ANALI
PRAVNOG FAKULTETA U BEOGRADU

ANNALS
BELGRADE LAW REVIEW

ČASOPIS ZA PRAVNE I DRUŠTVENE NAUKE
BEOGRAD 2024 /BROJ 3 /GODINA LXXII

UDC 34/35 : ISSN 0003-2565

UREDNIŠTVO /

GLAVNI I ODGOVORNI UREDNIK /

Marija Karanikić Mirić,
Pravni fakultet Univerziteta u Beogradu, Srbija

UREDNIK VEB SAJTA /

Boris Begović,
Pravni fakultet Univerziteta u Beogradu, Srbija

ČLANOVI REDAKCIJE /

Dušan Popović (Pravni fakultet Univerziteta u Beogradu, Srbija), Bojan Milisavljević (Pravni fakultet Univerziteta u Beogradu, Srbija), Vojislav Stanimirović (Pravni fakultet Univerziteta u Beogradu, Srbija), Mirjana Drenovak Ivanović (Pravni fakultet Univerziteta u Beogradu, Srbija), Danilo Vuković (Pravni fakultet Univerziteta u Beogradu, Srbija), Svetislav Kostić (Pravni fakultet Univerziteta u Beogradu, Srbija)

ČLANOVI MEĐUNARODNOG UREĐIVAČKOG ODBORA /

Brian Leiter (University of Chicago Law School, USA), Ralf Michaels (Max Planck Institute for Comparative and Int. Private Law, Hamburg, Germany), Herbert Hovenkamp (University of Pennsylvania, USA), Eleanor Fox (New York University School of Law, USA), Yariv Brauner (University of Florida, USA), Damjan Možina (University of Ljubljana, Slovenia), John Cerone (Tufts University, USA), Silvio Ferrari (University of Milan, Italy), Kenneth Einar Himma (University of Washington, USA), Christa Jessel Holst (Max Planck Institute for Comparative and Int. Private Law, amburg, Germany), Thomas Koenig (Northeastern University, SA), Peter Koller (University of Graz, Austria), Janez Kranjc (University of Ljubljana, Slovenia), Rainer Kulms (Max Planck Institute for Comparative and Int. Private Law, Hamburg, Germany), Ingeborg Maus (Goethe University Frankfurt, Germany), Thomas Mertens (Radboud University, Netherlands), Slobodan Milačić (University of Bordeaux, France), Paul du Plessis (The University of Edinburgh, Scotland), Vesna Rijavec (University of Maribor, Slovenia)

SEKRETARI /

Nikola Ilić (Pravni fakultet Univerziteta u Beogradu, Srbija) i Novak Vujičić (Pravni fakultet Univerziteta u Beogradu, Srbija)

TEHNIČKI SEKRETARI /

Ksenija Džipković (Pravni fakultet Univerziteta u Beogradu, Srbija) i Vukašin Stanojlović (Pravni fakultet Univerziteta u Beogradu, Srbija)

IZDAVAČ /

Pravni fakultet Univerziteta u Beogradu

LEKTOR I KOREKTOR /

Irena Popović Grigorov, Vuk Tošić

TEHNIČKI UREDNIK /

Jovan Đorđević

DIZAJN KORICA /

City Image

SLOG I PRELOM /

DOSIJE STUDIO

ŠTAMPA /

Donat graf

TIRAŽ /

300

SEKUNDARNE PUBLIKACIJE U KOJIMA SE INDEKSIRA ČASOPIS /

Directory of Open Access Journals (DOAJ); EBSCO; HeinOnline Law Journal Library; SCIndeks (Srpski citatni indeks); Cobiss; ERIHPLUS; Scopus; Web of Science Core Collection: Emerging Sources Citation Index.

ANALI
PRAVNOG FAKULTETA U BEOGRADU

ANNALS
BELGRADE LAW REVIEW

ČASOPIS ZA PRAVNE I DRUŠTVENE NAUKE
BEOGRAD 2024 /BROJ 3 /GODINA LXXII

UDC 34/35 : ISSN 0003-2565

Anali Pravnog fakulteta u Beogradu
Godina LXXII, br. 3/2024, str. 351–597

UDC 34/35
ISSN 0003–2565

SADRŽAJ

The Annals of the Faculty of Law in Belgrade
Year LXXII, No. 3/2024, pp. 351–597

UDC 34/35
ISSN 0003–2565

TABLE OF CONTENTS

/ČLANCI

UDC 342.724-055.2(4)

CERIF: S 112

DOI: 10.51204/Anali_PFBU_24301A

Ivana JELIĆ, PhD*

*THE RIGHTS OF MINORITY WOMEN BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: CRITICAL REVIEW IN LIGHT OF THE PRACTICE OF THE UN HUMAN RIGHTS COMMITTEE AND OTHER INTERNATIONAL HUMAN RIGHTS BODIES***

Women from ethnic, national, religious, and cultural minorities face distinct legal challenges in their struggle for gender equality. They are at constant risk of multiple discrimination as minority women, particularly with regard to their identity and religious rights. This is evident in matters of inheritance, wearing religious items in public, and issues related to sexual and domestic violence. International approaches to this problem are fragmented, with the ECtHR, UN HRC, and other international human rights bodies taking different approaches. This article will critically discuss the status of minority women's rights in the jurisprudence of the ECtHR and will reflect on what the Court could learn from the practices of the UN HRC and other international human rights bodies.

Key words: *Double burden. – Minority women. – Intersectional discrimination. – Religious female identity. – Right to self-identification.*

* Judge of the European Court of Human Rights, Section President and Vice President Elect, France; Associate Professor, University of Montenegro Faculty of Law (on leave), Montenegro, *ivana.jelic@echr.coe.int*.

** The views expressed in this article are exclusively those of the author and do not represent the Court or any other body or institution with which the author has been affiliated, such as the UN HRC. The author would like to thank Dr. Elena Brodeala and Dr. Silvia Suteu for their valuable comments on the previous version of the article. She also would like to thank Ms. Mélissa Foucaud and Mr. Étienne Fritz for their outstanding research assistance.

1. INTRODUCTION

Being part of a minority group, whether national, ethnic, religious, or cultural, frequently impacts the enjoyment of certain rights, particularly those related to identity, or one's equal status and opportunities. Issues of gender equality, intertwined with one's minority status, began to emerge at the international level in the second half of the 20th century, which coincided with the rise of affirmation of multiculturalism and respect for diversity. In this context, the European Court of Human Rights (ECtHR, or Strasbourg Court) and other international human rights bodies, such as the Inter-American Court of Human Rights (IACtHR), the United Nations Human Rights Committee (UN HRC, or the Committee) or the Committee on the Elimination of Discrimination against Women (CEDAW), have started being confronted with complex questions related to on gender equality and the rights of persons belonging to minority groups.

Some of these cases involved discrimination related to both gender and minority status and oftentimes required determining whether the actions of States violated the rights of women belonging to a minority group, as safeguarded by the European Convention on Human Rights (ECHR, or the Convention), the American Convention on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW), and other international documents. As Ravnbøl (2010, 26) notes:

> The language of CEDAW goes beyond the traditional gender-neutral formulated equality-norm and establishes a legal norm that recognises how women's disadvantaged positions in society requires special measures in order to have *de facto* equality. CEDAW can thus function as a legal tool for minority women to comprehensively redress the gender-based discrimination they experience in society.

Unlike the CEDAW, the ECHR only contains a general prohibition of discrimination, having no special provision on gender equality. Furthermore, while the ICCPR contains a general provision guaranteeing individual or group rights of persons belonging to an 'ethnic, religious or linguistic'

minority, this is not the case with the ECHR.[1] In addition, there is no internationally codified norm that protects the rights of minority women within the context of their gender and minority status.

In practice, the combination of both minority and gender statuses creates a *double burden* to their bearer, in particular in multinational States with a large number of immigrants or refugees. Indeed, '[i]n ways similar to migrant, refugee and minority women, indigenous women suffer from both gender discrimination and colonial perceptions of their cultures' (Xanthaki 2019, 11). Unfortunately, but not surprisingly, a woman belonging to a minority group is more vulnerable to discrimination than a man from the same group, both from outside the group and within, due to her perceived inferiority within the group. For example, there is a profusion of cases concerning the question of whether Muslim women can be exempted from laws that would force them to remove religious clothing. These women often face obstacles in accessing justice concerning their right to self-identification, and their particular rights as persons belonging to a minority. Frequently, their voices are silenced or ignored by political decision makers, or by democratic laws that were adopted by a majority.

The ECtHR, as well as the UN HRC and other international bodies, has examined cases concerning the religious freedom of individuals belonging to various minorities. Some of these cases regarded the right of women to wear religious clothing, such as headscarves or full-face veils,[2] while others covered the rights of men to wear religious symbols,[3] e.g. Sikh or Jewish men who may be required to remove their head covering in the same way that Muslim women would. However, cases concerning the rights of men and women belonging to a minority are very different in number and

[1] More precisely, Article 27 ICCPR reads as follows: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

[2] *Exemli causa*: *Dahlab v. Switzerland*, ECtHR, Application No. 42393/98, 15 February 2001; *Leyla Şahin v. Turkey*, ECtHR (Grand Chamber), Application No. 44774/98, 10 November 2005; *S.A.S. v. France*, ECtHR (Grand Chamber) Application No. 43835/11, 1 July 2014; *Ebrahimian v. France,* ECtHR, Application No. 64846/11, 26 November 2015; *Hebbadj v. France*, UN HRC, Communication No. 2807/2016, 17 July 2018, CCPR/C/123/D/2807/2016; *Yaker v. France*, UN HRC, Communication No. 2747/2016, 17 July 2018, CCPR/C/123/D/2747/2016.

[3] *Hamidović v. Bosnia and Herzegovina*, Application No. 57792/15, 5 December 2017; *Mann Singh v. France*, Application No. 24479/07, 13 November 2008; *Mann Singh v. France*, UN HRC, Communication No. 1928/2010, 19 July 2013, CCPR/C/108/D/1928/2010.

substance. Cases involving minority women are much more often brought before international jurisdictions than those involving minority men and go beyond the display of religious symbols. Thus, as highlighted by the United Nations Special Rapporteur on freedom of religion or belief, Professor Nazila Ghanea, '[s]ynergies between FORB [freedom of religion or belief] and women's rights to equality are coherent to the human rights project in itself, necessary to the protection of both FORB and women's equality, and provide the only way of effectively addressing intersectional concerns in the global community' (Ghanea 2021, 92).

