is additional support for all his normative views. Pragmatism and adaptation, therefore, are the only options. Although these claims about human nature are universalistic in essence and Machiavelli shows us that he is not immune to the trap of neglecting that everything can change and changes (Walker 1987, 79), they are nevertheless experiential and treated as a framework for particularities. Unlike, for example, Hobbes, who builds his political philosophy on universal claims about human nature, which serves as a first deductive point, from which he concludes almost everything about the duties and rights of the sovereign and the people.

On the other hand, Machiavelli's anti-idealism and cruelty do not mean that one should always be evil, selfish, or corrupt in politics. On the contrary, political circumstances are so complex and unpredictable that behavior according to predetermined patterns is never desirable:

[19] The goals of governance will be discussed shortly.

> A ruler, then, need not actually possess all the above-mentioned qualities, but he must certainly seem to. Indeed, I shall be so bold as to say that having and always cultivating them is harmful whereas seeming to have them is useful; for instance, to seem merciful, trustworthy, humane, upright, and devout, and also to be so. But if it becomes necessary to refrain, you must be prepared to act in the opposite way, and be capable of doing it (Machiavelli 2019, 60–61).

It is best, in fact, for the ruler to be feared and loved at the same time.

In the Middle Ages and the Renaissance, there were popular writings that belonged to the genre of "mirrors for princes" and aimed to show and describe how a good ruler should appear and behave (Simendić 2022, 16). Drawing on the Christian tradition and the Roman moralists, these writings recommended piety and four essential virtues to rulers: prudence, justice, courage, and moderation. A virtuous ruler was supposed to be a role model for others and show them the way to Christian salvation. In this sense, *The Prince* remains within the framework of the given genre only insofar as it describes the desirable qualities of a ruler that lead to a good outcome – as a response to the challenges of fate (i.e., changing political circumstances). Neither desirable traits, fate, nor a good outcome have their usual meaning in Machiavelli – *The Prince* is "the science of adapting character to circumstances" (Simendić 2022, 16, translated by author). In that context, Machiavelli criticises the widespread opinion at his time, and even beforehand, that everything is in God's hands and depends on fate – which a person cannot change. He believes that there is free will, although he does not reject that fate plays a role, but only a partial one (Machiavelli 2019, 82). Fate exerts great power where it meets no resistance, and it can also randomly reward people. Although moderately, Machiavelli shows a certain degree of faith in fate and astrology, which represents a departure from the experiential method characteristic of realism (Whelan 2004, 55). He also believed that human character strongly limits free will, as well as social position (Vujadinović 2014, 51).

The virtues he is alluding to are often qualities that were usually considered unworthy of a man, and the desired outcome of ruling is to remain in power as long as possible and achieve fame. Both substantive claims derive from his epistemological tendencies to see the world as it is.

> If a ruler, then, contrives to conquer, and to preserve the state, the means will always be judged to be honorable and be praised by everyone. For the common people are impressed by appearances and results (Machiavelli 2019, 61).

A good ruler is one who adapts to time and circumstances and manages to find a balance between peacefulness and ferocity, in order to please both the people and the army – he "must know well how to imitate beasts as well as employing properly human means" (Machiavelli 2019, 60). The virtue of a ruler is that he knows how to be both a fox and a lion at the same time, in order to recognise traps and scare wolves. As we have seen, he even says that it is dangerous if the ruler is truly endowed with classical virtues, but also useful if he knows how to pretend to possess them (Machiavelli 2019, 60). The ruler must be careful that what he says conveys the impression of "pure" gentleness, trustworthiness, and piety. Therefore, the context determines how he should behave, although experience shows that there are common incentives for ruling. As noted previously, normative claims are not necessarily "non-realist" – it is only important to make them as empirical and non-universal as possible. Machiavelli's advice for rulers, which implies contextual adaptation, shows how he sees such a connection between reality and normative claims.

On the other hand, like Aristotle, he does not shy away from using concepts like "good deeds" or "good behavior", meaning moral concepts in general. Their use implies knowing what is the concept of good, although it could rather be said that for Machiavelli this concept is closest to the idea of utility (instrumental normativity). For him, morality certainly has no metaphysical basis, but stems from the need for survival (Mulieri 2021, 502). Therefore, it could be said that he uses moral concepts that are socially accepted, without deeper philosophical refinement. Be that as it may, it is interesting to point out Machiavelli's simultaneous criticism of the criminal way of coming to power (using the example of the tyrant Agathocles):

> Yet it cannot be called virtue to kill one's fellow-citizens, to betray one's friends, to be treacherous, merciless and irreligious; power may be gained by acting in such ways, but not glory. If one bears in mind the ability displayed by Agathocles in confronting and surviving dangers, and his indomitable spirit in enduring and overcoming adversity, there is no reason for judging him inferior to even the ablest general. Nevertheless, his appallingly cruel and inhumane conduct, and countless wicked deeds, preclude his being numbered among the finest men. (Machiavelli 2019, 30).

We can see a similar type of condemnation in *Discourses on Livy*, where Machiavelli's humanism comes to the fore when he states that those who destroy order, religion, art, or anything that serves humanity are worthy of contempt (Machiavelli 1996, 31). His republican spirit is strong, i.e., the

elevation of freedom as a value, which does not diminish his analytical and historical approach in his works (Machiavelli 1996, 16). As pointed out, the fact that the concepts of humanism or the common good are mentioned should not mislead us into thinking that this is an idealistic excursus, at least not from the perspective of the ruler. The goals of governing are clear, and the moral qualities of the ruler, which are necessary for a high-quality order, act primarily instrumentally. The desired outcome for every political actor is not Christian salvation, but the attainment of human glory – and no such thing can be achieved without maintaining the state, order, and personal political success, which directly depends on the satisfaction of those who are ruled. In other words, the personal (well-recognised) interests of the ruler and the common interest are not in conflict. But again, our concern for ethics is only relevant to the extent of its connection and influence on methodology. The point here is that Machiavelli also does not seem to keep general conclusions about politics to a minimum, although his approach still offers substantially more contextualisation compared to other philosophers.

Based on previous points, it seems clear why a republic based on good laws is a meaningful choice for rulers in general: it allows for stability and less conflict, and therefore longer-term rule (Whelan 2004, 41). Similarly:

> if a ruler is more afraid of his own subjects than of foreigners, he should build fortresses; but a ruler who is more afraid of foreigners than of his own subjects should not build them. Hence, the best fortress a ruler can have is not to be hated by the people: for if you possess fortresses and the people hate you, having fortresses will not save you (Machiavelli 2019, 73).

Thus, the favor of the people is a means to an end. For the prince, everlasting glory is more important than his current reputation, and whoever collapses the state with his incompetence should be ashamed of it. In line with this is the definition of a republic, in the broadest sense of the word, as a positive order aimed at protecting the common good, and in a narrower, formal sense – as a mixed order, which Machiavelli considers to be the best since there is a balance between the three forms of government (Machiavelli 1996, 13; Simendić 2022, 21). The ruler should also ensure freedom and privacy (primarily private property) to the people, as well as protection from enemies.

On the other hand, as has been emphasised, none of these general conclusions and suggestions by Machiavelli have their full weight without a context in which they are set. Just as Aristotle offers a general solution for a good constitution, but then moves on to what is applicable to most circumstances – as a consequence of studying many contexts and experiences

– so too does Machiavelli handle universalistic claims. He proceeds with caution, uses them as a framework, and reminds the reader of the complexity of human affairs, even sometimes seeing conflicts as a condition for the realization of civil/state greatness (Vujadinović 2014, 54). A wise ruler must not keep his word if it does not benefit him or if the circumstances in which he made the promise have changed, i.e., he should be duplicitous because people "turn as the wind blows". Unlike Hobbes, who strives to abandon change, Machiavelli endorses it – he does not try to solve "eternal questions of political philosophy" (Walker 1987, 74). He rather provides a thorough overview of historical examples regarding questions that concern him and those to whom he is writing. Cunningness is a necessary trait of a ruler, because history shows that great things were accomplished by those who did not pay attention to their promises and who knew how to skillfully deceive people (Machiavelli 2019, 59). So, his line of thought seems to be analytical enough: practice shows that the ruling position is seized with the aim of conquering and gaining power, and there is no such thing without the maintenance of the state – which further depends on the satisfaction of those who are ruled. Thus, observed human nature and history teach us how politics unfold, which in the end brings us to some sort of framework about what should be done, but only after an assessment of concrete circumstances. This truly resembles Aristotle to a degree.

In the introduction, it was stated that Machiavelli's methodology harmoniously builds on Aristotle's, which is why they are discussed together. In this respect, it would be good to also emphasise their substantive links and compare them a bit more. Firstly, Machiavelli accepts the shifting of political orders from Polybius, as well as the six forms of government from Aristotle (Machiavelli 1996, 10). As noted, Machiavelli also accepts the position that conflicts between the rich and the poor are inevitable, and it is precisely the mixed rule that should resolve the conflicting interests. The position and strength of social groups are shown to be one of the main elements of his analysis, as well as the stability of government, which is a legacy of Aristotle's political philosophy. Although Machiavelli does not identify the personal and the general in the way the Greeks did, but rather, in the search for compromises, he somewhat separates the perspective of the people from the perspective of the ruler. It seems that with him those two points of view (the personal and the common) overlap in the abovementioned magnificence of the state. Machiavelli took pragmatism to a higher level, with a more pronounced pessimism about human nature, turning tyrannical cunningness into general advice for governing.[20] In this regard, he does not see moral

[20] With all of the given mitigations and nuances.

virtue as the ultimate goal of political life – he completely denies Aristotelian teleology by emphasizing that people join together for the sake of survival and that this happens for practical reasons. All values arise as a response to the challenges of survival (Mulieri 2021, 502). This takes him quite far from Aristotle's good and practically wise ruler. Nevertheless, although they adopt quite different ethical standpoints, Machiavelli follows Aristotle in his striving for experience-based inferences, which imply a combination of contextualist, comparative-historical and order stability analyses. Such a methodological approach is not common for other philosophers of the time, such as Plato, Cicero, Augustine, Thomas Aquinas, Marsilius of Padova, etc., nor was it prevalent after the Middle Ages (apart from the mentioned exceptions, such as Montesquieu and Hume) when universalistic and non-experiential claims were dominant.

From all that has been said, Machiavelli appears to possess both methodological elements of contextualist political realism to some degree. He starts from experience in reasoning, creating a nuanced and contextual picture of politics, which does not allow too many generalisations and fantasies, while at the same time seeing normative statements as a necessary reflection of the practical nature of politics. With the exception of the values of freedom and the magnificence of the state, morality is mostly instrumental for Machiavelli. Context forces people to adapt and practice shows that the ruling position is seized with the aim of conquering and gaining power, which for him implies that almost everything is permitted for the sake of preserving that same position. In order to do so, one must take into account all relevant obstacles and potential threats to the stability of the state in the given circumstances. There are no a priori solutions – politics rests on attempts to level the potential conflicts of different interests, although conflicts are at the same time not always bad. In a similar way to Aristotle, he deviates from strong contextualism because experience teaches us that history repeats itself, thereby expressing something universal within human affairs. Nevertheless, Machiavelli seems to express a higher awareness with regard to contextualisation than Aristotle.