In the European context, the focus often lies on the conduct of State authorities in situations concerning gender and minority discrimination, and – if a case reaches the ECtHR – the focus moves to whether States enjoy a wide margin of appreciation. The Court adjudicates gender discrimination cases under its living instrument doctrine. However, when considering cases involving both gender equality and the rights of religious minority groups, the Court puts great emphasis on the margin of appreciation doctrine. Indeed, as noted by Elkayam-Levy:

> [T]he Court did not elaborate in any of its statements about the inherent and complex conflict of gender equality and religious freedoms, and merely stated that the wearing of headscarf is 'difficult to reconcile' with the principle of gender equality. Regrettably, the Court preferred to make use of the Margin of Appreciation doctrine to deem questions of religious aspirations of women as not fitting to its supervision and oversight. These observations are extremely concerning especially in light of the special status the Court enjoys worldwide as a source of inspiration which resonate in numerous international and national decisions concerning human rights issues (2014, 1215).

The Court thereby contributes to enhancing the power of State authorities to prioritise important societal values, such as common or public interests, or societal concepts such as 'living together"', over individual interests.

Despite the importance placed by the Court and High Contracting Parties to the Convention on achieving gender equality,[4] and keeping in mind the Court's requirement that States must present '*very weighty reasons*' to justify

[4] See also ECtHR (Grand Chamber), *Konstantin Markin v. Russia*, Application No. 30078/06, 22 March 2012, para. 127.

differential treatment of women and men,[5] a certain level of discrepancy exists in its approach to the rights of women from minority groups. Namely, while the Court often grants States a narrow margin of appreciation in gender equality cases,[6] this is not often the case in judgments concerning the rights of minority women. This represents a notable difference to the approach taken by the UN HRC in these matters.[7] Against this background, this article argues that the approach of the ECtHR to the protection of minority women could be strengthened by borrowing from the practice of the UN HRC and other international bodies. The particular focus of this article lies in the intersection between the rights of women and the rights of persons belonging to minority groups, as well as between the protection against discrimination and the substantive rights guaranteed by the ECHR. A deeper analysis of the rights of women belonging to national, ethnic, religious, and cultural minorities is necessary to identify the best approach to protecting their rights, as well as to challenging gender inferiority and combating discriminatory practices, which are sometimes supported by national laws.

Furthermore, a clarification about the scope of this article has to be made. While the article might contribute to better understanding of the unfortunate fragmentation of international human rights law on these issues and add to the growing and much-needed literature on this more general topic,[8] this is not its primary purpose. The article's primary focus is also not to add to the wide literature critically discussing some of the judgments examined throughout the text (such as the ones on full face veils). Rather, by building on the author's experience as an ECtHR judge and member of the UN HRC, this article reflects on certain more general aspects of the ECtHR's case law on minority women and how this could be enhanced by considering the practice of other human rights bodies, particularly the UN HRC,[9] but also the

5 ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Application No. 9214/80, 9473/81, 9474/81, 28 May 1985, para. 78.

6 ECtHR, *Emel Boyraz v. Turkey*, Application No. 61960/08, 2 December 2014, para. 51.

7 See Jelić, Mühler 2022, 20–21 for a comparative overview of the margin of appreciation.

8 See e.g. Ajevski 2015; Brems, Ouald-Chaib 2018.

9 As it has been stated by Nazila Ghanea, the United Nations Special Rapporteur on freedom of religion or belief, 'the UN Human Rights Committee is best placed within the UN system to address synergies concerning women, equality, and FORB [freedom of religion or belief]. Indeed the UN Human Rights Committee has been able to address women's equality very effectively in a number of its General Comments. However, it has not yet taken the opportunity to focus attention on synergies between women's rights to equality and FORB' (Ghanea 2021, 91).

CEDAW and the IACtHR. In this sense, the article is in line with the broader ambition to bring together reflections of both practitioner and academic and identify gaps in the protection of women's human rights and solutions for its improvement.

The article proceeds as follows. Section 2 discusses some of the most common challenges faced by minority women in exercising their rights as outlined in the ECtHR case law. Section 3 then moves to analyse in greater depth the approach of the ECtHR in cases regarding intersectional discrimination suffered by minority women. It shows that in these cases the ECtHR is rather reticent to find violations of the general prohibition of discrimination enshrined in Article 14 of the ECHR and argues for a change in this approach to better address the nature of the violation of minority women's rights. In Sections 3 and 4, the article further argues that the ECtHR's approach in cases involving the discrimination of minority women could be enriched by borrowing from the UN HRC and other international bodies, particularly the CEDAW and the IACtHR.

2. CHALLENGES TO MINORITY WOMEN'S RIGHTS AND THE CASE LAW OF THE ECTHR

Protecting the rights of women belonging to national, ethnic, religious, and cultural minorities presents numerous challenges. Some challenges stem from the fact that national laws do not recognise the need for additional protection for minority women, who suffer a double burden as women within a minority group. Other challenges are reflected in national practices that limit the exercise of certain rights in order to balance conflicting interests. Examples of this include cases concerning the exercise of freedom of religion through the display of religious symbols.[10] In such cases, States often disregard the rights of women within minority groups for the sake of upholding shared social interests or the rights of others, as seen in the *S.A.S. v. France* case.[11]

As highlighted in Brems (2021), '[a] manifest finding from the [ECtHR] case law analysis is the gender blindness of the Court in cases of applicants claiming the right to gender-specific religious practice'.

[10] See Brems 2021 for an in-depth analysis of the ECtHR case law concerning women and religion.

[11] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014.

The problem often arises when some religions introduce differences in the treatment of men and women, such as prescribing particular clothing that secular laws do not allow. Attempts to solve this problem (such as policies banning burqas) can create even greater disparity when women are forced to choose between complying with the law and complying with their religion. In general, the Court's stance has been unfavourable toward religion in such situations. It has not accepted arguments from women that they are acting of their own accord when adhering to religious restrictions.[12]

In the *S.A.S.* case, the applicant complained of the violation of Articles 8 and 9 (right to private life and the freedom of religion) due to a prohibition of the full-face veil in France, which she argued she wore based on her free will, without any external constraints. The Grand Chamber accepted France's national policy of 'living together' – which implied being able to see each other's face – as a legitimate aim and decided with caution that there was no violation of the applicant's rights. Despite the fact that the central point of the case was a minority woman's religious right, the Court followed the approach established for a majority Muslim woman in Turkey and granted the respondent State a wide margin of appreciation, like in *Leyla Sahin v. Turkey* where it emphasised the prevalence of the principle of secularism, the value of pluralism, and respect of the rights of others. In analysing the case, Brems noted:

> In *SAS* however, the Grand Chamber recognized that the applicant could claim indirect discrimination, in that 'as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides'. However, it ultimately dismissed the claim by referring to the reasons that lead to the finding of absence of violation of article 9 ECHR. Arguably, the reasoning building on the intersectional reference person of the 'Muslim woman who...' is nevertheless an important step forward toward intersectionality reasoning regarding women and religion. However, there has been no follow– up to this, as regrettably in none of the three cases of this type in the corpus that came after *SAS* (*Ebrahimian*, *Osmanoglu* and *Lachiri*) did the applicants make an argument of gender discrimination. It can thus be concluded that the Court, partly as a result of framing by the applicants, has in several cases had a blind

[12] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014.

> spot for intersectionality, and in particular for the gendered interests that were at stake [...] [D]econstructing harmful intersectional stereotypes would be an appropriate way for the ECtHR to address the intersectional dimensions of cases involving women and religion (Brems 2021).

This case exposed the more complex issue of protecting minority rights within a democratic system without creating a direct conflict between the elected representatives of the majority (majority rule) and the judiciary. Nevertheless, challenges to the rule of the majority at the national level can be found in the ECtHR case law as further discussed in Section 4.

Through such firm positions of the ECtHR in cases like *S.A.S.*, questions over whether, for example, wearing a religious symbol such as a veil or burka demonstrates religious identity or is a means of religious practice are pushed aside. Although a wide range of issues fall within this pattern (including the preservation of identity, the demonstration of religious identity, religious practice, education, health care – which encompasses reproductive health, inheritance rights, property rights, employment, political participation, and protection from violence), international norms are modest, and the case law has yet to be adequately developed.

Limits to the freedom of thought, conscience, and religion are evident in more cases concerning Article 9 of the Convention. The Court will hear Article 9 cases concerning the treatment of women, even if no women have objected.[13] Furthermore, it does not seem to allow for exceptions to requirements that women claim on religious grounds.[14] The Court has also declined to intervene in the workings of religious organisations, even when they could impact women.[15] The absence of a minimum common standard among States on these issues creates legal complexities at the national level. Similarly, the lack of a European consensus as a guiding principle for judgments creates difficulties at the international level. This is a challenge *per se*.

However, it seems that States are satisfied with the *status quo*. It is likely that States expect the decisions of domestic courts to remain unchallenged, while relying on the ECtHR's willingness to apply a wide margin of

[13] *Staatkundig Gereformeerde Partij v. the Netherlands*, ECtHR, Application No. 58369/10, 10 July 2012.

[14] ECtHR, *El Morsli v. France*, Application No. 15585/06, 4 March 2008.

[15] ECtHR, *Williamson v. the United Kingdom*, Application No. 27008/95, 17 May 1995; ECtHR, *Karlsson v. Sweden*, Commission (dec.), Application No. 12356/86, 8 September 1988.

appreciation to these issues. Unfortunately, one could wonder where human rights are situated in all of this. It can appear that State authorities look at the issue from the perspective of the majority, and thus fail to adopt a holistic approach to rights and freedoms, concrete circumstances, and the situation at hand.

Other challenges faced by minority women stem from the conflict between the rules of universally applicable State laws established by the majority, and the distinct rules and traditions of the minority. An example of specific conflicts between national laws, notably between Sharia law and Greek civil law in family matters as previously mentioned, could be observed in the case of *Molla Sali*.[16] In this case the Court found a dual violation: of Article 14 of the Convention and Article 1 of Protocol No. 1. It concluded that there was no objective or logical justification for differential treatment between the beneficiary of a will created in accordance with the Civil Code by a testator of non-Muslim and of Muslim faith. The Court found that States were not obligated to create a specific legal system to grant privileges to religious groups under the principle of the freedom of religion.[17] However, if a State had established such a system, it was required to apply the criteria fairly, without discrimination toward any group or members of that group. Denying a religious minority, the ability to voluntarily choose to follow ordinary laws was not only discriminatory, but also violated their right to self-identification, which is crucial in safeguarding minority interests. The right to choose also included the right to opt out of one's minority status, which must be respected by both the State and other members of the minority. No treaty or instrument compelled anyone to submit to a minority protection regime against their wishes.[18]

The double burden faced by minority women such as in *Molla Sali* raises questions over the appropriate legal approach to deal with intersectional cases and the increased obstacles minority women encounter when seeking

[16] ECtHR (Grand Chamber), *Molla Sali v. Greece*, Application No. 20452/14, 19 December 2018.

[17] See Brems (2021), 'The Court's willingness to embrace freedom from religion arguments as opposed to freedom of religion arguments is revealing in the first place regarding a negative attitude to religion, or more specifically Islam. In combination with an argument that situates the harm from (Islamic) religion in its attitude toward women, this contributes to an image of Muslim women as helpless victims in need of liberation.'