5. CONCLUSION

What is to be asserted from this complex input? It appears that we can safely conclude the following: both philosophers fulfill the experiential condition of a realist methodology, but both have divergences from contextualism, since they often reach general conclusions about the best ways to do things in politics, although bearing in mind that those claims are not fully fruitful without the context.

On the other hand, as was noted in the introduction – it also seems reasonable to state that being characterised as a forerunner of a line of thought within political theory calls for somewhat mitigated criteria of identification. Perhaps such criteria could be expressed within Aristotle's and Machiavelli's theories through contextualism in a weaker sense: there are general advice, requirements, and principles regarding politics but their proper application requires sensitivity to the context and particularities of the situation. This still distinguishes them from most of the political philosophers of their time, as well as subsequent ones.

On top of that, it is reasonable to say that Machiavelli expresses a deeper realist tendency than Aristotle, especially in the substantive aspect. Nevertheless, this does not imply that Aristotle should be left out of the picture, nor that the importance of his methodology should be neglected. Lastly, it is up to the reader to decide to what *degree* the approaches of these two classical thinkers overlap with each other and fit the assumptions, as well as what is the extent required for the title of predecessor.

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ГЛАС ЗА ПАРЛАМЕНТАРНУ РЕПУБЛИКУ

Аутор чланка предлаже да се у Србији полупредседнички систем организације власти, који лоше функционише, замени режимом парламентарне републике. Парламентаризам би превазишао слабости садашњег система које се пре свега састоје у хипертрофији председничке власти. Писац разматра два питања будућег парламентарног уређења – избор шефа државе и однос владе и парламента. Предлози за уређење тих установа, дати у чланку, представљају само позив за расправу о промени система организације власти, коју писац сматра неопходном.

Кључне речи: *Србија*. – *Устав*. – *Организација власти*. – *Промена*. – *Парламентаризам*.

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1. УВОД

Србија је, по слову Устава од 2006. године, држава која има полупредседнички систем организације власти. То устројство је преузето од претходног устава, донетог почетком деведесетих година прошлог века, и није се показало ни корисним ни функционалним. Напротив, изазвало је многобројне тешкоће, па се зато оправдано може поставити питање да ли такво уређење треба задржати.

Полупредседнички систем организације власти представља образац у којем бирачи непосредним гласањем бирају шефа државе, док је влада одговорна представничкоме телу, проистеклом из општих избора (више о томе Popović 2019, 195). Оваква конструкција политичких установа почива на томе да и шеф државе и представничко тело своју легитимност изводе непосредно од народа, што та два органа доводи у исту раван. Функционалан модел полупредседничког система развио се у Француској под Уставом од 1958. године. Током времена се раширио по многим земљама које су га прихватиле, нарочито у Европи и Африци. Иако се може рећи да у земљи порекла успешно функционише више од пола века, тај систем организације власти садржи у себи недостатке. Ови су се у већој мери испољили у земљама рецепције него на извору, у држави у којој је поменути систем настао.

2. СЛАБОСТИ ПОЛУПРЕДСЕДНИЧКОГ СИСТЕМА

Основна слабост полупредседничког система састоји се у томе што тај склоп организације власти може произвести напетост између шефа државе и владе одговорне представничкоме телу. Напетост потиче управо од непосредног избора шефа државе. Државни поглавар има, већ по самој замисли о конструкцији политичких установа, истакнуту улогу која на свој начин конкурише народном представништву. То се лепо види у земљи родоначелници система – Француској. Председник Републике се по Уставу од 1958. године појављује у трострукој улози. Он је чувар Устава, арбитар међу политичким странкама и гарант највиших националних интереса (вид. Popović 2019, 170 и тамо наведену књижевност). Таква слика положаја председника републике, изабраног непосредним гласањем, пружа довољно основа за увид у компликовано функционисање политичких установа које може проузроковати полупредседнички систем организације власти. Председник републике и влада одговорна пред народним представништвом су два уставна ор-

гана који један другом конкуришу у пољу извршне власти. Због тога се понекад каже да овакво уређење познаје двоглаву или бицефалну егзекутиву.

Полупредседнички образац организације власти не функционише, међутим, увек на исти начин. Од напетости између два уставна органа још је гора ситуација у којој шеф државе постане надмоћан над представничким телом. Наиме, кад се при народном гласању поклопе две већине, она која је изабрала председника и она која је изабрала парламентарну већину, систем практично посматрано функционише на исти начин као председнички. Тако је, рецимо, било у Француској под владом генерала Де Гола, на почетку примене устава који и данас важи. Насупрот овоме, ако се председничка и парламентарна већина разиђу, наступа ситуација у којој председник једног политичког уверења обавља своју функцију у присуству владе чији је политички правац различит од председничког. Француски политичари су, суочени с таквим приликама, прибегли обрасцу понашања који је назван кохабитацијом. У ствари, могло би се рећи да је управо кохабитација типичан и усавршен облик функционисања установа, какав је карактеристичан за полупредседнички систем организације власти. Тај облик се од председничког разликује једино онда кад постоји кохабитација. Функционисање система у таквим условима захтева од носилаца различитих, чак супротстављених, политичких опција висок степен толеранције и њихово доследно придржавање овлашћења у уставним оквирима.

Примена полупредседничког система организације власти у Србији показала је слабости које се јављају и у другим земљама, што потврђује недостатке саме теоријске конструкције тог обрасца. Две слабости су се код нас испољиле у највећој мери. То су скоро потпун изостанак кохабитације и, што је још горе, хипертрофија председничке функције.

Кохабитација је у правом смислу речи у Србији постојала само за време мандата председника Милутиновића, кад је, после обарања с власти Слободана Милошевића, режим био промењен. Постојање коалиционих влада у току мандата председника Тадића, Николића и Вучића не може се сматрати кохабитацијом. У влади је тад увек учествовала и у ствари чинила њену окосницу управо председничка странка. Најпре је то била Демократска, а доцније Српска напредна странка. Непостојање кохабитације већ је само по себи проблематично, а утицај те чињенице на политичке установе код нас много је већи него што би се на први поглед могло закључити.

Непостојање онаквог распореда политичких снага какав изазива кохабитацију слаби парламентарну компоненту полупредседничког система. Парламентарна већина губи значај ако нема сопствени став, различит од председниковог. Уместо да се спроводи програм оних странака које у представничком телу састављају владајући блок, влада се поводи за политиком какву води шеф државе. У Француској је својевремено председник Саркози такву ситуацију језгровито описао речима да је влада у ствари дужна да спроводи председников политички програм (Gicquel, Gicquel 2015, 575–576). Српски пример потврђује исправност Саркозијеве опаске. Већ по тој особини се разговетно види да полупредседнички систем у Србији суштински фукционише као једна врста председничког. Такав закључак се појачава кад се има у виду друга већ поменута слабост.

Друга слаба тачка примене полупредседничког система организације власти у Србији јесте хипертрофија председничке функције. Пишући о овлашћењима председника Републике по Уставу од 2006. године, професор Ратко Марковић је та овлашћења разврстао у три круга. То су били (а) представљање Републике Србије, (б) послови тзв. неоперативне егзекутиве и (в) овлашћења у ванредном и ратном стању (Марковић 2020, 328–329).[1] У послове назване неоперативном егзекутивом Марковић је убројао проглашење закона, предлагање личности за председника Владе, али и командовање Војском Србије, уз постављање и унапређивање официра.

Ако се остави по страни расправи подложно схватање да је командовање оружаним снагама неоперативна делатност, мора се ипак рећи како су политичари који су вршили дужност председника Републике у Србији сви до једног искорачили из поља неоперативне егзекутиве. Они су се отворено упустили у утврђивање и вођење политике, што је по слову одредбе члана 123 Устава од 2006. године поверено Влади. Такво понашање је постало толико уобичајено да јавност и политички чиниоци српску владу све више посматрају као један орган који је на неки начин придодат шефу државе. То се дешава зато што влада нема сопствени политички правац, који би се разликовао од председничког. Као илустрација за оно што је управо речено врло добро могу послужити преговори Србије с међународном заједницом ради решења косовског проблема. Преговоре одавно води садашњи председник Републике и страни чиниоци се једино њему обраћају у вези с питањима која се тим поводом јављају.

[1] Марковић је имао у виду чланове 111–113 и 200–201 Устава од 2006. године.

Јасно је да се председничка уставна овлашћења превазилазе услед тога што постоји поклапање двеју већина – оне која је изабрала председника с оном која је изабрала Народну скупштину. Председник се у свом деловању осећа слободним зато што зна да иза њега стоји парламентарна већина, која ће, буде ли потребно, сопственим печатом оверити одлуку какву је он сâм донео. Суштински праузрок повећања председничких надлежности лежи, међутим, у чињеници да шефа државе непосредно бирају грађани. Посреди је грешка у самоме систему, коју је веома тешко, а у нашим условима у Србији, управо немогуће исправити. Због тога је неопходно променити систем организације власти. Легитимност председника Републике налази се, према одредбама Устава од 2006. године, у истој равни с Народном скупштином, тако да влада, која носи парламентарну одговорност, тешко може конкурисати шефу државе.

Влада проистиче из представничког тела, док је државни поглавар, услед начина на који је изабран, у непосредном додиру с народом. То му у свакидашњем поступању, али и у свести обичног грађанина, доноси предност над владом, док истовремено умањује значај представничкога тела. Уместо да стане уз владу коју је изабрала, ако треба и насупрот шефу државе, Народна скупштина у Србији се редовно саглашава с председником Републике. Тиме углед народног представништва бива у великој мери уништен, а влада се своди на једну врсту председничког сервиса. Такав склоп односа јасно показује недавна изјава актуелног председника Републике да он лично неће допустити смену једног министра, од кога је јавност захтевала да одступи. Министра у функцији фактички држи шеф државе, а не Народна скупштина. Уместо да одговарају пред парламентом, министри у Србији полажу рачун председнику Републике.

Пошто се слабости полупредседничког система код нас не могу исправити у оквиру самога поменутог обрасца организације власти, намеће се закључак да тај систем треба заменити другим, који би боље фукционисао у складу с демократским начелима. Председнички систем не би у ту сврху дошао у обзир, због оног што је већ речено. Уочене слабости полупредседничког система појављују се управо зато што се постојећи уставни механизам примењује као да је систем организације власти председнички. Осим тога, Србија је европска држава, а на нашем континенту председнички систем готово нигде није прихваћен. Изузетак у том погледу постоји однедавно. То је Турска, где је поменути образац организације власти уведен под владом ауторитарног председника Ердогана.