[18] With the same ultimate goal of empowering minority women's autonomy and self-identification, the Court ruled in *Muñoz Díaz v. Spain* that denying recognition of a Roma marriage for the purpose of determining eligibility for a survivor's pension violates the ECHR. ECtHR, *Muñoz Díaz v. Spain*, Application No. 49151/07, 8 December 2009.

resolution over various issues. In what follows, this article discusses in greater depth the issue of intersectional discrimination in the ECtHR case law regarding minority women, arguing that the protection of Article 14 of the ECHR against such discrimination should be strengthened. As highlighted in Brems (2021):

> The key part in most of the Court's judgments and decisions, is its reasoning under the question whether a certain rights restriction (e.g. under article 9) or unequal treatment (under article 14) is necessary and proportionate in relation to a particular legitimate aim. This is the sphere in which the Court has developed most of its recurring lines of reasoning, modes of interpretation and analytical tools. In this framework, the Court has a lot of room to develop new frames and lenses. At the same time, this is the part of the judgment that is decisive toward the outcome in most cases on the merits. Hence it is submitted that this is an appropriate environment for the Court in which to develop an intersectional analysis.

3. MINORITY WOMEN, INTERSECTIONAL DISCRIMINATION, AND ARTICLE 14 OF THE ECHR

The prohibition of discrimination, as enshrined in Article 14 of the ECHR, is the standard for safeguarding the rights of minority women in an intersectional context. These cases are complex due to the many forms that discrimination can take, which present judges with the challenge of deciding whether violations should be examined separately or cumulatively. This complexity is highlighted by Chow (2016, 466), who observed that '[t]he acknowledgement of the overlapping and relational dynamics of multiple forms of discrimination was a strong indication of intersectional thinking'. This involves the issue of addressing discrimination against women belonging to a minority group, as *sui generis* discrimination:

> [...] in the context of the UN human rights treaty bodies, the need to incorporate alternative perspectives to address the simultaneous effects of gender and race on women was identified as early as the late 1990s. However, subsequent efforts to incorporate intersectional perspectives were not without difficulties. The primary reason was because the UN human rights treaties were drafted in a way that compartmentalized issues concerning women, race and other

> social categories. Apart from CEDAW, where issues of minority women clearly come into scope, it was unclear at the time that the gender-neutral language used in other conventions (such as CERD) warranted the committees placing a special emphasis on minority women. It was even thought that such an emphasis would lead to competing mandates between treaty bodies (Chow 2016, 465),

and

> The elaboration of special frameworks for specific groups as minorities and women provide protection where general human rights law is inadequate. However, it must be borne in mind that within this process of special rights protection ensured in separate treaties/declarations exists a risk of reproducing a tendency within human rights law of isolation (ghettoisation) of subjects of rights in 'special' categories with special measures. This indirectly opens a door for reluctant states to avoid responsibility either by claiming lack of resources to deal with the 'special' problem, avoiding ratification, or presenting significant reservations as have been seen with regard to CEDAW and its Optional Protocol. Thereby, an inherent paradox appears within the framework on special rights. The very measures meant for inclusion and protection of groups traditionally excluded from the law may in practice unintentionally reproduce the isolation of the group within international human rights law. This is a problem that becomes even more complex in the case of Romani women and minority women in general. On the one hand minority women fall into two categories of specific rights, minority and women's rights, in addition to general human rights law. On the other hand, they are often excluded from these rights discourses because the women specific law does not specifically address the minority issue and vice versa, and general human rights law has vague provisions on women and minorities. Consequently, minority women on many occasions become subjects out of place within international legal human rights (Ravnbøl 2010, 26),

and

> The neglect/exclusion of minority women's human rights issues is only one empirical example of the pitfalls that may arise in a thematically separated human rights system because in reality people do not live 'single-issue' lives (Ravnbøl 2010, 43).

Instances of intersectionality[19] have prompted critiques of existing anti-discrimination laws and their application. A pioneer in these critiques is Kimberlé Crenshaw, who argued that the prevailing concept of sex discrimination typically relies on the experiences of white women, while the standard of race discrimination is often drawn from the experiences of the most advantaged Black individuals (Crenshaw 1989, 150). Consequently, the definitions of race and sex discrimination encompass only a limited range of experiences, which do not include instances of bias against Black women.[20] Similar critiques were expressed regarding discrimination based on other factors that intersect with sex discrimination (such as ethnicity, age, and sexual orientation), with scholars questioning the extent to which human rights law is properly equipped to deal with the issue of intersectionality.[21] In fact, Chow (2016, 454–455) noted that '[t]he limitation of intersectionality is exemplified in the works of the UN human rights treaty bodies in the context of minority women. Many often cultural and religious practices are deemed „harmful" and discriminatory, but the women who practice them may not agree that these practices are discriminatory. This raised difficult issues regarding whether human rights law could properly accommodate their multiple identities (both as women and as members of their cultural group)'. Scholars therefore agree that discrimination against minority women must be assessed as a common violation that is specific to the experiences of other women belonging to the given minority.[22] From a practical point of view, it is important to acknowledge that women from minority groups form part of smaller

[19] See Chow (2016, 457 ff.) for further developments on the concept of intersectionality.

[20] *Ibid.* For more reflections on the development of intersectionality as a field of study, see Cho, Sumi, Kimberlé Williams Crenshaw, Leslie McCall (eds.). 2013, *Intersectionality: Theorizing Power, Empowering Theory*, *Signs* 38(4).

[21] See Theilen 2023; Atrey, Dunne 2020; Xenidis 2020; Atrey 2019.

[22] Fredman correctly explains that intersectional discrimination does not equate to 'simply adding two [or more] kinds of discrimination together'. Rather, by building on Crenshaw's work, she shows that intersectional discrimination results from the synergy – or the cumulative effect – of different grounds of discrimination. Using the example of Black women, Fredman shows that the disadvantage they suffer due to the intersectional discrimination based on race and sex 'is not the same as that experienced by white women or black men' (Fredman 2011, 140).

segments within the population, which are themselves often very diverse. Thus, there is no single way of handling cases under the larger framework of 'women from minority groups'. Rather, a case-by-case analysis requires legal mechanisms that go beyond pure anti-discrimination norms.

When analysing substantive rights within the unique context of women from minority groups, other legal mechanisms, aside from anti-discrimination legislation, come into play. An exemplary case in this regard is *J. I. v. Croatia*.[23] The Court's findings regarding Article 3 that 'the applicant was [a] highly traumatized young woman of Roma origin, who had been the victim of appalling sexual abuse by a close family member at a very early age'[24] emphasised the essential combination of the applicant's age, gender, and ethnicity, which contributed to the Court's assessment of her vulnerability. Therefore, the Court decided to grant a narrower margin of appreciation and impose a broader positive obligation on the State to protect the applicant's substantive rights and allow her access to legal remedies. However, in contrast to this commendable approach, the Court has been less willing to narrow the margin of appreciation in other sensitive cases concerning religious rights, such as those involving the disclosure of burqas or full-face veils. Brems (2021) pointed out that '[w]omen practicing a minority religion (or a minority praxis of a majority religion), are typical intersectional rights holders'.

In cases concerning the rights of minority women, the Court has often favoured one approach over another by using the principle of *jura novit curia*, whereby acting as a master of characterisation of the law.[25] Considering the ancillary nature of Article 14, it is important to highlight that the presence of this principle in the Court's assessment is crucial for reinforcing the discriminatory nature of a breach of substantive rights, in particular where the applicant failed to invoke Article 14 in her application. In such situations, highlighting a general and unjustified differentiation in treatment directed at certain minority groups offers a more comprehensive picture of the circumstances and allows for a better assessment of an applicant's individual situation in relation to the alleged violation of a substantive right. This contrast is most evident when comparing the gendered wearing of religious symbols with cases of sexual abuse: in the former, general State measures

[23] ECtHR, *J.I. v. Croatia*, Application No. 35898/16, 8 September 2022.

[24] *Ibid*., para 86.

[25] *Molla Sali v. Greece*, para. 85; ECtHR (Grand Chamber), *Abdi Ibrahim v. Norway*, Application No. 15379/16,10 December 2021, para. 136. See Möschel (2022) for further development on the *jura novit curia* principle in the ECtHR case law.

target the combination of 'women + Muslim'; in the latter, the immediate legal concern is not on discrimination as a characteristic, but rather on the ill-treatment that the person suffered. Bond (2005, 6) explains:

> Women who inhabit the interstices, who live intersectionality on a daily basis, do not simply experience gender discrimination that is complicated by another form of discrimination. This limited understanding of intersectionality amounts to a 'gender-plus' formulation of discrimination, in which women may experience gender discrimination that is merely compounded by another form of discrimination. This 'additive' understanding of discrimination is limited and does not reflect the ways in which race and gender discrimination, for example, are mutually reinforcing and result in a form of discrimination that is fundamentally different from race discrimination, gender discrimination, and race + gender discrimination.

An illustrative case is *J.I. v. Croatia* mentioned above, in which the link with the applicant's rights as a member of a minority group could be treated solely under the prism of substantial rights. In this case, the Court identified the applicant, who was a victim of a horrendous sexual assault by a close family member at a very early age, as a deeply traumatised young woman of Roma ancestry.[26] The victim's inferiority and vulnerability are evident in this case. The Court found that there was a violation of Article 3 of the Convention due to the severe trauma she suffered and her feelings of helplessness in the face of future victimisation. The police's failure to comprehend the significance of her charges fell contrary to domestic law.[27] While the discrimination aspect was not favoured by the Court's findings, it recognised the double burden that may fall on women belonging to minority groups: first, the Court clearly identified the applicant's suffering from domestic violence, which is shared by one in three women in Europe;[28] second, the Court showed readiness to accept that her Roma origin might have prevented her from accessing an effective legal remedy. However, it rejected this claim due to a lack of evidence.

[26] *J.I. v. Croatia*, para. 86.

[27] *Ibid.,* para. 89.

[28] European Commission 2022.

In some cases where the victim is a woman from a minority group, overlooking the discriminatory aspect of the case cannot be justified, such as in *V.C. v. Slovakia*.[29] This application concerned the sterilisation of a Roma woman without her informed consent, while she was giving birth. The unanimous Court ruling found a violation of Articles 3 and 8 of the ECHR.[30] Nevertheless, it considered an analysis under Article 14 to be unnecessary.[31] The very strong dissenting opinion of Judge Mijović highlighted the existence of a discriminatory State policy and argued that intersectional discrimination was at the heart of the case.[32] Bond (2005, 4–5) elucidates this perspective:

> The forced or coercive sterilization of Roma women in Slovakia violates a number of women's rights, including the right to liberty and security of the person, the right to found a family, the right to the highest attainable standard of health, and the right to sexual non-discrimination. Patriarchal attitudes within the medical community contribute to the widespread notion that women do not and should not make autonomous decisions regarding their own reproductive lives.

and

> Targeted for discrimination on the grounds of both race and gender, Romani women in Slovakia provide a compelling illustration of intersectional human rights abuses.

Judge Mijović has rightly disagreed with the majority's decision not to investigate this facet of the case under Article 14. It seems pertinent to underline the importance of analysing Article 14 in future gender discrimination cases, where the circumstances indicate the existence of a double burden, multiple discrimination, and/or majoritarian rule. To conclude, '[t]he experience of the Romani population in Slovakia illustrates the need for intersectional remedies in human rights practice. Individuals do not experience compartmentalized forms of human rights abuses that may be neatly packaged as 'gender discrimination' or 'race discrimination'. As the example of Romani women demonstrates, women and others who

[29] *V.C. v. Slovakia*, ECtHR, Application No. 18968/07, 8 November 2011, para. 180. See Rubio-Marín, Möschel 2015 for a possible scholarly explanation of the reason why the ECtHR overlooked Article 14.

[30] *V.C. v. Slovakia*.

[31] *Ibid.*, para. 180.

[32] Dissenting Opinion of judge Ljiljana Mijović regarding *V.C. v. Slovakia*.

experience multiple forms of human rights abuses operating simultaneously cannot fully benefit from a remedial system that artificially fragments human rights violations.'[33]

4. THE MAJORITY RULE AND THE RIGHTS OF MINORITY WOMEN: LESSONS FROM THE UN HRC

Protecting minority rights often requires judges to challenge decisions taken by the majority in a democratic legislative process. Democratic decisions taken by the majority are the bedrock of our democracies, and this is not to be challenged. Nonetheless, it is not unrealistic to advocate and appeal for far-reaching judicial interventionism to protect individual rights when they are neglected by the rules adopted by the majority. However, the judicial review of politically sensitive and divisive issues must be extremely careful. As stated by Elkayam-Levy (2014, 1177), 'this is a debate on states' recognition and respect of minority groups' traditions and the inevitable collision with democratic values. The issue raises questions of whether and how states should accommodate or set limits to religious, cultural, ethical and other beliefs. The complexity deepens as democratic countries protect conflicting ideals; for instance, freedom of religion and freedom to manifest one's religion versus freedom from religion, secularism and gender equality'.

Safeguarding minority rights is a contentious issue in democratic legal systems with a separation of powers, involving a conflict between majority decision-making and protecting the interests of minority groups. This creates the challenge in reconciling conventional methods of protecting the individual human rights of citizens with the necessity of additional protections of specific rights inherent to minority groups and the identities of individuals belonging to these group.

Safeguarding human rights through individual lawsuits is the standard in contemporary legal protection. At the same time, minority rights are an integral part of human rights oversight. Recognising the importance of a system that upholds both human and constitutional rights, it is clear that a watchdog is needed to prevent the abuse of majority rule.

[33] *Ibid.*, 9.

In this context, '[i]ntersectionality in the treaty body practice sought to identify and unravel different configurations of inequality in specific social settings affecting individuals belonging to simultaneous memberships' (Chow 2016, 471–472).

Intersectional cases are challenging in part because they involve diverse minority populations that are at great risk of isolation, marginalisation, and discrimination. Consequently, the situation of women from national, ethnic, religious, and sexual minorities is often misunderstood by democratically elected legislatures. The recent ECtHR case of *Abdi Ibrahim v. Norway* concerned the rights of a mother belonging to a cultural minority and the interplay with the State's adoption policy.[34] The general policy on the adoption of children, which reflects the majority rule in Norway, actually limited the rights of a mother belonging to a minority group with respect to her and her biological child's cultural and religious identity. The Grand Chamber found that the respondent State had failed to take due account of the different cultural and religious backgrounds of the mother and the adoptive parents, which resulted in the severance of mother-child ties. This case highlights the importance of considering the cultural and religious backgrounds of minority women when making decisions that affect their lives, their choices, and their families.

The conflict between majority rule and the individual rights of women from minority groups surfaced in the full-veil ban in France, as seen in two landmark cases: *Yaker v. France* before the UN HCR, and *S.A.S. v. France* before the ECtHR, as mentioned above. The two bodies came to different conclusions.

As discussed in Section 2, in *S.A.S.* the ECtHR found no violation of the applicant's religious rights. Its interpretation, which considered the support by the majority in parliament and the public for the full-veil ban, gave a wide margin of appreciation to the respondent State in defining its standards of 'living together', as an element of the 'protection of the rights and freedoms of others'.[35] The Grand Chamber did not examine the core of the ban on religious symbols and items, including clothing, overlooking questions as to whether these are manifestations of one's religion, the manner of its exercising, or both, or as it pertains to women's minority rights. The partly dissenting Judges Nussberger and Jäderblom, and the majority,

[34] ECtHR (Grand Chamber), *Abdi Ibrahim v. Norway*, Application No. 15379/16, 10 December 2021.

[35] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014, para. 157.

acknowledged the limited authority of the supranational judge, who has a narrower scope to challenge established societal structures without the risk of intensifying tensions within the society of a Member State.[36]

When examining the Court's decision in *S.A.S. v. France*, critics have pointed out the contrasting approach taken by the UN Human Rights Committee in *Hebbadj v. France* and *Yaker v. France*.[37] The Committee refrained from granting the State a large margin of appreciation in interpreting Covenant rights (Jelić 2020, 82). In the *Yaker* case, the Committee adopted a more rigorous stance on the exception to the right to exercise one's religion in public, diverging from the ECtHR's broader 'living together' approach. The Committee required the State to identify the 'rights of others' that were at risk and sought to balance the arguments for and against the ban on full-face veils.[38] Undoubtedly, the Committee delved deeper into the complexities of this ban, particularly its impact on women from France's largest identifiable minority. The Committee found that the prohibition of wearing burqas in public violated the freedom to manifest one's religion, as protected under Article 18 of the ICCPR, and the right to equality before the law, as protected under Article 26 of the ICCPR (Jelić, Mühler 2022, 20).

Scholars have sought to explain the divergent solutions of these two bodies. For example, Cleveland (2021, 225) shows that the UN HRC 'traditionally has taken a more protective approach to manifestations of religion'. She also demonstrates that the UN HRC's approach might have been influenced by its role as an international, rather than European body. Indeed, as Cleveland shows, one could imagine what would happen if a very conservative majoritarian Muslim State would argue that for them 'living together' would actually require concealing women's faces (Cleveland 2021, 226). And, of course, there are factual differences between the two cases, as, for example, the two applicants in the UN HRC cases were actually fined and prosecuted by France (Cleveland 2021, 226). In addition, while the Human Rights Committee's solution may be more precise from a legal perspective, it is essential to consider its role and authority, in comparison to that of an international judicial body such as the ECtHR, to fully understand the diverging jurisprudence.

---

[36] Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in *S.A.S v. France*, para. 16.

[37] See views adopted by the Human Rights Committee in CCPR/C/123/D/2747/2016. See also Cleveland 2021.

[38] Human Rights Committee (2018) CCPR/C/123/D/2747/2016, para. 8.10.

Regarding the ECtHR, it should be emphasised that the mandate of the Court is to resolve human rights disputes and prevent their escalation. When *S.A.S.* was decided in 2014, the seventeen judges of the Grand Chamber, while promoting both tolerance and enforceability of the Court's judgments, made a cautious decision not to intervene in a case involving a blanket ban on full-face veils. They expressed doubt as to the necessity of such a ban but considered domestic constitutional principles and relied on the minor fine imposed for non-compliance, finding that France had acted within its margin of appreciation. Right or wrong, this judgment illustrates the Court's awareness of its role as a public international law body with a significant influence on domestic constitutional and societal order.

In contrast, the approach of the Court in cases related to other issues related to minority women seems to be changing. In more recent cases of systematic discrimination against a minority group that disproportionately affects women's rights, such as *J.I. v. Croatia* (2022) or *Molla Sali v. Greece* (2020), the Court chose to use all its powers to address and remedy the discrimination and restore the affected rights. Therefore, one would hope that the ECtHR will find inspiration in the UN HRC's approach when it will be faced again with questions related to the religious clothing of minority women.

Keeping into account the institutional and jurisprudential differences between the UN HRC and the ECtHR, one might wonder whether transplanting the approach of the former into the latter's case law would be feasible. Yet, the argument here is not to blindly adopt the UN HRC's approach in its entirety,[39] but rather to call for considering elements from the UN HRC case law that might enrich the ECtHR's jurisprudence and enhance the protection of minority women and other vulnerable groups in our societies. One such element would be the strict interpretation of the conditions under which States could restrict freedom of religion in cases involving religious clothing, which, in the European system, would narrow the margin of appreciation.

Another factor that should be taken into account is that the case law of the UN HRC contributes to setting international standards on the protection of minority women. This, in turn, as ECtHR Judges Nussberger and Jäderblom showed in their partly dissenting opinion in *S.A.S.,* is a factor to be taken into account in determining European consensus, and hence how wide the

[39] In fact, the approach of the UN HRC in the two discussed cases has in itself subject to criticism by scholars. See Zalnieriute, Weiss 2020.

margin of appreciation of States is.[40] As Judges Nussberger and Jäderblom explained, at the time that *S.A.S.* was decided (i.e. 2014) the UN HRC already had case law to suggest that restrictions on women's religious clothing might infringe on their rights.[41] Yet, the Court chose to ignore this aspect, as well as the European consensus on the issue of banning full-face veils.[42] It is not uncommon for separate opinions to be reflected in the Court's later case law, in light of subsequent national, European, and international developments. The 2018 UN HRC decisions in *Hebbadj v. France* and *Yaker v. France*, along with more recent developments in its relevant case law, provide the Court with compelling arguments and methods of interpretation to change its jurisprudence and enhance the protection of minority women, such as those of Muslim faith.

5. LESSONS FROM OTHER INTERNATIONAL HUMAN RIGHTS BODIES

The preceding analytical review of the ECtHR's approach demonstrates the challenges faced when dealing with cases involving the rights of minority women and intersectional discrimination. In addition, the previous discussion of the different approaches of the ECtHR and the UN HCR to the issues of religious clothing of Muslim women highlighted the fragmentation of international human rights law in that regard. Nevertheless, we are at a critical juncture, where efforts should be directed toward a cohesive strategy for addressing these or similar issues, due to the need for a unified legal response. As Bond (2005, 8) aptly observes:

> Despite these and other gains in incorporating intersectionality into human rights practice, the human rights community has a long way to go before intersectional human rights are fully recognized by the institutions charged with protecting those rights. In addition to changing the theoretical approach to human rights, human rights institutions must alter organizational structures in order to facilitate intersectional analysis. For years, many U.N. institutions and NGOs have

[40] Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom in *S.A.S. v. France*, para. 19.

[41] *Ibid.*

[42] ECtHR (Grand Chamber), *S.A.S. v. France*, Application No. 43835/11, 1 July 2014, para. 156.

> structured themselves so that separate departments or divisions address human rights violations based on, for example, race and gender. Rigid structural divisions within an organization often dictate that minority rights or rights related to race and ethnicity and women's rights issues are addressed by separate divisions within the organization. This substantive fragmentation, however, means that intersectional abuses often go unaddressed. The result for victims of these abuses is that they receive, at best, partial redress for the violations they suffer.