Парламентарни систем је једино прихватљиво решење за српско уставно устројство. Преостала два облика организације власти која данас постоје – консоцијативни и скупштински – не долазе у обзир сваки из својих разлога. Србија није подељено или плурално друштво да би усвојила онај први, док с другим има лоша искуства из комунистичког раздобља своје уставне повести. Осим тога, скупштински или, како се још зове, директоријални систем организације власти примењује се само у једној земљи, Швајцарској, која је по много чему особен случај.[2]

Парламентарни систем организације власти, захваљујући својој конструкцији, не подлеже слабостима полупредседничког система чије смо постојање утврдили у Србији. Ако се послужимо једним од иначе многобројних одређења појма парламентаризма, доћи ћемо до закључка да постоје три карактеристике тога државног облика. У парламентарном систему (а) народ не бира непосредно шефа државе, (б) шеф државе је лишен ефективних овлашћења, док је (в) истински носилац таквих овлашћења влада, одговорна парламенту (Popović 2019, 129). Из овога се лако може закључити како се под парламентарном владом не може догодити хипертрофија председничке функције нити функционисање уставног система као председничког. За Србију би то било корисно зато што би се начелно избегло постојање ефективне двоглаве егзекутиве, што се показало неупутним, некорисним и подложним деформацији. Земљом би управљала влада проистекла из парламентарне већине, одговорна пред народним представништвом. Најзад, мада никако на последњем месту, у парламентарној републици не би била могућа концентрација власти у једној личности.

3. ДВА ПИТАЊА ПОВОДОМ ПРЕЛАСКА НА ПАРЛАМЕНТАРИЗАМ

Парламентарна република би се у Србији могла успоставити путем парцијалне или тоталне уставне ревизије. Питање о правном путу установљавања друкчијег облика организације власти од садашњег веома је значајно, па му треба посветити посебну пажњу и подробно га размотрити. Намера писца овог текста, међутим, не иде тако далеко.

[2] О основним облицима организације власти видети Поповић 2023, 49–50; о функционисању скупштинског система под комунистичким режимом у Србији видети Marinković 2019, 65–69.

Овде ће у општим цртама бити начелно расправљена само два проблема која се, кад се размишља о увођењу парламентарног система у Србији, истичу у први ред. Најпре, то је питање избора шефа државе. Садашњи поступак непосредног избора председника Републике требало би укинути и заменити га оним који је примерен парламентарној републици. Осим тога, треба се посветити проблему односа парламента и владе јер тај однос представља кључно питање парламентарног уређења. Парламентарна влада не може бити подређена председнику Републике нити ће се носилац те функције мешати у владин рад и доношење одлука. Зато је неопходно размотрити начин на који треба уредити однос извршне власти и представничког тела.

На свако од та два питања могуће је дати различите одговоре у оквиру парламентарног уређења власти. Због тога их треба претходно расправити без намере да се дају коначни судови о томе који би механизам био најприкладнији за Србију. Предлози који ће овде бити учињени подложни су даљој расправи и у коначном исходу, избору самих грађанки и грађана Србије. Сврха је овога написа да се пруже разјашњења односа међу појединим установама, како би се тиме помогло при доношењу одлуке која ће доиста бити најкориснија за нашу земљу.

4. ИЗБОР ПРЕДСЕДНИКА РЕПУБЛИКЕ

Обично се каже да се у парламентарној републици шеф државе бира у представничком телу. Тај исказ је у основи тачан, али захтева објашњење у појединостима. Постоје, наиме, два начина избора шефа државе у парламенту. По једном, парламент у редовном саставу бира председника републике. По другом систему, међутим, парламент не бира шефа државе у свом редовном него у проширеном саставу.

Размотримо најпре образац према којем председника републике бира редовни састав парламента. Пример таквог избора нам пружа грчки устав, у чијем је члану 30(2) прописано да се председник Грчке Републике бира у тамошњем једнодомном парламенту. Начелно се, по члану 32(3) Устава, захтева квалификована већина за избор шефа државе и то двотрећинска у првом и другом, а тропетинска у трећем гласању. Ако се ниједна од квалификованих већина не може постићи, у четвртом кругу гласања не захтева се квалификована, него апсолутна већина. Најзад, ако се ни апсолутна већина не може постићи Уставом је предвиђено да ће у петом гласању за председника републике бити изабран кандидат који добије највише гласова. Вредно је напомене

да се свако наредно гласање обавља пет дана после претходног. Ако у петом гласању два кандидата имају једнак број гласова, изабран ће бити онај који је у првом кругу имао већу подршку.[3]

Као што се види, замисао твораца грчког устава састоји се у томе да шеф државе буде личност од широког поверења, а не експонент тренутне парламентарне већине. Због тога се за избор у прва три гласања захтева квалификована, а тек у четвртом је довољна апсолутна већина. Ако се ни таква не може постићи, онда ће у последњем, петом гласању релативна већина бити довољна. Како између гласања за избор шефа државе у парламенту мора протећи пет дана, то значи да ће се посао избора обавити у сразмерно кратком року. Избор релативном већином, до којег долази у петом гласању, представља једну практичну норму, која се указује као *ultima ratio* у ситуацији кад у парламенту постоји мозаик политичких странака, које међу собом не могу постићи договор о личности једног кандидата. Према подацима који се налазе на интернету, од осам до сад изабраних председника Грчке Републике пет је изабрано у првом гласању у парламенту. Такав је случај и садашње председнице г-ђе Сакеларопулу. Три пута је избор обављен у трећем гласању.

Други начин избора шефа државе у парламентарној републици јесте онај при којем председника републике бира парламент, нарочито проширен за ту прилику. Такав систем се јавља у регионализованим државама и у федерацијама. Примере за то пружају нам Италија и Немачка.

Италија је регионализована држава, чија је територија састављена од двадесетак региона, од којих пет имају посебан статус. Италијански парламент је дводоман и састоји се од Посланичког дома и Сената. По члану 83(1) италијанског Устава председник Републике се бира на заједничкој седници парламентарних домова. Чланом 83(2) Устава предвиђено је да ће приликом избора шефа државе парламент бити проширен делегатима које изаберу регионални савети. Сваки регион шаље по три делегата и међу њима мора бити заступљена мањина на регионалном нивоу.[4] Као и у Грчкој, за избор председника Републике се у Италији захтева квалификована већина у првом и другом гласању проширеног парламента.

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[3] О избору председника републике вид. Spyropoulos, Fortsakis 2017, 76–77. Књига је објављена пре најновије ревизије грчког устава од 2019. године. У овом чланку је узет у обзир текст чл. 32 Устава који данас важи.

[4] Видети Pasquino 2016, 121–122 (о избору председника Републике), 132–136 (о регионалном уређењу). Изузетно, најмањи регион Вале д'Аоста шаље само једног делегата за избор председника Републике.

За разлику од грчког, италијански устав не ограничава број гласања, али за избор шефа државе обавезно захтева апсолутну већину у изборном телу. На овоме месту треба указати на игру бројева. Италијански парламент има 600 народних представника у оба дома.[5] Регионални делегати не чине више од 10% тога броја, што им не пружа прилику да пресудно утичу на избор председника Републике.

Италијански систем избора шефа државе пати од могућег великог броја гласања у проширеном парламенту, док се између гласања воде преговори политичких странака, како би се постигла већина. Унапред се не може знати колико ће трајати избор шефа државе и колико пута ће се гласати. Председник Сарагат је 1964. године био изабран у двадесет првом кругу гласања, а председник Леоне 1971. године у двадесет трећем (Popović 2019, 61). Јасно је да су, из разумљивих разлога, творци италијанског устава желели да шеф државе у проширеном парламенту свакако буде изабран квалификованом већином. Апсолутна већина у изборном телу, која је за избор довољна почев од трећег гласања, представља најмању прихватљиву меру за високу функцију председника републике. Тај стандард, уз избор председника у проширеном парламенту, понекад доводи до тешкоћа при избору.

Немачка је федеративно уређена држава, чији се председник такође бира у једној врсти проширеног парламента. Немачка Савезна скупштина, за коју се и код нас одомаћио израз Бундестаг (*Bundestag*), бира се на непосредним изборима по мешовитом изборном систему, како је предвиђено чланом 38 немачког устава. Немачки савезни председник бира се, међутим, у посебном телу, које се у том уставу назива Савезним сабором (*Bundesversammlung*). То је предвиђено чланом 54 Устава, који у трећем ставу одређује састав поменутог тела. Савезни сабор се састоји од свих посланика Бундестага и једнаког броја чланова изабраних по пропорционалном систему у парламентима савезних покрајина.

По члану 54(6) Устава, у прва два круга гласања за избор савезног председника захтева се апсолутна већина у Савезном сабору. Ако ниједан кандидат не постигне такву већину, у трећем гласању биће изабран онај ко освоји највећи број гласова. Немачки систем избора шефа државе је врло практичан зато што допушта само три гласања. Истовремено је мање него грчки и италијански наклоњен идеји о спречавању утицаја тренутне парламентарне већине на избор шефа државе. Такав утицај је донекле спутан начином избора Савезног

[5] Италијански изборни систем је упознао честе промене у последње време; овоме треба додати и измене Устава. Вид. Pouzadoux, 2022.

сабора, у којем парламентарци чине само једну половину састава. Устав због тога при трећем гласању допушта избор председника републике уз подршку релативне већине у изборном телу. Додајмо уз ово да немачки устав изреком забрањује расправу пре гласања у Савезном сабору, који опет представља тело без икакве друге надлежности осим избора шефа државе (Popović 2019, 73).

Није нимало једноставно одговорити на питање који би од поменутих начина избора председника парламентарне републике био препоручљив за Србију. Пошто није регионализована држава, ни федерација, Србији би, по свој прилици, више пристајало да се председник републике бира у редовном саставу парламента, а не у проширеном. Тешко би, међутим, било прихватити замисао да се шеф државе у било којој ситуацији може у Народној скупштини изабрати релативном већином. Видели смо да се то може догодити у грчком систему избора председника Републике, премда се то до сад није десило. Избор шефа државе релативном већином у Немачкој изазива мање приговора због посебног састава изборног тела, односно избора председника у проширеном парламенту.

Ако би се у Србији, као у Италији, настојало на апсолутној већини за избор председника Републике у Народној скупштини, главна примедба таквом систему би била сасвим једноставна – шефа државе би изабрала тренутна парламентарна већина. То је управо оно што свакако треба избећи, због значаја и угледа председничке функције.

О избору шефа државе квалификованом већином у Народној скупштини, при политичким приликама какве владају у Србији тешко је уопште размишљати. Раскорак међу политичарима супротстављених праваца је толики да је практично незамислива њихова сагласност о било којој личности. Изузетак би се могао јавити кад једна странка или коалиција у Народној скупштини располаже квалификованом већином. Тад, међутим, захтев за квалификованом већином не би значио ништа јер би се исход опет свео на то да тренутна парламентарна већина изабере шефа државе. Другим речима, тренутна квалификована већина би функционисала исто као што то чини апсолутна.

Идеја о квалификованој већини приликом избора шефа државе јавља се зато да би се странке приволеле избору личности која ужива висок степен поверења јавности. Такав систем избора има своје наличје у чињеници да захтев за квалификованом већином пружа мањини могућност вета. Због тога се у уставима више држава прибегава резервним клаузулама, како би се избегла могућност да мањина изврши опструкцију, односно запречи избор шефа државе.

Можда би се, имајући у виду оно што је управо речено, у Србији могло размишљати и о избору председника Републике у проширеном парламенту. При таквом разматрању наилазимо на препреку која се састоји у питању: како проширити Народну скупштину кад приступа избору председника републике? Србија није ни федерација ни регионализована држава, те би као једина могућност преостала идеја да представници локалних самоуправа заседају заједно с народним посланицима кад се бира председник Републике. То би рецимо, могли бити председници општина. У Србији, изван територије Косова и Метохије, има око 170 општина, рачунајући и градске. Народна скупштина има 250 посланика, али би тај број, догоде ли се уставне промене, свакако требало смањити. Може се, рецимо, замислити да Народна скупштина има у парламентарној републици 150 народних посланика, којима би се, кад бирају председника Републике, придодало 50 председника општина које ови изаберу међу собом. У таквом телу би се онда, према грчком моделу, могла захтевати квалификована већина за избор председника Републике у првом и другом кругу гласања, апсолутна у трећем и коначно релативна у четвртом. На тај начин би се у разумној мери смањила могућност да тренутна парламентарна већина изабере шефа државе.

О свему овоме треба добро размислити. Начином избора који је овде предложен омогућило би се постизање ширег консенсуса за избор шефа државе, чиме би се избегла у грубом облику надмоћност тренутне парламентарне већине. Истовремено, избор се не би одуговлачио у недоглед.

5. ОДНОС ПАРЛАМЕНТА И ВЛАДЕ

Друго питање од великог значаја за парламентарну републику тиче се односа парламента и владе. И то питање захтева подробно разматрање и пажљиво рашчлањавање с погледом на упоредно право. Проблем односа владе и парламента може се разлучити у две одвојене теме, од којих је једна образовање владе, а друга владина одговорност пред парламентом. Те две теме су повезане, али се из разлога прегледности излагања могу раздвојити, како бисмо их засебно посматрали.

На овоме месту су неопходне две претходне напомене. Прво, кад се разматра однос парламента и владе у парламентарном поретку, у обзир се могу узети и парламентарне монархије. У погледу утицаја шефа државе на политичке одлуке нема суштинских разлика између парламентарне републике и парламентарне монархије. Ни у једном ни

у другом облику владавине не долази до интервенције шефа државе у процесу доношења одлука. Друга напомена се односи на разликовање једнодомног од дводомног система у парламентарно уређеним државама. Овде ћемо пре свега имати у виду једнодомни систем, какав постоји у Србији. У дводомном систему влади је, зависно од државе, за образовање и опстанак потребна или сагласност само једног или, нешто ређе, оба парламентарна дома. Дводомни систем ће, међутим, остати изван нашег видокруга, зато што за успостављање таквог система у Србији нема реалних изгледа.

6. ОБРАЗОВАЊЕ ВЛАДЕ

Кад је реч о образовању владе, прво питање које треба поставити јесте да ли устав једне државе у начелу допушта образовање мањинске владе. У неким државама постоји таква могућност, а као примери се могу навести Шведска и Немачка. Шведским уставом је начелно предвиђено да се било који предлог стављен на гласање у парламенту усваја обичном, то ће рећи, релативном већином. Предлог је одбијен само онда кад је више од половине свих чланова једнодомног парламента (*Риксдаг*) гласало против. Примењено на образовање владе, то значи да ова од самог почетка може бити мањинска. Ако се један број народних посланика уздржи од гласања те се не скупи већина која се опире образовању владе, ова може већ од свог настанка функционисати као мањинска. Тако се, рецимо, седамдесетих година прошлог века догодило да у парламенту у којем заседа 349 посланика влада буде уведена у живот уз подршку свега 39 гласова народних посланика. Том приликом је 66 посланика гласало против, док су сви остали били уздржани (Popović 2019, 53).

Таква еластична норма се ретко среће, а њен је циљ да омогући образовање владе, односно кабинета и у ситуацији кад у парламнету нема јасно изражене већине. Еластичност уставне норме истовремено омогућава трајање владе, пошто ова опстаје све док је не обори апсолутна већина свих посланика у Риксдагу. Шведски систем је особен и неки га називају негативним парламентаризмом (Lauvaux, Le Divellec 2015, 620).

Могућност образовања мањинске владе јавља се и другде, а још један пример пружа нам Немачка. Тамошњи устав захтева сагласност већине свих народних посланика у Бундестагу за увођење владе у живот. Таква већина се назива канцеларском, зато што кандидат за место

председника владе или канцелара тражи подршку парламента за свој политички програм. Влада на челу с канцеларом може функционисати тек кад у Бундестагу обезбеди апсолутну већину (Meinel 2023, 15–16).

Члан 63 немачког устава, односно Основног закона (*Grundgesetz*), познаје међутим и резервну клаузулу која омогућава образовање мањинске владе. Наиме, ако се у гласању у Бундестагу није могла постићи апсолутна већина ни за личност коју је предложио председник Републике ни за другу личност коју би парламентарци предложили, онда, по члану 63(4) Основног закона, председник Републике има две могућности. Једна је да за канцелара именује личност коју је подржала релативна већина, док се друга састоји у вршењу права дисолуције, односно распуштању Бундестага. Искористи ли председник ону прву могућност, влада ће при свом постанку бити мањинска.

Норме које омогућавају стварање мањинске владе већ при самом образовању имају циљ да држави обезбеде извршну власт, у лику министарског кабинета, кад у представничком телу не постоји јасна већина која би подржала један политички програм. У Шведској је примена тог механизма готово постала правило, што се никако не би могло рећи за Немачку. На овоме месту зато треба поставити питање какав би се механизам образовања владе могао предвидети за парламентарну републику у Србији.

У члану 127(4) нашег важећег устава прописано је да је влада изабрана кад „је за њен избор гласала већина од укупног броја народних посланика“. У Србији се, дакле, мора створити парламентарна већина која ће изнедрити владу окупљену око једног политичког програма, на основу којег ће функционисати извршна власт. Владе су до сад скоро увек биле коалиционе, чак и онда кад би једна од парламентарних странака била у стању да, с обзиром на број посланика у Народној скупштини, владу образује сама. Може се рећи да систем образовања владе који захтева апсолутну већину у представничком телу добро функционише. Политичари су се на такво уређење навикли, а грађани га сматрају прихватљивим и логичним. Због тога би по свој прилици било неупутно предлагати промену основне уставне норме о образовању владе ако се у Србији уведе парламентарна република. Приликом примене поменуте уставне одредбе нису се појављивали велики проблеми у пракси.

Ако проблема при образовању владе до сад није било, томе разлог може бити наш донекле суспрегнут политички живот, оптерећен ауторитарним склоностима појединих политичара. Политички живот од увођења вишестраначког система до 2000. године није представљао

либералну демократију. Од 2012. године до данас постоји лагано кретање к ауторитарности, за које би се чак могло казати како се убрзава. Раније смо утврдили да је разлог томе хипертрофија председничке власти, због чега би требало напустити садашњи полупредседнички систем.

Није немогуће да би се, нестанком јаког председника који данас ставља у сенку остале уставне органе, у парламентарној републици појавио проблем стабилности егзекутиве и тешкоћа при образовању владе. Због тога би, осим основне уставне норме, коју бисмо могли сачувати, ипак било неопходно увести неки облик корективног механизма. Тиме би, путем резервних клаузула, било омогућено образовање владе и кад је представничко тело фрагментирано тако да не може створити већину за неки политички програм.

Поставља се зато питање како би резервне клаузуле могле изгледати. Пре свега, оне се не морају налазити у уставу парламентарне републике. Неке земље, као једно време Италија или данас Грчка, имају одговарајући механизам у своме изборном законодавству. Реч је о додељивању тзв. бонуса у виду додатних парламентарних седишта странци или странкама које освоје највише гласова на изборима. На тај начин се ствара парламентарна већина способна да образује владу. При томе се мора имати на уму да је српски изборни систем пропорционалан и сва је прилика да ће такав и остати. Непознато је како би на предлог за увођење изборног бонуса или, како се још назива, премије реаговали грађани и политичари. Тај проблем ваља пажљиво проучити пре него што се определимо за било какав конкретан предлог. У сваком случају, уређењу парламентарне републике биће неопходна предохрана против понављања парламентарних избора услед немогућности да се образује влада. Хоће ли то бити предвиђено уставом, чији би текст допустио стварање мањинске владе, или изборним законодавством путем увођења изборних бонуса, то је питање које остаје отворено.

7. ОДГОВОРНОСТ ВЛАДЕ

Правило је у парламентарном систему организације власти да је влада у целини, као и сваки појединии министар, одговоран пред парламентом и да се на власти може одржати само док га парламентарна већина подржава. То значи да су и појединии министар и влада у целини у обавези да поднесу оставку и одступе ако су у парламенту поражени у гласању. У колевци парламентаризма, Британији, о томе постоји уставна конвенција, која носиоце извршне власти – министре обавезује

да тако поступе.[6] Строго правило о владиној одговорности налагало би влади, или појединoм министру, да поднесе оставку онда кад предлог који су поднели не добије већину у гласању у парламенту. Повесница парламентаризма познаје такве случајеве. Они су били нарочито чести у земљама у чијем је представничком телу заступљено више странака које тешко склапају парламентарну већину. Искакање једне странке из тесне већине доводило је, по правилу, до пораза владе у гласању у парламенту и њеног пада. Напротив, у земљама где се политички систем развио као двостраначки такав случај се ретко догађа. То показује пример Британије. Тамо се више од четрдесет година није догодило да парламент обори владу у гласању.[7]

У Србији не постоји двостраначки систем, па би узор за уређење односа владе и парламента требало тражити у уставима држава које у парламенту имају страначки мозаик. Наша ситуација ће имати више додирних тачака с таквим уређењем него с двостраначјем. Питање које се на овоме месту поставља могло би да гласи: како избећи изненадан пад владе, изазаван гласањем у парламенту при којем је влада остала у мањини? Стара уставна конвенција, настала у земљи родоначелници парламентаризма, начелно се одржава. Влада мора одступити ако више не ужива поверење парламента. Ипак, то не значи да влада мора бити дужна да поднесе оставку сваки пут кад у гласању у парламенту остане у мањини. Покушало се у неким земљама, рецимо, с тиме да влада унапред одреди кад ће њен пад бити могућ тако што пред парламентом постави питање о сопственој одговорности уочи гласања о неком предлогу. Такво поступање омогућило је да влада постављањем питања о сопственој одговорности у ствари дисциплинује парламентарну већину, вршећи притисак на парламентарце. У случају изгласавања неповерења влади долази до распуштања парламента и нових избора, што онда значи да се народни посланици морају поново надметати за своја седишта у представничком телу.

Својеврсну прекретницу у погледу уређења односа владе и парламента донео је немачки устав – Основни закон од 1949. године. Новина коју је увео тај устав јесте установа тзв. конструктивног неповерења. Творци немачког устава су спровели у суштини једноставну замисао. Парламент може да обори владу само онда кад је у стању да именује личност која ће саставити нову владу (вид. Meinel 2023, 43). Пораз владе у гласању у парламенту не доводи до пада владе и нових избора. Тиме

[6] О настанку уставне конвенције видети Popović 2019, 32–34.