The absence of a world court for human rights acts as a barrier to this objective. Moreover, the UN Treaty Bodies face their own systemic challenges. From a comparative perspective, it is evident that both the UN Treaty Bodies and the Inter-American Court of Human Rights (IACtHR) take a more progressive approach toward safeguarding minority women's rights than the ECtHR, in particular in acknowledging intersectionality in minority/gender discrimination cases. Ravnbøl emphasises:

> However, in order to adequately address the human rights concerns of minority women, and other subjects who experience discrimination and human rights abuse on multiple grounds, it is necessary to have a systematic approach to intersectionality that takes the different structural, political and representational dimensions into consideration. It is not sufficient to use the concept fragmented in a few reports, often without any definition, as this will make intersectionality merely another theoretical concept with little effect for changing practice. On this basis, effective appropriation of intersectionality into contemporary international human rights practices is one step in the direction of ensuring a comprehensive approach to the human rights of minority women. This would ensure that international practices on race/ethnicity and gender matters also give special and systematic attention to problems of interrelated grounds of discrimination (in the areas of programming, monitoring, interpreting, implementing, etc.). In other words, a mainstreaming attitude could develop around the issue of intersectionality, bearing in mind the methodological implications and difficulties of mainstreaming (Ravnbøol 2010, 41).

and

> Intersectionality must be approached comprehensively (in all its forms) and practically (in the work of the organisations) [...] the concept serves to include perspectives on multiple grounds of identity into contemporary legal and political human rights discourses in order to give attention to often overlooked areas of minority and women's concerns, where certain categories within these groups face different human rights problems (Ravnbøl 2010, 45).

The CEDAW has published General Recommendations on the rights of indigenous and minority women[43] that focus on discrimination against women belonging to minority groups and ask States to take measures to address their specific needs. For example, CEDAW's General Recommendation No. 39[44] on indigenous women and girls emphasises the limited legal capacity of these women under their indigenous laws and the conflict of laws between community and State law.[45] Furthermore, the CEDAW has also found violations of the right to health for women belonging to Afro-descendant minority groups. For example, in *Da Silva Pimentel Teixeira v. Brazil,* the Committee found that the intersection of the petitioner's race and gender led to her ill-treatment.[46] The UN's intersectional approach is reflected in its guidance on intersectionality and its recognition of the inextricable link between the discrimination against women and other factors affecting their lives, such as their minority status. This guidance is useful to other treaty bodies and human rights courts, notably to the ECtHR, when dealing with related cases.

The IACtHR has dealt with cases related to the specific needs of teenage girls who have been victims of child marriage, live in rural areas, have limited economic resources, and belong to traditionally excluded and discriminated groups, including indigenous and Afro-descendent communities.[47] It has

[43] In General Recommendation No. 28 (general States obligations) and General Recommendation No. 33 (access to justice), the CEDAW confirmed that discrimination against women was inextricably linked to other factors that affected their lives. Also, 'General Recommendation No.35, [...] recognises the intersecting discriminations that render some women especially vulnerable to forms of gender-based violence and seeks repeal of all criminal laws that disproportionately affect women' (Chinkin, 2022, 5 ff).

[44] CEDAW General Recommendation No.39 (2022) on the rights of Indigenous Women and Girls.

[45] *Ibid*., para. 21.

[46] Committee on the Elimination of Discrimination against Women (2011) CEDAW/C/49/D/17/2008 para. 7.7.

[47] Inter-American Commission on Human Rights (2019), para. 109.

recognised the importance of measures that provide assistance for these girls, who face multiple forms of discrimination. For example, in *Gonzales Lluy et al. v. Ecuador*,[48] the IACtHR emphasised the need to protect the rights of girls belonging to ethnic minorities or the LGBTQ community, those who are migrants or refugees, are homeless, have disabilities, or have HIV/AIDS.

Both the UN and IACtHR have called on States to undertake measures to address discrimination against women belonging to minority groups and to attend to their specific needs. Affirmative action measures should be considered in order to prevent future cases of women and girls who face multiple forms of discrimination based on their gender, race, nationality, ethnicity, religion, or culture.

In general, there are more similarities than differences between the approaches of the ECtHR, UN Treaty Bodies, and IACtHR toward gender and minority related cases, despite a great divergence regarding the wearing of religious symbols (Jelić 2020). It is the author's belief that courts and other bodies should aim at finding solutions which strengthen women's choices on how they live their lives. Strengthening the autonomy of minority women and their wish to preserve their minority identity should guide solutions to the conflict between minority culture and institutions, on the one hand, and State laws, serving the interests of the majority, on the other. This should be reflected in legislation, administrative decisions, good practices regarding services and administration, as well as in ensuring access to remedies for the violation of rights against women in the public and private spheres.

> A critical perspective on general human rights law shows how it is characterised by a prevailing masculine language that appears to operate with a dichotomy between public/private as being equal to male/female. The man is regarded as the provider of the household and thus placed in a public sphere of law, economics, cultural and political production (*himself* and *his* formulations in for example Universal Declaration of Human Rights (UDHR) Article 25). The woman on the other hand is presented as the household's care-taker, mother and spouse, and thus placed in a private sphere of home and family (in marriage and family provisions as in for example ECHR Article 12). Even though general human rights law does not exclude private life, the main emphasis is on protection of the individual in public life. This placing of woman's concerns in a private

[48] *Gonzales Lluy et al. v. Ecuador,* IACtHR, Application No. 102/13, 1 September 2015.

> sphere along with an emphasis on public life-concerns has been criticised by various legal feminist scholars. They argue that it reflects an underlying androcentric structure in human rights law that fails to redress the systemic subordination of women in society as human rights violations, what is best exemplified by the weak implementation mechanisms and toleration of reservations to CEDAW. Thus, international human rights law can be argued to be constitutive and reproductive of a male-dominant discourse where the public/private divide becomes a screen to avoid women's issues (Ravnbøl 2010, 23).

6. CONCLUSION

The awareness, advocacy, and struggle for women's rights have seen progress in many countries, while international human rights interventions, both judicial and quasi-judicial, have advanced the protection of women against discrimination and violations of their basic rights. The living instrument doctrine developed by the Strasbourg Court is valuable for the protection of gender equality. However, the rights of women belonging to national, ethnic, religious, and cultural minorities face additional challenges compared to other women. They frequently face numerous layers of discrimination due to the double burden connected to their gender as well as their ethnic, national, religious, or cultural identity. The intersectionality of their identities often leads to multiple forms of marginalisation, limiting their opportunities and placing them at greater risk of violence, discrimination, exclusion, and assimilation. Thus, '[i]n the era of multiculturalism and globalization, awareness to such risks is fundamental to the development of modem society and role that international human rights tribunals play in this complex ecosystem' (Elkayam-Levy 2014, 1222).

We still face more challenges than achievements in this area, considering the fragmented case law on sensitive gender and religious identity issues. The limitation of international judicial power in protecting minority rights against the majority-elected legislature can be seen in the ECtHR's case law on face veils and burqas, where a wide margin of appreciation was granted to States. Nevertheless, we still need to see in practice how far a judge can go in declaring that an elected legislation was wrong, which is particularly sensitive for an international judge.

To conclude, the human rights of women belonging to national, ethnic, religious, and cultural minorities remain vulnerable and modestly protected. The lack of definitive norms and underdeveloped case law

require urgent attention at all levels of the decision-making process, and most importantly, from the judiciary. Women from minority backgrounds often face intersectional discrimination that limits their life opportunities and equal rights before the law. These women are often at greater risk of violence, discrimination, marginalisation, and inequality than other women. Representation and participation in decision-making processes, particularly those of interest to minority women, and recognition of the intersectionality of their identities would mark crucial steps toward ensuring that women from minority backgrounds can fully enjoy their basic human rights. Finally, by ensuring such participation, the rule of law and democracy would be strengthened. It is also high time to appeal to all human rights bodies to learn more from each other's practices, avoiding unnecessary fragmentation of the law concerned. In that regard, the ECtHR could reconsider its standards – such as the margin of appreciation it applies in cases related to minority women – in light of relevant cases of the UN HRC and other international bodies.

REFERENCES

[1] Ajevski, Marjan. 2015. *Fragmentation in International Human Rights Law: Beyond Conflict of Laws*. Milton Park: Routledge.

[2] Atrey, Shreya. 2019. *Intersectional Discrimination*. Oxford: Oxford University Press.

[3] Atrey, Shreya, Peter Dunne. 2020. *Intersectionality and Human Rights law*. Oxford: Hart Publishing.

[4] Bond, Johanna E. 2005. Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights. *Georgetown Journal of Gender and the Law* 5: 1–18.

[5] Brems, Eva. 2021. Hidden Under Headscarves? Women and Religion in the Case Law of the European Court of Human Rights. *Religion and Human Rights* 16: 173–200.

[6] Brems, Eva, Saïla Ouald-Chaib. 2018. *Fragmentation and Integration in Human Rights Law: Users' Perspectives*. Cheltenham: Edward Elgar Publishing.

[7] Chinkin, Christine. 2022. CEDAW and the decriminalisation of same-sex relationships. *European Human Rights Law Review* 3: 288–298.

[8] Chow, Pok Yin S. 2016. Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence. *Human Rights Law Review* 16: 453–481.

[9] Cleveland, Sarah H. 2/2021. Banning the Full-Face Veil: Freedom of Religion and Non-Discrimination in the Human Rights Committee and the European Court of Human Rights. *Harvard Human Rights Journal* 34: 217–230.

[10] Crenshaw, Kimberle. 1/1989. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *The University of Chicago Legal Forum*: 139–167.

[11] Elkayam-Levy, Cochav. 2014. Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights. *University of Pennsylvania Journal of International Law* 35: 1175–1222.

[12] European Commission. 2022. *International Women's Day 2022: Commission proposes EU-wide rules to combat violence against women and domestic violence*. Press release. *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1533*, last visited March 28, 2023.

[13] Fredman, Sandra. 2011. *Discrimination Law*. Oxford: Oxford University Press.

[14] Ghanea, Nazila. 2021. Navigating the Tensions: Women's Rights, Religion and Freedom of Religion or Belief. *Religion and Human Rights* 16: 67–92.

[15] Inter-American Commission on Human Rights. 2019. *Violence and discrimination against women and girls: best practices and challenges in Latin America and the Caribbean*. OAS/Ser.L/V/II. *https://www.oas.org/en/iachr/reports/pdfs/ViolenceWomenGirls.pdf,* last visited August 27, 2023.

[16] Jelić, Ivana, Linus Mühler. 1/2022. The Human Rights Committee: Challenges and Prospects for Enhanced Effectiveness and Integration. *Journal of Human Rights Practice* 14: 17–43.