[7] Последњи такав пример био је пад Калаханове владе 1979. године; видети Popović 2019, 39–40.

је обезбеђена стабилност егзекутиве у оквиру самог парламентарног система; избегавају се изненадни пад владе услед пораза у гласању и министарске кризе, које су у неким случајевима знале бити дуготрајне.

Немачки систем конструктивног неповерења прихватило је више земаља, међу којима се могу поменути Словенија и Шпанија. Словенија има полупредседнички систем организације власти, али стабилност владе ипак није тражила у председничким овлашћењима, док је Шпанија парламентарна монархија. Члан 116 словеначког устава редигован је с погледом на члан 67 немачког. Том нормом је предвиђено да парламент може изгласати неповерење влади само ако именује личност која ће саставити нову владу на основу поверења апсолутне већине у парламенту.

Шпански устав је усвојио исти образац. Чланом 113(1) тог устава је предвиђено да је за постављање питања о поверењу влади потребна апсолутна већина свих посланика шпанског Конгреса, тамошњег доњег дома парламента. У члану 113(2) Устава захтева се да предлог за изгласавање неповерења влади обавезно садржи име личности кандидата који ће саставити нову владу. Шпански аутори истичу да систем одговорности владе какав је усвојен у њиховој земљи одликују две особене црте. Прво, поменути механизам је уведен под утицајем немачког устава те га Шпанци, као и Немци, називају конструктивним неповерењем. Осим тога, такво уређење је инспирисано идејом да се омогући стабилност егзекутиве у парламентарном поретку (Guerra 2013, 119).

Угледање на норму члана 67 немачког Основног закона и прихватање установе конструктивног неповерења у другим земљама говори у прилог томе да би ваљало озбиљно размотрити могућност да устав будуће парламентарне републике у Србији усвоји поменуту установу. Готово би се рекло како је у наше време такво појачање положаја извршне власти у оквиру самог парламентарног система управо неопходно за исправно функционисање парламентарног склопа организације власти. Стари тип тог уређења с веома честим министарским кризама није више прихватљив. Конструктивно неповерење је излечило једну од некад хроничних слабости парламентаризма. Тај начин појачања егзекутиве много је бољи од обрасца ефективне двоглаве егзекутиве, какав се среће у полупредседничком систему организације власти. Због свега тога би установу конструктвиног неповерења требало прихватити у будућој парламентарној републици у Србији.

8. ЗАКЉУЧАК

Основна намера писца овога текста је да се у нашој јавности покрене расправа о промени система организације власти какву познаје садашњи устав и о преласку на поредак парламентарне републике. Тај облик уређења власти би у Србији пре свега укинуо широка овлашћења шефа државе. Мора се ипак приметити да су та овлашћења према одредбама нашег важећег устава мања од оних која су носиоци председничке власти један за другим приграбили у пракси током времена.

Невоља је управо у томе што је у полупредседничком систему председник републике изабран непосредно од народа. То је председницима донело положај с којег су се могли упустити у доношење одлука и у оним областима у којима је други уставни чинилац – влада била надлежна да их доноси. Због тога је неопходно одустати од непосредног избора шефа државе. Предност парламентарне републике над садашњим уређењем у овој тачки толико је очигледна да се свако доказивање указује излишним. У парламентарној републици председничка функција не може служити амбициозним политичарима као полуга за повећање сопствене моћи фактичким проширивањем овлашћења мимо уставних одредаба. Такво понашање спречиће избор шефа државе у парламенту.

Ако се грађанке и грађани Србије у догледној будућности одлуче да успоставе парламентарну републику, преображај организације власти неће бити једноставан. Појавиће се бројна питања на која треба дати одговор или усвајањем новог или ревизијом постојећег устава. Два таква питања су издвојена у овоме тексту као пример да би се уочили проблеми који се могу јавити приликом конструкције парламентарне републике. На појединим местима је у тексту учињен и конкретан предлог поводом неке од могућих недоумица, али читав напис треба пре свега схватити као позив на расправу која ће се, по свој прилици, распламсати у најскорије време. У тој расправи треба најпре саслушати различита мишљења, а затим их пажљиво размотрити, пре него што се донесу коначне одлуке, које ће највише одговарати приликама у српском друштву.

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AN OPINON IN FAVOUR OF PARLIAMENTARY REPUBLIC

Summary

The author puts forward the idea to replace the existing, ill-functioning semi-presidential form of government in Serbia with parliamentary government. The latter would put an end to the shortcomings of the current form of government, predominantly consisting in hypertrophy of the presidential powers. The author discusses two topics concerning the parliamentary form of government: election of the head of state and the relations between parliament and the cabinet. The author's suggestions regarding the future shape of these institutions in a future parliamentary republic are aimed solely at instigating debate, which he considers indispensable.

Key words: *Serbia*. – *Constitution*. – *Organisation of Power*. – *Change*. – *Parliamentary Government*.

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/ПРИКАЗИ

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Plokhy, Serhii. 2023. *The Russo-Ukrainian War: The Return of History***. New York: W. W. Norton & Company, 376.**

'We must strive not for the expansion of the state,
but for a clarity of what remains of our spirit'.

Alexander Solzhenitsyn, 1991

The book was, according to the author, written between March 2022 and February 2023, the first year of Russia's all-out war on Ukraine, and it covers roughly the first ten months of military operations of the Russian invasion. So, a reasonable question for the reader is what is the aim of a historian in writing the book on the ongoing event? What is the aim of a history book about the war that is written in the middle of the war? Even at the time when this review goes to press, it is still the middle of the war, with a comprehensive military stalemate, a few military breakthroughs, here and there, for one side or the other, and there is no clue whatsoever when and how the war will end.

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The author, a Harvard-based Ukrainian historian, with substantial opus focusing on the Soviet Union and Ukraine (Plokhy 2010; Plokhy 2014; Plokhy 2015; Plokhy 2018) complains that after the war started, the media kept reaching out to him for commentary, so 'I felt that I could not refuse, as my words might actually have some impact on the course of events. I realized that as a historian I could offer something that others lacked when it came to understanding the largest military conflict in Europe since World War II. Eventually I convinced myself that, to rephrase Winston Churchill, historians are the worst interpreters of current events except everyone else' (p. xx). The reader grasps that the book aims to have 'some impact on the course of events'. This is quite a legitimate aim of the book, but then this is not a history book, this is not an academic exercise, but rather a mix of advocacy, lobbying, PR, and propaganda. As to the author's self-serving rephrasing of Winston Churchill, it is not convincing to the reader that historians are superior in the interpretation of current events, such as the ongoing Russo-Ukrainian war. Perhaps, military experts should have a word in explaining military operations, lawyers about breaches of international law, international relations specialists about strategic considerations, and economists about the economic sanctions on Russia and economic havoc created in Ukraine.

Be the rephrase of Winston Churchill's quip as it may, the author at the Preface lays out what should be the plan of the book, organised around three questions: 'What made such a war of aggression possible? What made the Ukrainians resist as they did and are continuing to do? Finally, what will be the most important consequences of the war for Ukraine, Russia, Europe, and the world?' (p. xx). Undoubtedly very ambitious questions, each worthy of its own book. The author specifies that he takes a *longue durée* approach to understanding the current war – for him the war began eight years earlier, on 27 February 2014, when Russian armed forces seized the building of the Crimean Parliament, the first step in the annexation of Crimea, whatever the euphemism used for this in Russia. At the beginning of the book, before any evidence is presented, the author spells out, not as a hypothesis, but as an irrefutable insight: 'In many ways, the current conflict is an old-fashioned imperial war conducted by Russian elites who see themselves as heirs and continuators of the great-power expansionist traditions of the Russian Empire and the Soviet Union. On Ukraine's part it is first and foremost a war of independence, a desperate attempt on behalf of a new nation that emerged from the ruins of the Soviet collapse to defend its right to existence' (p. xxi). Too many pompous words and too many asserting statements for the opening of an academic book. Not a promising start, the reader ponders.

Six chapters, effectively the first part of the book, are about the history. Serhii Plokhy gives his version of a crash course on the history of Ukraine, Russia, and the Soviet Union. Chapter 1 ('Imperial Collapse') deals with the end of the Soviet Union. One of the very few insights in this chapter that is indisputable is that the Soviet Union collapsed on 25 December 1991, at 19:12 Moscow Standard Time. But the crucial question is the reason for its demise. 'The Soviet Union fell on account of the Ukrainian referendum, as the Ukrainians were the only ones who put the question of their independence to a vote' (pp. 3–4).[1] Is there any evidence provided that the Ukrainian independence referendum was a necessary condition for the collapse of the Soviet Union? None, whatsoever. On the contrary, it is suggested (Sarotte 2021; Zubok 2021) that a crucial agent of the collapse of the Soviet Union was Russia's president at the time, Boris Yeltsin, as dissolving the country was a safe way for him to get rid of his arch-rival Michael Gorbachev and move Russia in direction of capitalism and market economy. Although the Belovezha meeting (at which the accords to dissolve the Soviet Union were reached between Russia, Ukraine, and Belarus) was hosted by Belorussia's President Stanislav Shushkevich, the key person at the meeting was Boris Yeltsin and it was his political will that was decisive for the dissolution of the Soviet Union. Without his political stance at the time, the Soviet Union would have been preserved, with or without Ukraine.

More generally, the alternative hypothesis could be that the crucial reason for the dissolution of the Soviet Union and the collapse of communism was a putsch organised by Moscow hardliners on 19 August 1991, orchestrated and led by Vladimir Kyrchkov, the head of the KGB. It was the people of the Soviet Union, predominantly the people of Russia, who did not want to go back to a communist dictatorship and a country run by a KGB officer. It was the people of Russia who supported Boris Yeltsin in these dramatic days, which sent shockwaves through the Soviet Union, demonstrating widespread fear of restoration of communist dictatorship and the return of the KGB thugs. Perhaps that very fear, and not strong national feeling and identity, that was decisive for people in Ukraine to vote for independence in the referendum (incidentally, independence from the Soviet Union, not from Russia).

[1] It is not true that, as the author claims, 'the Ukrainians were the only ones who put the question of their independence to a vote'. The independence referendum was held in Estonia in March 1991, with 78.4 per cent of the voters supported independence (Gill 2003, 41; Smith 2013, 54). The other two Baltic republics, for political reasons, decided not to organise referendums, but it was their legislatures that proclaimed the 1940 annexation by the Soviet Union null and void. Anyway, the Ukrainians were definitely not the only ones, as is wrongly claimed in the book.

As to the referendum, the author points out that 'In the Crimea, the only region of Ukraine with a majority Russian population, 54 percent supported independence. Sevastopol, the home port of the Black Sea Fleet, did even better, registering 57 percent support for Ukrainian independence' (p. 2). Although 'majority' is a euphemism for 'almost all', this result is paradoxical. It was ethnic Russians who predominantly voted not to be in the same country with other Russians! The only available explanation is that they were running away from the Soviet Union, its communism and KGB overwatch, rather than from Russia. Without even noting that this is a paradox, the author considers the referendum result in Crimea as merely evidence of how widespread the idea of independent Ukraine had been in 1991. Well, that is confirmation bias, the reader comments.

What follows is an extensive and rather tedious saga of the history of the Russo-Ukrainian relations, starting with the 'myth of the Kyivan Rus' and ending with the dissolution of the Soviet Union. The saga is told within the framework of George Orwell's *Animal Farm* – four legs good, two legs bad. The nice, generous, and democratic Ukrainians, and the nasty, greedy, and authoritarian Russians – without any shades of grey.[2] According to the author, Stephan Bandera was a patriot, fighting for the liberation of Ukraine, who never perpetrated horrible crimes against Poles or Jews, and he was a person who fought the Nazis and never collaborated with them. Perhaps this is the reason why he was granted residency in Munich after the war. The reader gets used to it, but then the problem is that the author does not explain the crucial development: by and large peaceful dissolution of the Soviet Union, dubbed in the book as the 'Soviet empire'. On the one side, it is compared to the Ottoman Empire (with grave inaccuracies about the break-up of the former Yugoslavia), on the other, it is compared to the dissolution of the Portuguese colonial empire, perhaps some other colonial empire – who cares. But for the author, only one thing is certain: 'The role of Ukraine in bringing about the Soviet collapse can hardly be exaggerated. Not only was it a key political actor pushing for the dissolution of the USSR, but it also helped to ensure a peaceful disintegration' (p. 32). Any evidence provided? No! The reader ponders – had Russia's political elite desired the empire to be

[2] Just as an example of this approach: 'The Germans soon replaced the democratic Central Rada with the authoritarian regime of hetman Pavlo Skoropadsky, but the democratic Ukrainian People's Republic was restored when the Germans withdrew from Ukraine late in 1918' (p. 16). A 'democratic republic' in the middle of what Snyder (2010) refers to as 'Blood Lands' in late 1918 is hardly a convincing notion. The reader wonders whether the author believes that.

preserved, it would have taken that path, with or without Ukraine.[3] Whether the empire would have been preserved in the long run is not relevant for this debate. Furthermore, had Russia's political elite wanted to use force to preserve the empire and change the borders as necessary – it would have taken that path.[4] Hence, it seems to the reader that the key player in the game and the key explanation for the 1991 peaceful dissolution of the Soviet Union was Russia, not Ukraine.

Chapter 2 of the book ('Democracy and Autocracy') ensures the reader knows who is who: it is the clash between Ukrainian democracy and Russian authoritarianism, even in the 1990s. Hence, the reader learns that 'Ukrainian democracy presented a major threat to the Russian political regime, as it provided an example of a functioning political system with a strong parliament, which encouraged and empowered Russian liberal opposition to the increasingly authoritarian regime in Moscow' and 'the Ukrainian democratic tradition and parliamentary system made it much more difficult for Russia to regain control over Ukraine' (p. 36). Nonetheless, in the same chapter, there is evidence of the operations of the Ukrainian government. 'Most damaging in the recordings were conversations in which [President Leonid] Kuchma gave his interior minister an order to kidnap an oppositional journalist, Heorhii Gongadze. He had disappeared in September of that year, and his headless body was found in a forest near Kyiv in November' (p. 58). What a democracy!

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[3] The author quotes a quip from Zbigniew Brzezinski that 'Without Ukraine, Russia ceases to be an empire, but with Ukraine suborned and then subordinated, Russia automatically becomes an empire' (p. 4). Needless to say – no evidence is provided. Nonetheless, much more important is an analysis by Lieven (2015) and his estimate that this insight was true in 1918, at the time of the Treaty of Brest-Litovsk, but following the structural changes in the Soviet economy and relocation of many manufacturing capacities to Siberia, as well as new developments east of the Ural Mountains, a Russian empire without Ukraine would have been quite feasible in 1991.

[4] The issue of the borders between the republics of the Soviet Union, i.e. the internal administrative borders that become international borders according to the Belovezha Accords, is hardly mentioned in the book. The author of this review, by coincidence, learned more about this issue from former Belarus President Stanislav Shushkevich during a ten-minute private conversation over a cup of tea during the break at a conference held in May 2011 in Moscow. The bottom line is that it was the context that was important. The Belovezha conference took place at the time of the peak in ferocity during the first stage of the civil war(s) in Yugoslavia, which was effectively about changing borders. Hence the sinister notion of 'Yugoslavia with nukes' was unavoidable in Belovezha. The participants quite rationally swept these issues under the carpet, enabling the peaceful dissolution of the Soviet Empire. The only problem is that the issues came back – with vengeance (Lieven 2022).

A much more interesting insight is that '[w]ith no recent tradition of national statehood, the country was unlikely to coalesce quickly around a political center of its own: instead, there was a strong regionalism that fragmented Ukrainian political space and made politics much more competitive than they had ever been in Russia' (p. 42). The comparison with Russia notwithstanding, this is a convincing portrait of the Ukrainian political scene, but there should be an important caveat: competitiveness in politics does not necessarily mean democracy; it is a necessary, but not sufficient condition. Democratic institutions – those that specify the rules of political competition and ensure its sustainability – are not inevitably short-term consequences of competitiveness. It is Way (2016), quoted by the author, who points out that Ukraine's surprising pluralism was rooted in underdeveloped ruling parties, a weak authoritarian state, and national divisions between eastern and western Ukraine, and refers to it as 'pluralism by default'. Such pluralism is better grounds for building democracy than monolithism (regardless of its source), but it is a far cry from democracy. Accordingly, the insight that 'Ultimately it was Ukrainian regionalism, rooted in political and cultural differences, that came to the rescue of Ukrainian democracy' (p. 61) is simply not convincing, because the reader is not quite certain that there was anything substantial to be rescued – pluralism has been mistaken for democracy.

Chapter 3 ('Nuclear Implosion') addresses serious issues – unfortunately, not with an equally serious approach. The author's statement that 'Russia wanted the Ukrainian nuclear weapons to be transferred to its territory as soon as possible, which would greatly strengthen its claim to an exclusive sphere of influence in the post-Soviet space' (p. 63) is misleading. This was the idea of the United States administration, for national security reasons, so that it would deal with only one nuclear power, Russia, instead of the four powers on whose territories the Soviet nuclear weapons were located (Ukraine, Belarus, and Kazakhstan, in addition to Russia). This is not to say that the Russian political elite was reluctant to embrace the status of nuclear power, but the attitude of Yeltsin *et al*. was something completely different from what is presented in the book. Also, the title of the chapter is misleading: it does not only discuss the nuclear issue but also Ukraine establishing its independence and building the nation, as well as many foreign policy and other challenges. The nation building process was, undoubtedly, a difficult, complicated, and painful one for various reasons, many of them had nothing to with Russia, with many obstacles and choices between two evils, in which the principle of lesser evil had to be applied. In some cases, Russia's position was not helpful, but the point is that at the time it was immersed in a nation-building process on its own, following the break-up of the Soviet Union, with its political elite having different views on certain issues it had

in common with the Ukrainian political elite, such as NATO enlargement. Nonetheless, pointing out that 'Models and rulers changed, but the basic principle remained the same: Russia's recognition of the territorial integrity and sovereignty of the post-Soviet states would be conditional on alliance with Moscow' (p. 65) means, in short, that everything is Russia's fault. It is an oversimplification at best.[5]

Chapter 4 ('The New Eastern Europe') starts in 2000/2001 with two big changes: a new (and currently still incumbent person) in the Kremlin, and the Al-Qaeda attack on 11 September 2001. Suddenly, the Russian and American political elites found the ground for collaboration, but soon the problems in relations between the two emerged. Ukraine is one of the situations, especially its NATO aspiration. The author describes the process of deterioration of relations between Russia and the West referring to Putin's February 2007 speech in Munich, which was followed by the 2008 Bucharest summit and the decision of NATO to invite Ukraine (and Georgia) to join NATO. This controversial decision was made by the US President for reasons that had nothing to do with Ukraine and Eastern Europe; due to his failure in the war on terror, he wanted to score some points on foreign policy grounds (Sarotte 2021; Kaplan 2022), although this is not mentioned in the book. The author is right in claiming that this decision was problematic because it was not followed by a MAP (Membership Action Plan), making Ukraine more vulnerable. Nonetheless, he does not attempt to analyse the reason for such a decision, on any of the sides: NATO countries, Russia, and Ukraine itself.

Nonetheless, the author jumps to the conclusion that 'a few months after the Bucharest summit, Russia launched a war on Georgia, ostensibly in defense of the Georgian enclave of South Ossetia, which had seceded from Georgia in the early 1990s. The Russian attack allegedly came as a response to the actions of the Georgian army, which had been ordered into South Ossetia, but there was no doubt that the war was directly linked to the outcome of the Bucharest summit' (p. 88). A few comments about this claim.

[5] The author of the review has no second thoughts about the political and legal responsibility of the Russian political elite, i.e. Putin, for starting and waging Russia's aggressive war against Ukraine, an aggression against a foreign, internationally recognised country, a blatant violation of international law, and a breach of international treaties that Russia has concluded. Nonetheless, it seems that the issue of historical responsibility, i.e. the process in which conditions for the Putin's decision are made, should be considered in a more balanced manner, as it appears that historical responsibility does not solely lie with Russia. This was clearly demonstrated in thorough considerations of various strategic options and decisions regarding these options by the West, predominantly the US administration (Sarotte 2021). Begović (2022), reviewing Sarotte's book, further develops some of these considerations.

First, this is an example of a *post hoc ergo propter hoc* fallacy. Second, this insight is not based on facts. It was the Georgian military that started a full-scale military operation against the breakaway region of South Ossetia, with artillery shots fired in anger at various sites in the region. It was the Russian military that responded to this attack. Third, the Georgian military action was deliberate and planned in advance, so it was Georga that 'launched the war', rather than Russia, as the Russian military move was only a reaction to the premeditated Georgian military action.[6]

Chapter 5 ('The Crimean Gambit') starts by explaining the idea of Eurasianism, which, according to the author, aims to re-create the former Russian imperial and now post-Soviet space based on Russia's imperial heritage, Russian culture, and Orthodox Christianity, possibly integrating the non-Russian parts of the former empire into the present-day Russian Federation, and linking these ideas to different people, such as Alexander Solzhenitsyn and Alexander Dugin.[7] Regardless of whether the ideas are convincing or not, or the extent to which Solzhenitsyn subscribed to them, they cannot explain the action of the Russian political elite regarding the annexation of Crimea and especially its timing. The author points out that 'Now Putin, faced with the loss of his protégé in Kyiv [Yanukovich – remark BB], Ukraine's almost certain signing of an association agreement with the EU, and thus the fiasco of his plans to involve Ukraine in the Russia-

[6] By some strange coincidence, the author of this review visited Georgia just prior to the Russian military intervention and spent two weeks in the country (in July 2008), leaving the country one week (on 1 August) before military operations started. In private conversations with senior Georgian decision-makers (including government ministers and advisors to the President Saakashvili), he witnessed, first-hand, that a wide rift had opened in the government, with fighting between doves (mainly older officials) and hawks (predominantly younger officials), who were in favour of triggering fully-fledged military operations in South Ossetia for 'its liberation and integration into Georgia'. Travelling throughout Georgia at the time, he also witnessed poorly concealed movements of Georgian troops. It is reasonable to assume that the Russian government obtained proper intelligence about all these matters. Hence Russian troops on the border were 'locked and loaded'. This is not to say that the Russian military intervention in 2008 was not an invasion of a sovereign country, as well as a violation of international law, but rather to clarify that it was not unprovoked. Furthermore, the military engagement on both sides looked like a 'special military operation', with somewhat limited casualties, rather than a fully-fledged war, like to one that is still going on in Ukraine – it was in its 737th day at the time this review went to press.