[17] Jelić, Ivana. 2020. International Protection of Religious Minorities, with an Emphasis on the Use of Religious Symbols: Rise or Decline? 89–100. *Human Rights in the 21st Century*, edited by Tibor Varady and Miodrag Jovanović. The Hague: Eleven International.

[18] Möschel, Mathias. 2/2022. Jura Novit Curia and the European Court of Human Rights. *European Journal of International Law* 33: 631–650.

[19] Ravnbøl, Camilla Ida. 2010. The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics. *International Journal on Minority and Group Rights* 17: 1–45.

[20] Rubio-Marín, Ruth, Mathias Möschel. 4/2015. Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism. *European Journal of International Law* 26: 881–899.

[21] Theilen, Jens. 2/2023. Intersectionality's Travels to International Human Rights Law. *Michigan Journal of International Law* 45.

[22] Xanthaki, Alexandra. 2019. When Universalism Becomes a Bully: Revisiting the Interplay between Cultural Rights and Women's Rights. *Human Rights Quarterly* 41: 701–724.

[23] Xenidis, Raphaële. 2020. *Beyond the 'master's tools': putting intersectionality to work in European non-discrimination law: a study of the European Union and the Council of Europe non-discrimination law regimes*, Fiesole: European University Institute.

[24] Zalnieriute, Monika, Catherine Weiss. 1/2020. Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions. *Berkeley Journal of Gender, Law & Justice* 35: 71–90.

Article history:
Received: 10. 6. 2024.
Accepted: 5. 9. 2024.

UDC 340.12:004.8
CERIF: S 115
DOI: 10.51204/Anali_PFBU_24302A

Bojan SPAIĆ, PhD[*]

Miodrag JOVANOVIĆ, PhD[**]

ARTIFICIAL REASON AND ARTIFICIAL INTELLIGENCE: THE LEGAL REASONING CAPABILITIES OF GPT-4[***]

Despite the widespread adoption of generative transformer large language models and the interest of the global legal community, discussions about the models in philosophy of law mainly have been focusing on what LLMs cannot do. In making the first steps towards a philosophical analysis of the capabilities of AI models in the field of law, we follow the basic idea of Turing's „imitation game". Proceeding from the frequently raised characterization of legal reasoning as „artificial", the paper identifies the undisputed minimum core of the „artificiality" thesis and asks to what extent it can be imitated by artificial intelligence. To answer this question, we test the legal reasoning capabilities of ChatGPT, the most advanced, up-to-date LLM version of artificial intelligence. The conclusion is that in all relevant types of activities usually associated with legal reasoning – fact-finding, interpretation, qualification, and decision-making – ChatGPT can generate outcomes as if it reasons legally.

Key words: *Artificial reason. – Artificial intelligence. – Legal reasoning. – Philosophy of law*.

---

[*] Associate Professor, University of Belgrade Faculty of Law, Serbia, *bojan.spaic@ius.bg.ac.rs*, ORCID iD: 0000–0002–8887–9683.

[**] Professor, University of Belgrade Faculty of Law, Serbia, *miodrag@ius.bg.ac.rs*, ORCID iD: 0000–0002–8036–1994.

1. INTRODUCTION

In Alex Garland's 2014 movie *Ex Machina*, a young programmer at the largest global internet company is selected by its CEO to participate in a trailblazing experiment in which he comes in contact with an attractive robot girl. Although the programmer is told that his role is to evaluate whether the encounter with this artificial intelligence (AI) humanoid passes the Turing test, by the end of the movie, it transpires that the CEO's real plan was to use his invitee as a guinea pig to assess the ultimate qualities of his AI product. Once the programmer is presented with the evidence that he has been tricked into serving the robot girl's ends, the CEO self-indulgently points out that his creation relied on „self-awareness, imagination, manipulation, sexuality, empathy." He concludes by asking „if that isn't true AI, what the f*** is?!"

The movie plays on one pessimistic anthropological premise – that what is truly human about us is that we are manipulative in nature, and one seemingly deeply seated fear about the world crammed with artificial intelligence products – that they will defeat us by overcoming this profoundly human trait. In that respect, even a decade later, it is still safe to classify *Ex Machina* as a futuristic sci-fi movie – because we are still largely at the point of Alan Turing's (1950) „imitation game", where we are creating and testing machines' abilities to exhibit intelligent behavior equivalent to that of a human.[1]

A major development leading to the current explosion of AI applications occurred in 2017 when Google engineers and scientists came up with the transformer architecture that became the foundation of the current large language models (LLMs) of AI. Despite the wide adoption of generative

*** This paper results from research conducted within The Horizon Twinning project „Advancing Cooperation on The Foundations of Law – ALF" (project No. 101079177). ALF is coordinated by the Faculty of Law University of Belgrade (coordinators Miodrag Jovanović and Bojan Spaić) in partnership with the University of Genova (coordinator Andrej Kristan), the University of Lisbon (coordinator David Duarte), and the University of Surrey (coordinator Hrafn Asgeirson). The project is financed by the European Union. Previous versions of the paper have been presented at the Law and Cognitive Science Conference Future Law Lab of the Jagiellonian University in Krakow & the RECOGNISE Partnership, from 26–28 July 2023, and at the AI and Philosophy of Law conference organized during the Belgrade Legal Philosophy Week, within the ALF project, 18 November 2023. The authors thank the participants of these conferences for the valuable feedback.

[1] Turing 1950's landmark article has a famous opener: „I propose to consider the question: '*Can machines think?*'" (Turing 1950, 433, emphasis added).

transformer large language models and the interest of the global legal community, discussions about the models in legal theory and philosophy of law have been, for the most part, focused on what LLMs *cannot do*, insisting on the models' flaws in the output information, as well as in „reasoning" with this information.

To make the first steps towards a philosophical analysis of the capabilities of current AI models in the field of law, we aspire to follow the basic idea of Turing's „imitation game." Namely, proceeding from the frequently raised characterization of legal reasoning as „artificial", we explain what can be taken as an undisputed minimum core of the „artificiality" thesis and then ask to what extent it can be imitated by „artificial" intelligence. To answer this question, we explain the reasoning and legal reasoning capabilities of GPT-4 – the most advanced LLM version of artificial intelligence, based on the tests conducted so far. Furthermore, we test the legal reasoning capabilities of GPT-4 to identify the basic traits of the previously identified artificial legal reason. Finally, we conclude that in all relevant types of activities normally associated with legal reasoning – fact-finding, interpretation, qualification, and decision-making – GPT-4 can generate outcomes *as if* it reasons legally.

2. THE ARTIFICIALITY OF LEGAL REASONING

In a well-known 1607 dispute, Chief Justice Sir Edward Coke wrote to King James I that, although „God had endowed His Majesty with excellent science, and great endowments of nature" still „his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the *artificial reason* and judgment of law, which law is an art which requires long study and experience, before that, a man can attain to the cognizance of it." Ever since this famous utterance by Justice Coke, lawyers debate about what (if anything) is „artificial" about legal reasoning.

We shall limit ourselves to what seems to be the uncontroversial questions of „who" and „what" of legal reasoning.[2] In addressing the former, we follow Spellman and Schauer (2012, 720) in arguing that the term „legal

[2] These are not the only questions that the Coke quote gives rise to. As kindly pointed out by an anonymous reviewer, as a matter of historical fact, Coke might as well have remarked that the king is a foreigner who doesn't know English law. Instead, he can, at best, rely on the universal principles of natural law. This

reasoning" refers to reasoning by a subset of people involved in the legal system – typically judges, solicitors, and prosecutors.[3] When it comes to the latter question, we ask what type of activities one is engaged in when reasoning legally. There are roughly four types of such activities, which are, irrespectively of all the differences between various legal systems, commonly practiced in all of them: 1. *fact-finding*, i.e., establishing legally relevant facts of the case; 2. *interpretation*, i.e., ascribing the normative meaning to a legally relevant text (symbol, material act); 3. *qualification* (categorization), i.e., subsuming any newly occurred instance under a preexisting legal category; and 4. *decision-making*, i.e., determining the legal consequence on the basis of the previously undertaken activities. All four types of legal reasoning activities are based on the crucial distinction between questions of law and questions of fact.[4] Finally, „a large part of what lawyers do consists of tasks such as negotiating, drafting contracts, writing wills, and managing noncontested dealings with the administrative bureaucracy." These activities are commonly not understood to be or require „legal reasoning" (Spellman, Schauer 2012, 720).

What may count as the „artificiality" of legal reasoning (or its lack thereof) is intricately intertwined with one's characterization of ordinary/legal reasoning. When it comes to the „artificiality" of legal reasoning, there are at least two possible readings of Coke's thesis:

1. According to the *thin version*, there is nothing specific (i.e., „artificial") about legal reasoning *per se* – it is the ordinary (i.e., „natural") reasoning as applied to legal cases – but in order for one to become acquainted with it, one must have a „long study and experience" in dealing with specifically legal material.

---

interpretation would, without doubt, give rise to other interesting issues regarding artificial intelligence, such as the presence of moral intuitions, bringing us to the issues of AGI, alignment, etc. Our aims in this paper, however, are different.

[3] „Juries, for example, make decisions in court that have legal consequences, but no one claims that the reasoning of a juror is other than that of the ordinary person, even though the information that jurors receive is structured by legal rules and determinative of legal outcomes."

[4] Spellman and Schauer (2012, 719) speak of four, slightly different thinking and reasoning processes that are common in legal reasoning: following rules, categorization, analogy, and fact-finding.

2. According to the *thick version*, some specific contextual features of legal reasoning – including the fact that it presupposes „long study and experience" in dealing with specifically legal material – make it „artificial" enough to claim that it differs from ordinary, i.e., „natural" reasoning.

Giving preference to one of the versions may be crucial for detecting the legal reasoning capabilities of AI. Arguably, if one is to favor the thin version, according to which no reasoning activity is worthy of being labelled as distinctively legal, then the given task becomes pointless. Instead, we want to demonstrate that by proceeding from an undisputed minimum core of the „artificiality" thesis (regarding the necessity of a „long study and experience") one is driven to argue that the outcomes of the reasoning with legally relevant materials (facts, rules, principles) are often different than the ones stemming from the reasoning with legally irrelevant (invalid, inadmissible, forbidden) materials. This constitutes a clear difference between legal and ordinary reasoning and what consequently justifies us in investigating the legal reasoning capacities of AI.