[7] Alas, the reader is provided much more information about the concept of Eurasianism, its origin, features and profound political consequences, particularly in terms of the influence, especially of Alexander Dugin's contributions, on 'Russian military, police and statist foreign policy elites' in a short books review (Morson 2024), than from a book about the Russian aggression on Ukraine.

led Customs Union and Eurasian Union, decided to take the peninsula by force' (p. 106). This is more of a description than an explanation because it is not specified why exactly Putin decided on this particular move. It is evident that the political developments in Ukraine caught Putin on the back foot, yet why he adopted such an aggressive, high-risk strategy, burning all the bridges behind himself, remains a mystery to the reader, as the author does not provide any consideration of the Russian domestic policy, including political economy, for Putin's behaviour in this and other situations, despite the existence of contributions focused precisely on this (Stoner 2021) and on his mechanisms of promoting and securing power as a 'spin dictator' (Guriev, Treisman 2022). It is disappointing for an academic history book to only focus on the events, without even considering their background or the context in which they unfolded. This failure is even more important because the author himself believes that the ongoing Russo-Ukrainian war started in 2014, with the Russian occupation (and subsequent annexation) of Crimea.

As to the annexation of Crimea, the author points out that 'the Ukrainian parliament gave Putin a political gift with its maladroit adoption of a new law supporting the use of the Ukrainian language, which pro-Russian politicians in Ukraine characterized as an attack on Russian minority rights' (p. 106). Finally, some political responsibility, though in very soft terms, is allocated to the Ukrainian side, the reader ponders. However, whether the adoption of this law was 'maladroit' or was a part of strengthening Ukrainian national identity at the time of trouble, remains to be seen in some serious historiography that will be written with substantial historical distance, long after the war has ended.

There is no doubt that the Russian annexation of Crimea was a turning point. The author claims that '[h]aving failed to keep all of Ukraine in his orbit, Putin opted for the annexation of part of its territory to develop his Greater Russia project, meant to integrate territories with ethnic Russian majorities into the Russian Federation. The hope was that the construction of Greater Russia would save Putin's Pan-Russian and Eurasian integration projects' (p. 111). There is a problem with this view. The point is that by carving out parts of Ukraine's territory, whatever the pretext may be, Putin would alienate Ukrainians, boosting their national feelings/identity, and making both his Pan-Russian and Eurasian integration projects, of which Ukraine is a cornerstone, much harder to achieve. In short, Greater Russia and the Pan-Russian and Eurasian integration projects are substitutes.[8]

[8] This is effectively confirmed by the author, who contradicts himself in the book just a few pages later. 'The annexation suggested that Putin had given the Greater Russia project – annexation of the territories either settled by ethnic Russians

Chapter 6 ('The Rise and Fall of the New Russia') starts with the author referring to the substantial change in Putin's attitude towards the basic political issue of distinction between citizens and members of ethnic communities, which occurred in Putin's 2014 address to the Parliament. 'This was a marked departure from his earlier statements and pronouncements, in which his main addressee and point of reference was the multiethnic Russian political nation embodied by the citizens of the Russian Federation, referred to as *rossiiane* rather than ethnic *russkie*. Now he claimed that Russia and the Russians were the greatest divided nation in the world' (p. 119). Without disputing this change, the reader has second thoughts as to the extent to which the change was genuine. Perhaps it was a pragmatic change of a spin dictator obsessed with popularity and without any of the aces that he had in his sleeve in the 2000s (Guriev, Tiersman 2022).

According to the author, the annexation of the Crimea made the New Russia. 'The annexation of the Crimea made imperialism and nationalism key elements and driving forces of Russian foreign policy' (p. 120). Well, this is a change in Russian foreign policy, but it is hardly sufficient to proclaim the emergence of the New Russia. What are the changes in Russian society, Russian domestic policies, and domestic political institutions? The author is silent about them. Now, there is a question for the reader of this review: is there any good history book on the Second World War, especially its origin, that does not consider changes in society, domestic policies, and domestic political institutions of Nazi Germany?

Surprisingly enough, within the chapter titled 'The New Russia', there is a section titled 'The New Ukraine'. Trying to explain the terms that the author emphasises: 'A country divided by issues of history, culture, and identity when the Crimea was annexed was now united by the desire to defend its sovereignty, democratic order, and way of life at almost any price' (p. 132). It is irrelevant whether this is an accurate description of the change that occurred in Ukraine in 2014 – the reader feels that this decisive change, after all, happened in February 2022 – but this is the author's admission that, contrary to insights in many paragraphs in his book, Ukraine was not a homogenous country, with many issues related to its history, with heterogeneous cultures and languages, and with weak national identity.[9]

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or considered to be Russian on historical or cultural grounds – priority over the projects of Russo-Ukrainian unity and Eurasian integration' (p. 120).

[9] In the other chapter of the book the author claims that with the election of Zelensky in 2019 'Ukrainian society had rallied around the government to embrace its new linguistic and cultural identity' (p. 139), again contradicting himself and adding to the reader's confusion whether Ukrainian identity had existed for centuries or was created in 2014 or 2019.

This is the crucial point. It was Vladimir Putin, courtesy of his decision to launch grand scale aggression in February 2022, who enabled the great Ukrainian unification. Vlad, the Unifier; Vlad – the Nation Builder![10]

In Chapter 7 ('Putin's War'), we come to the war, actually, the preparations for the war and the beginning of Russia's aggression. This is nothing but a chronology of who said what, devoid of analysis of the context, motives, or explanations of messages between the lines. This is predominantly a media text, more precisely, a compilation of media reports – virtually a press clipping. Nonetheless, it does not provide an answer to the crucial question: why did Putin decide to launch a full-scale invasion of Ukraine and what was his aim? The point is that Putin has been a politician (although his fervent supporters would rather say a statesman), so there must a political motive for such a move – there must be some political aim for it. Simply quoting Putin's publicly disclosed accounts on everything and anything does not answer these questions. The author points out that Putin produced and distributed by media on July 2021 the essay 'On the Historical Unity of Russians and Ukrainians'. So what? Even if the assertion that 'Putin was clearly upset with the Ukrainian democracy that kept generating political leaders dedicated to the idea of the independence of Ukraine' (p. 138) is accepted, that is not a reason to go to full-scale war. Even the official goal of Russia's 'special military operation' – declared to be to 'demilitarize and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation' – is a propaganda proclamation rather than a clear program. Accordingly, what is missing from the book is the answer to the question why Putin decided to start a fully-fledged war against Ukraine.

This question is especially relevant because it is now evident, as it was at the time the book manuscript went to press, that Putin's decision was a grave miscalculation and a horrible mistake from the point of view of his interest – 'It is worse than a crime, it is a mistake'.[11] It was a blunder! Putin made a fool of himself. Although this was evident at the time the manuscript of the book went to press, it is even more evident at the time this review goes to press. Putin humiliated himself by this decision and the ultimate failure

[10] It is indisputable that some steps of this nation building and cultural unification were accomplished between 2014 (annexation of Crimea) and February 2022 (launching the full-scale invasion of Ukraine), but it seems to the reader that it was the fully-fledged military aggression in 2022 and its unexpected ferocity that was decisive for the outcome.

[11] This sentence is attributed to the Prince of Talleyrand (*Charles Maurice de Talleyrand-Périgord*), a French clergyman and prominent diplomat at the end of the 18th and beginning of the 19th century, renowned for his cynical remarks.

to win a blitzkrieg and to install a puppet government in Kyiv (regardless of its sustainability), and all the signals were there that this option was not feasible. He demonstrated that he was an impotent dictator, save for a stockpile of nuclear weapons that he had inherited. On top of it came the Prigozhin affair, in which, from the outset, Putin acted like a mafia boss rather than a serious dictator. The feeling is that Stalin, doubtless a proper dictator, with an impressive track record, was turning in his grave when Prigozhin's troops were unopposed during their march on Moscow. Can anyone imagine rebellious Red Army units with political demands marching on Moscow with Stalin in the Kremlin? Nonetheless, there is nothing about that crucial Putin's blunder in the book on the Russo-Ukrainian war. Quite a shame.

The following four chapters (Chapters 8–11) deal with the war itself. They are nothing but a chronology of the events based on media reports and, sometimes, on the Facebook page (*sic*) posts by individuals. In short, these chapters are a summary of the media reporting on the first year of the war; naturally, with such an approach, they lack academic rigour. However, perhaps more importantly, the frontline reporting is done by the author who was thousands of miles away. So, there is no smell of battle in these lines, no blood, sweat and tears. It is a far cry from Ernest Hemingway's juicy reporting from the Spanish Civil War, *Mourir à Madrid*-style. It is also well below of reporting by Tim Judah from war-torn Ukraine in his contributions for *The New York Review of Books*. In short, these chapters are ideal for people who are too lazy to systematically follow media coverage, who are satisfied with a shallow notion of goodies and baddies, and who are complacent enough to consider things without embracing the difficult questions. They will greatly enjoy these highly readable chapters. Good for them!

The final two chapters are about international players, their position, and changes in that position since the beginning of the war. Again, this is a chronicle of media reports without any profound analysis of the developments. In short, Putin accomplished a united West, an enlarged NATO, adding 1,340 kilometres of Russian border with NATO countries (this time Finland), making the German public move from its pacific stance towards the warpath. Some players in the East do not subscribe to the Western condemnation of Russia, but the key player, China, has been reluctant to fully support the Russian war effort. Unfortunately, there is nothing new for the reader who has paid average attention to the new coverage of these developments. Again, there is no deep or rather any analysis of these developments, the motives of the players, their dilemmas and possible alternative strategies,

the consequences of these developments – not only to the war but to global international relations. In short, this is again a kind of summary of media reporting – a press clipping.

There is nothing intellectually exciting in the Afterword of the book (which has the utterly pretentious title 'New World Order'), but some assertations deserve attention. The author claims, that 'By paying an enormous price in wealth and the blood of its citizens, Ukraine is terminating the era of Russian dominance in a good part of eastern Europe and challenging Moscow's claim to primacy in the rest of post-Soviet space' (p. 294). With all the respect, regret and sympathy for the massive casualties and wealth losses of the Ukrainians, especially those casualties that are the consequences of Russian military actions without any military rationale, i.e. terror actions, the reader comments that the Russian era of dominance in Eastern Europe ended in 1991, and Moscow's claim to primacy in the rest of the post-Soviet was challenged a long time ago. A reality check helps.