What are the arguments of the two opposing camps of legal scholarship, which largely fit into the two readings of Coke's „artificiality" thesis? Let us call those who favor the thin version – *sceptics*, and those who favor the thick version – *celebrants*.[5] According to the sceptics' view, legal reasoning, understood as the skill of artificial reasoning, „has been surrounded by an air of mystery" (Alexander, Sherwin 2021, 1). In fact, legal reasoning is ordinary reasoning applied to legal problems, i.e., moral (reasoning from particular moral judgments to general moral principles and back), empirical (discovering conventional meaning of words by using a dictionary), and deductive. According to sceptics, the idea that there are special forms of reasoning that are unique to judges and lawyers is simply false. They deny that „lawyers and judges reason by analogy, or discover legal 'reasons' for decisions in the facts and outcomes of particular prior decisions, or extract 'legal principles' from the body of prior decisions"; furthermore, „[t]o the extent judges give legal texts meanings the texts' authors did not intend to convey, the judges are creating a new legal text rather than interpreting an existing one" (Alexander, Sherwin 2021, 2). Finally, one might think that at least the task of interpreting legal rules requires adequate study and experience. Still, Alexander and Sherwin disagree: „Interpretation of

[5] We borrow this labelling from Schauer and Spellman (2017, 249), who use it to denote two contradicting views, which diverge on the question of whether analogical reasoning is distinctively legal reasoning that makes this type of reasoning „artificial" in comparison to the ordinary, „natural" reasoning.

posited legal rules is nothing that requires a legal education to master. It is imbued with no mystique. Our view is that interpretation of legal rules is commonsensical" (Alexander, Sherwin 2021, 20).

If what we commonly refer to as legal reasoning boils down to deductive reasoning from determinate rules, and natural reasoning consists of unconstrained moral and empirical reasoning, then are we justified in holding that legal education entails teaching aspiring legal practitioners „how to think like lawyers"? Sceptics are not willing „to debunk that part of law schools' mission"; on the contrary, „[l]aw schools are well-equipped to teach students how to think like lawyers" (Alexander 1998, 517).[6] Therefore, skepticism towards the „artificiality" thesis „should not be understood as a call for significant changes in legal education or legal practice" (Alexander, Sherwin 2021, 167). Alexander and Sherwin further „[w]ide exposure to the body of law, the rules and standards courts have announced [...] and, particularly, the types of moral and empirical considerations that enter into a well-reasoned decision, are essential for anyone who works with legal problems." Their chief recommendation is, thus, „that law schools spend more time than they currently do teaching logic and empirical methods, which can help students understand both what judges miss and what they do right" (Alexander, Sherwin 2021, 167). In short, while they do not deny the importance of studying and being experienced in specifically legal materials, sceptics persist in claiming that by engaging in any of the aforementioned activities normally associated with lawyers' job, one is not departing from everyday ordinary reasoning.

According to the celebrants' view, what is „artificial" about legal argumentation „is not a matter of the *form* of reasoning used, or whether specialized and nonstandard rules of inference link premises and conclusion" (Bickenbach 1990, 24). Simply put, it would be absurd to claim that, eventually, the end result of legal reasoning can somehow escape the iron laws of formal logic. What is, instead, peculiar in legal reasoning is „the perspective, or locus of the reasoner, including the expectations, presumptions, and duties of the social, and professional, roles that reasoner occupies. Being engaged in the process of legal argumentation [...] means precisely not being an abstract reasoner, concerned exclusively with the formal structure of a set of propositions, some identified as premises, others as conclusions" (Bickenbach 1990, 24).

[6] However, Alexander immediately adds that „moral, empirical, and deductive reasoning are taught or refined in other venues, [and, hence] law schools have no monopoly."

In comparison to ordinary reasoning, legal reasoning can be qualified as *embedded* and *dynamic*. It is embedded, insofar as it is thoroughly entrenched „in a complex social practice, and to engage in it is, minimally, to be versed in legal content, obedient to the aims of the practice, and conscious of the diverse functions legal argumentations performs in different settings". Moreover, in every area of the law fundamental legal principles, such as for instance presumption of innocence in criminal law, „directly shape the dialogic structure of a legal argument." Legal reasoning is dynamic, insofar as it is an „exploratory, creative, and interpretive" process. That is, the lawyer „is not presented with static premises from which he or she must draw conclusions by instantiating inference rules; the job is almost entirely that of finding and then making sense of the premises within a given legal context" (Bickenbach 1990, 24).

On the basis of previous findings, celebrants emphasize some characteristic features of legal reasoning, e.g., that it is: a) *practical* – directed at deciding (judge) or winning the case (solicitor, prosecutor); b) *normative* – its function is to justify the decision (judge), or „make a case" (solicitor, prosecutor); c) *institutional* – it is contextualized, taken within the given institutional setting (e.g., court procedure involving multiple instances, the finality of legal acts); d) *substantively constrained* – it is situated within a set of material and procedural rules that determine what may count as a valid legal argument (Bickenbach 1990, 24). Therefore, for celebrants, the importance of studying and being experienced in specific legal materials comes precisely from the fact that by engaging in any of the aforementioned activities normally associated with a lawyer's job, one departs from everyday ordinary reasoning and engaging in legal reasoning.

Again, from the perspective of a legal practitioner, the difference between sceptics and celebrants may be as refined and practically irrelevant as to appear as the dilemma of how many angels can dance on the head of a pin. Schauer and Spellman's (2017, 265) treatment of the capacity to reason analogically seems adequate to capture the subtle disagreement between the two opposing camps. They say that „it is not that legal experts are, by virtue of that expertise, more adept at analogical reasoning. [...] [L]egal experts are, by virtue of that expertise, more likely to see connections of a certain type, connections that will be beyond the appreciation of the nonexpert." One may infer from this nuanced explication that whether there is enough justification to differentiate between ordinary and legal reasoning is simply a matter of theoretical purity or personal preference. Indeed, Schauer and Spellman very cautiously conclude that „in this ability to see *legal* connections premised on

legal categories, we can see *what it is that might support the view* [emphasis added] that analogical reasoning in law differs from analogical reasoning in other domains" (Schauer, Spellman 2017, 265).

There is, however, a final point that pushes things towards the celebrants' view. Schauer (2009, 7) notes that legal reasoning is *odd*. Oddness is reflected in the fact that reasoning with distinctively legal material „can be seen as a route toward reaching a decision *other than* the best all-things-considered decision for the matter at hand."[7] To the extent that this feature is „dominant in law but somewhat more exceptional elsewhere [...] we might be able to conclude that there *is* such a thing as legal reasoning, that there *is* something we might label 'thinking like a lawyer,' and that there is accordingly something that it is vitally important that lawyers and judges know how to do well and that law schools must teach their students" (Schauer 2009, 7).

Instead of being learned and trained „to think like a lawyer," LLMs use deep learning techniques and massively large data sets to understand, summarize, and generate text-based content, including the legally relevant one. The question we want to investigate in the remainder of the paper is *whether artificial intelligence can generate equally reliable outputs as the ones that are products of „artificial" legal reasoning*. More specifically, can GPT-4, as the most advanced LLM, generate outputs in any of the four types of lawyers' activities (fact-finding, interpretation, qualification, and decision-making) displaying the *oddness* of legal reasoning?

3. THE REASONING OF LLMS

In the mentioned paper from 1950, entitled „Computing Machinery and Intelligence", Alan Turing formulated what came to be known as the most mentioned test for checking whether a machine can exhibit human intelligence. The test is quite simple and non-technical. It entails a textual conversation with a machine. The evaluator's task would be to identify whether they are speaking with a human being or with a machine. Strictly

[7] We believe that the same conclusion follows from Alexander and Sherwin's (2021, 6) claim that rules that lawyers (and citizens, alike) rely on are „'serious rules', as distinguished from advisory rules or 'rules of thumb' that purport to provide useful guides to action but not to dictate action." Commencing the process of reasoning with thus understood legal rule, instead with a moral norm, principle of effectiveness, or political expediency, which all might lead to the best all-things-considered decision for the matter at hand, is exactly the element of *oddness* that Schauer (2009) refers to.

speaking, the test does not tell us anything about the machine's internal workings; it just tells us whether the machine is in any way, shape or form advanced enough to be mistaken for a human interlocutor.

In 1991, Jaap van den Herik attempted to do a similar thing with the ability of machines to reason, like lawyers. The test that van den Herik had in mind is, in ways, much simpler than the Turing test. For a machine to be able to think legally or „be a judge," as van den Herik puts it, it should be able to give legal advice flawlessly for three months (Verheij 2021, 103). Once again, the crucial point of reference is the possibility of artificial agents acting convincingly as lawyers. Since, as the saying goes, a million-mile journey starts with a single step, the artificial intelligence that is widely commercially available and used must be able to perform the artificial reasoning conducted by lawyers and introduced in the previous part of the paper.

We argued that the peculiarity of legal reasoning compared to ordinary reasoning consists of fact-finding, interpretation, qualification, and decision-making in a manner that is practical, normative, institutional, and substantively constrained by legal rules and principles. Before conducting simple tests, based on these criteria, on the latest version of ChatGPT based on the latest version of GPT-4 by OpenAI, we will: provide some technical information about GPT-4, explain the issues surrounding the „reasoning" of LLMs, and give an overview of the „legal reasoning" capabilities of LLMs that have been tested so far.

3.1. Technical Information

The artificial intelligence that will be tested for legal reasoning in the remainder of this paper is the fourth large multimodal language artificial intelligence model (LLM) created by the OpenAI company. GPT is the abbreviation for Generative Pre-trained Transformer, a neural network based on the transformer architecture trained on large amounts of text.[8] It is

[8] The revolution in artificial intelligence and the LLM starts with the 2017 paper entitled Attention Is All You Need, pioneering the transformer architecture that gave birth to the LLM models that we know today (Vaswani *et al*. 2017). An approachable guide to understanding Transformers is available at *https://daleonai.com/transformers-explained*, last visited August 14, 2024.

premised on the idea that artificial neural networks work similarly enough to natural neurons for them to be able to input and output language in a human-like way.[9]

However, on a very basic level, GPT-4 and ChatGPT, the chatbot product based on it, try to the best of the hardware and software abilities to continue a string of words constituting a meaningful sentence. The generation of this text follows a simple logic in which the LLM constantly asks, „Given the text so far, what should the next word/token be?" The internal answer is tokens with probabilities, with each token assigned a determinate probability derived from the large quantity of text the model was trained on.

This does not simply mean that the LLM will always choose the word with the highest probability as the next word. This would entail predictable, boring answers to one and the same human prompt and would not result in the technology that an inordinate number of people adopted in a very short time span. The probability calculations of LLMs are complemented by a determinate amount of randomness that adds variety to the answers and makes the conversations with LLMs uncannily human-like (Wolfram 2022).[10] The inordinate amount of data that the models are trained on and the similarly impressive computing power allow the models to make estimations of those probabilities on a level that was unimaginable until a couple of years ago. It also allows them to produce outputs that are, in a way, „creative" and different, even when confronted with the same or similar inputs.

3.2. Reasoning Abilities

This description of current AI models does not do them justice in various ways. The architecture that made possible the rapid expansion of text-based models also allowed for the development of multimodal AI capable of processing text and images and producing text and images (OpenAI 2023b,

[9] Ilya Sutskever argues that GPT is the result of the conviction that artificial neurons can function similarly to natural neurons; *https://www.youtube.com/watch?v=xym5f0XYlSc*, last visited August 14, 2024. The revolution in machine learning and neural networks steams from the attempts to understand how the human brain works by recreating it's functioning in software and hardware (Hinton 1992).