Furthermore, the author asserts the Russo-Ukrainian war in the way that '[i]t was the first "good war" since the global conflict of 1939–45, in which it was very clear from the start who was the aggressor and who the victim, who was the villain and who the hero, and whose side one wanted to be on' (p. 294). *Animal Farm* language notwithstanding, a cynical reader could ask the question: is it really so? How about the many US military interventions, in some cases fully-fledged wars around the globe since the end of the Cold War? How about the First Gulf War? How about the Kosovo War and the bombing in Serbia? Did that not stop, according to advocates and decision-makers such as Bill Clinton and Tony Blair, the genocide of bloodthirsty Serbian aggressors (though on the territory of their own country) against the peaceful Kosovo Albanians? Plokhy should be more careful not to offend advocates of the R2P ('Responsibility to Protect') and their icon Samatha Power, because there will be more 'good wars' to follow in which someone will be protected by the US military might, and someone, preferably the one without nuclear armament, will be eliminated.

Curiously, the author claims that '[t]he Russo–Ukrainian war, like nothing else, undermined the foundations of the post-Cold War order, triggering processes that would lead to the formation of the new international order' (p. 295). 'It's China, stupid!' Exactly, it is, first and foremost, the rise of China's economic might, followed by its foreign policy turning more belligerent, quite expectedly, that undermined the foundations of the post-Cold War order. It is the economic rise of many emerging makers that made these countries and their governments more powerful in international relations. In the post-1990 period both Russia and Ukraine failed miserably: from an economically equal partner, China has grown its GDP to now being

more than ten times greater than Russia's. However, despite the Russo-Ukrainian war being horrible, it is not a crucial global international relations event. The recent attack on Israel by Hamas, supported by Iran, the recent Yemen's Houthi attacks on international shipping, also supported by Iran, have proved to have more impact on international commerce than the Russo-Ukrainian war. It is indisputable that these developments came after the book was published, but they just provide further evidence about the author's exaggeration of the impact of the war on the international relations, which his book focuses on.

Furthermore, wishful thinking does not do a great job of providing insight into both history and the present. For example, the author states that '[i]ronically, the view that the Yalta Conference had established spheres of influence was mistaken: at the conference, President Franklin Roosevelt rejected not only the principle of spheres of influence, but also Stalin's claim to exclusive control of Eastern Europe' (p. 296). The only problem regarding this insight is that it is not based on facts. Whatever President Franklin Roosevelt thought and felt about Stalin's posture, he rejected nothing of the kind in the document that the three sides agreed upon in the Protocol of Proceedings of Crimea Conference.[12] President Roosevelt was more cooperative with Stalin, and more lenient to his claims than his British counterpart, Prime Minster Churchill (Hamilton 2019; Preston 2020). There was an obvious reason for that. As a political realist, Roosevelt knew that it was not feasible to remove the Red Army from the ground in Eastern Europe, and more importantly, that the American main focus was not Europe, where the war had already been won, but Japan, and that the Soviet Union, specifically it's military might, was a valuable asset at a time when it was still uncertain whether the atomic bomb would work.[13]

[12] The only exception was perhaps the case of Poland, dealt with in Section VII of the Protocol, although this section stipulates only moderation of the power structure already established by the Soviet Union and expansion of its western borders to the Curzon Line, which is today the border between Poland, Belarus, and Ukraine. This provided grounds for the legalisation of the Soviet annexation of eastern Polish provinces (labelled by Stalin as Western Ukraine and Western Belarus), which was accomplished in 1939, under the auspices of the Ribbentrop-Molotov Pact (Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics). The text of the Protocol of the proceedings of the Crimea conference is available at: *https://avalon.law.yale.edu/wwii/yalta.asp* (Last visited 31 January 2024).

[13] That idea worked, as the Agreement regarding Japan, signed by the heads of the states in Yalta separately from the Protocol (which was signed by the foreign ministers), stipulates in the first paragraph that 'The leaders of the three great powers – the Soviet Union, the United States of America and Great Britain – have agreed that in two or three months after Germany has surrendered and the war in Europe is terminated, the Soviet Union shall enter into war against Japan on

Apart from wishful interpretation of the facts, there is a substantial number of factual errors in the book. For example, the author claims that 'In 1967, when the Soviet government celebrated the fiftieth anniversary of the USSR' (p. 22). No, that is not correct. It was the fiftieth anniversary of the October Revolution; the USSR was established in 1922 (on 28 December). Someone who is a historian of the Soviet empire should know these details better and demonstrate that knowledge in his books. As to the other parts of the world 'Yugoslavia, a federative south Slavic state formed on the ruins of the Ottoman Empire in 1918' (p. 30). No, not only were the western border of ruins of the Ottoman Empire rather far away at the time of the formation of Yugoslavia, but substantial regions of Yugoslavia had never been part of the Ottoman Empire, but rather the Habsburg Empire.

Perhaps the most embarrassing factual error regarding Ukraine is the claim that '[i]n February 2022, a few weeks after his inauguration, Yushchenko attended a meeting of heads of state of NATO member nations in Brussels, where he publicly declared that he wanted his colleagues to regard Ukraine as a future member of the alliance' (p. 84). Yushchenko's inauguration took place in January 2005 and this visit occurred in February of that year, not in 2022. It is stunning that none in the publishes' team, including the author, spotted such a technical mistake in the manuscript. Perhaps this is the price for the hasty production of the book – the sooner it reaches the customers the better, never mind the loose nuts and bolts.

The reader is hardly any wiser after reading this book. What is the reason for this? Is it, perhaps that the book is about an ongoing historical event, was written in the middle of it (not literarily, the knowledge of where the middle was will come ex-post) and, in short, the author attempts to tell an unfinished story? There is no doubt that such an approach creates substantial limitations in historiography: there is no historical distance, archive materials are not available, and no secondary sources, save media reports.[14] Nonetheless, what such a contribution can do is to create a framework for asking relevant questions regarding the ongoing event, especially considering the stalemate on the battlefield that was reached, for example: what will be the outcome of the war, who will win, and what will victory will consist of, or, alternatively, what kind of truce will be concluded? This is exactly what Tooze (2024) did

the side of the Allies'. What follows are the territorial concessions to the Soviet Union, mirroring Japan's territorial losses. The text of the Agreement is available at: *https://avalon.law.yale.edu/wwii/yalta.asp* (Last visited 31 January 2024).

[14] As Economist (2024) points out in a sarcastic tone '[t]o go quickly from missile launch to book launch is an impressive feat of publishing. Whether such speed makes for equally impressive histories is less clear'.

in his comparison of the Russo-Ukrainian War and the Great War, specifying that the outcome of both wars is/was uncertain, noting that in the case of the First World War, the outcome was uncertain as late as perhaps two months before the Armistice. Furthermore, taking into account that a total victory by either side is improbable, he also stipulates the political risk that both sides, especially Zelensky or whoever will be Ukrainian president, would face in the process of reaching a compromise peace. Unfortunately, there is nothing of the sort in Plokhy's book.

In short, this book is not well thought out, and the research is even worse, it lacks academic content, it is poorly written, thought readable, and edited even more poorly. It was produced hastily. The findings are not balanced. There are only good guys and bad guys in this book, snow-white angels and nasty villains – glorified Ukrainians and villainised Russians.[15] Perhaps all these things are understandable given that the author himself discloses in the Foreword that the aim of the book is to 'have some impact on the course of events'. The author of the review is not competent to evaluate the advocacy, PR and propaganda effects of any endeavour in this field, and so he remains ignorant of whether the book actually made an impact in these areas.

As to the academic point of view, the value of the book should be tested by the three questions that the author spells out in the Preface as being the cornerstones of the book. The first question, '[w]hat made such a war of aggression possible?', was answered only partially, indirectly, and unconvincingly, without considering the crucial factor of this war – Putin's blunder in starting it. The second question, '[w]hat made the Ukrainians resist as they did and are continuing to do?', is not answered at all. Instead, there is only a package of press clippings in the book, providing evidence that Ukrainians have resisted, which is not a great revelation, although a surprise to many, but there is no explanation as to why that extraordinary achievement has occurred. Finally, '[w]hat will be the most important consequences of the war for Ukraine, Russia, Europe, and the world?' No answer whatsoever, save a trivial insight that China will emerge as a key beneficiary of the current war. So much for the answers to the questions

[15] These findings of this review of Plokhy's book fully contradict the evaluation of the book in some other reviews, such as some published in the UK. For example, 'The great chronicler of Ukraine breaks new ground in his rigorous and elegant analysis of Europe's biggest conflict since 1945' (Harding 2023), or that the book is 'comprehensive yet concise, eminently readable, and carefully sourced' (Wilson 2023). It is as if we did not read the same book.

that the author himself formulated. In short, according to academic criteria, this book is a failure, and its academic impact is negligible. Perhaps it can be used as an example of how *not* to write a history book.

Is it politically correct at the present to claim that a book on Ukraine's war effort in the Russo-Ukrainian war is a poorly written academic book? The answer will come from the readers of this review.

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/VARIA

УПУТСТВО ЗА АУТОРЕ

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3. рукопис и списак литературе,
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Т: У једном истраживању (Петровић, прихваћено за објављивање) посебно се истиче значај права мањинских акционара за функционисање акционарског друштва.

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Т: За референце у тексту користити скраћенице (ВСС Рев. 1354/06; CJEU C-20/12 или Giersch and Others; Opinion of AG Mengozzi) конзистентно у целом чланку.

Л: Не треба наводити судску праксу у списку коришћене литературе.

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Т: За референце у тексту користити скраћенице (ЗКП или ЗКП РС; Regulation No. 1052/2013; Directive 2013/32) конзистентно у целом чланку.

Л: Не треба наводити прописе у списку коришћене литературе.

4. ПРИЛОЗИ, ТАБЕЛЕ И СЛИКЕ

Фусноте у прилозима нумеришу се без прекида као наставак на оне у остатку текста.

Нумерација једначина, табела и слика у прилозима почиње са 1 (једначина А1, табела А1, слика А1 итд., за прилог А; једначина Б1, табела Б1, слика Б1 итд., за прилог Б).

На страни може бити само једна табела. Табела може заузимати више од једне стране.

Табеле имају кратке наслове. Додатна објашњења се наводе у напоменама на дну табеле.

Треба идентификовати све количине, јединице мере и скраћенице за све уносе у табели.

Извори се наводе у целини на дну табеле, без унакрсних референци на фусноте или изворе на другим местима у чланку.

Слике се прилажу у фајловима одвојено од текста и треба да буду јасно обележене.

Не треба користити сенчење или боју на графичким приказима. Ако је потребно визуелно истаћи поједине разлике, молимо вас да користите шрафирање и унакрсно шрафирање или друго средство означавања.

Не треба користити оквир за текст испод или око слике.

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Слике не могу бити веће од 10 cm x 18 cm. Да би се избегло да слика буде значајно смањена, објашњења појединих делова слике треба да буду постављена у оквиру слике или испод ње.

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