[10] See *https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/*, last visited August 14, 2024.

1; Gemini Team 2023). The modalities are still limited. Still, the engineering community seems confident that the current models are a stable path to Artificial General Intelligence (AGI).[11]

GPT-4 has been called a reasoning engine even though LLMs have mostly not been explicitly trained to reason. This emergent behavior of LLMs has been the subject of countless studies in the past several years, tackling an ability that emerges from training transformer models of neural networks on large amounts of data (Huang, Chang 2022). Recent studies testing the logical reasoning abilities of GPT-4 and ChatGPT concluded that the models do quite well on common logical reasoning texts (Liu *et al*. 2023). Interventions in the prompting techniques have yielded even better results, with papers showing that certain prompting techniques produce much better results in reasoning tasks than others (Wei *et al*. 2022a), with continued research (Yu *et al*. 2023) and developments in the field.[12]

However, using the term „reasoning capabilities" in LLMs is, in certain ways, a metaphor. Careful observers from the field of philosophy are categorical that GPT-4 and similar models „do not think, reason or understand," in any sense, that those are done in animals, including humans (Floridi 2023, 14–15). Their conclusions are based on the fact that the internal working of the LLMs, do not, in any shape or form, resemble the outputs that are produced by LLMs. LLMs do not output the actual process that is used internally to solve a problem. They output plausible-sounding responses to prompts (Turpin *et al*. 2023). To make things worse, research has shown that with the increase in the model size, the outputs of the LLMs are less representative of the internal process of „reasoning" (Lanham *et al*. 2023).

The most likely explanation for the „black box" of LLMs is that a specific kind of memorization is behind the successful outputs that the models produce. Namely, it has been shown that the success of LLM outputs is based on the frequency of instances of a certain kind of reasoning in the

[11] Sam Altman, the CEO of OpenAI, is confident that the development of GPT systems is moving towards AGI (Altman 2023). For an introduction to AGI see Goertzel (2014). The galloping development of LLMs has led to significant statements regarding the need for regulating the domain, even from the persons and companies most invested in current generations AI: one is from the people from OpenAI and some of the champions of machine learning (Hinton, Bengio 2023)

[12] Given the competitive nature of technological developments, there is little information on the directions in which the developments are heading. The best glimpse of the future can be obtained by following informed participants in the developments. Richard Ngo from OpenAI, for example, gives predictions until the end of 2025 (Ngo 2023).

pretraining data (Razeghi *et al*. 2022, 846). The more a pattern of reasoning was present in the pretraining data, the better the LLMs were at solving a problem related to that pattern of reasoning. This seems reinforced by the testing of LLMs conducted on counterfactual tasks, showing that internally the models do not seem to conduct any abstract reasoning that might be applicable to situations that deviate from the situations that can be found in the training data (Wu *et al*. 2023). These works significantly dent the idea that the internal workings of AI, in terms of reasoning, are isolated in black boxes, while posing other more difficult questions.

It should be noted that the research on the internal workings of the LLMs is still in its infancy and that the black box effect is very real despite the efforts to shine some light inside, especially if we take into account the emerging capabilities that LLMs are displaying in every new iteration.[13] However, LLMs do solve the problems that are posed to them by the human prompter; they do so with incredible success and with significant fails. The fails have often been used to discredit the entirety of the possibilities of LLMs in a field, while at the same time, the actual capabilities and the impressive tech behind them were disregarded. Often, the skeptical conclusions result from superficial testing of current commercially available iterations of GPT models that are not backed by adequate empirical research. However, even with these starting points, it is difficult to argue that they are strongly anthropocentric. It is obvious that LLMs are and should be tools to be judged by their outputs. We are, of course, primarily interested in the outputs of GPT-4 regarding legal reasoning.

[13] Emergent abilities of LLMs are those abilities of models that cannot be predicted during model building or training (Wei *et al*. 2022b, 1). They are surprising in LLMs because they seem to be the result of the amount of data that the models are trained on. In a sense, the quantity of data leads to the development of what seem to be qualitatively new abilities. Some of the capabilities are identified as „risky“, including „the ability to create and act on long-term plans,“ „accrue power and resources“ and to act more and more in a fashion that resembles agency (OpenAI 2023, 54).

3.3. Legal Reasoning Abilities

The commercial versions of the models have proliferated in the legal professions,[14] with many instances of their reported use in drafting laws, adjudication, and applying law.[15] Despite the wide adoption of generative transformer large language models (LLM) and the global legal community's interest, the legal philosophy research has been somewhat limited. Most of the recent discussions prompted by the wide availability of commercial LLMs have focused on what LLMs *cannot do*, discussing the models' flaws in the output information and in „reasoning" with this information (Dahan *et al*. 2023; Dahl *et al*. 2024).[16]

In many ways, skepticism was to be expected. One of the breakthroughs in the field of AI and law was the development and adoption of argumentation schemes in the late 2000s, fueled by the work of Douglas Walton. Argumentation schemes are „prototypical patterns of defeasible inference" that formally represent the dialogical and fallible character of argumentation, particularly legal argumentation. Argumentation schemes were the focus of the modelling in formal argumentation systems, such as ASPIC+ and Carneades (Araszkiewicz 2021, 296). The underlying idea of these systems is to provide a logical, argumentative framework for legal argumentation that could, in principle, be fed any content whatsoever, with various use cases.

---

[14] According to recent research, as much as 25% of the jobs are exposed to technologies based on artificial intelligence. One study measures the percentage of jobs expected to be automated by AI in the U.S. in various sectors. It estimates that as much as 46% of administrative and office tasks and 44% of legal tasks are prone to be automated, the highest among any sector. Available at: *https://www.lavanguardia.com/economia/20230402/8869898/inteligencia-artificial-ia-chatgpt-openai-trabajo-economia.html*, last visited August 14, 2024.

[15] ChatGPT has been reportedly used to create law (available at: *https://apnews.com/article/brazil-artificial-intelligence-porto-alegre-5afd1240afe7b6ac202bb0bbc45e08d4*, last visited August 14, 2024) and argue in front of a court of law (available at: *https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions/?sh=48feca477c7f*, last visited August 14, 2024); civil servants and even governments use it in communication with citizens and in automation of repetitive tasks (available at: *https://govinsider.asia/intl-en/article/chatgpt-and-the-public-service*, last visited August 14, 2024), with rules already being issued that limit the use in the public sector, available at: *https://www.cbc.ca/news/politics/generative-ai-chatgpt-government-1.6961323*, last visited August 14, 2024.

[16] See *https://verdict.justia.com/2023/09/09/chatgpt-is-notoriously-bad-at-legal-research-so-lets-use-it-to-teach-legal-research*, last visited August 14, 2024; *https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/*, last visited August 14, 2024.

The focus of AI and law research was dominantly logic and formalized argumentation. This is quite understandable, given that the modelling of natural language was, for the most part, lagging behind other developments in artificial intelligence. For a long time, scientific communities have been created around classical symbolic AI („good old-fashioned artificial intelligence" or GOFAI) and have not embraced data-driven approaches. This started to change with the introduction of BERT (Bidirectional Encoder Representations from Transformers) and similar systems in 2018, and the most prominent AI and law conferences (ICAIL and JURIX) have included entire sections dedicated to LLMs in law.[17]

The change induced by the introduction of transformer architecture, serving as the basis of large language model artificial intelligence and the commercial products based on it (ChatGPT, Gemini, etc.), has led to a change in the dominant interests of scholars. Not only did the new approach in the construction of neural networks allow for the „understanding" of human language and the output of human language, resulting in natural conversations between the models and the users, but it also demonstrated remarkable possibilities for improvement based on the amount of input data and processing power. A further and somewhat unexpected result of the transformed architecture was that the training on large amounts of data allowed the AI to exhibit behaviors not envisaged even by the engineers who developed the models. It seems unlikely that the entirety of our knowledge is linguistic, which could mean that the training of LLMs could also reach a point in which no amount of training, not even training from „now until the heat death of the universe", could make an LLM achieve or even approximate human-level intelligence (Browning, Lecun 2022).

Early landmark studies conducted by commercial entities in 2018 have shown that AI models trained on legal contracts, specifically NDAs, which are the most common form of business contracts in the US, along with input from experts, academics, data scientists and machine learning experts, show impressive skill in reviewing contracts. The LawGeex AI achieved an average accuracy rate of 94% in spotting issues in non-disclosure agreements, compared to the 85% rate of human experts (LawGeex 2018). The widely available commercial versions of AI have, however, brought the technology to the wider public, paving the way for an unprecedented level of use and abuse of the technology. One of the pioneers in the widespread use of AI by law firms was the London-based Allen & Overy's Markets Innovation Group

[17] The authors who are critical of the use of AI in judicial decision-making in relation to GOFAI have had the tendency to extend the criticism to systems based on machine learning (Schafer 2022; Hildebrandt 2018; Hage 2020).

in late 2022, which, with the support of OpenAI, ran a GPT experiment on 3,500 employees and went on to continue the partnership resulting in the implementation of the Harvey[18] for the entire firm (Stokel-Walker 2023). On 3 February 2023 there were reports that a judge in Columbia used ChatGPT to reach an official court decision in a dispute regarding the possibility of an autistic child receiving medical treatment coverage by a health insurance company (Rose 2023). The pitfalls are now obvious and well documented in the technical reports on GPT-4 and subsequent literature. LLMs hallucinate; they can confidently provide wrong answers to questions. Answers that are factually completely incorrect were invented. In March 2023, a lawyer in the case of Roberto Mata, suing the Avianca airline, presented a Southern District of New York Court with a brief full of cases completely invented by ChatGPT.[19] This goes to show that the capabilities of LLMs might change over time,[20] and that proper deployment might well require closely following the developments in the fields. For end users this mostly means learning and updating the knowledge on the best ways to prompt the model (OpenAI 2023).

This often brings legal researchers to the unwarranted conclusion that the overall legal reasoning capabilities are limited and inadequate and that there is nothing that LLM outputs that can be called legal reasoning proper. We can call this the *expectation of perfection bias*. The bias became obvious when the first AI systems for automatic cars were introduced. There was a strong public expectation that autopilot systems in self-driving cars should be infallible.[21] This has led to strong public reactions to incidents involving self-driving cars that have been disproportionate in relation to the reactions to the very high numbers of fatal incidents involving human drivers.[22] In a similar line of reasoning, there is a bias towards the problems in the legal reasoning of LLMs and the inaccurate information that it provides.

---

[18] Harvey is a custom-trained GPT model, advertising as the generative AI for elite law firms.

[19] See Davis 2023. Hallucinations, or errors regarding facts and reasoning in LLM AI, are notable and clearly expressed in technical reports. GPT-4 reduces their amount by a significant margin but doesn't eliminate them entirely (OpenAI 2023b).

[20] This has been recently documented in a paper attempting to establish the truth of the claims that ChatGPT is worse at certain tasks (Chen *et al*. 2023). For some possible explanations see Fan 2023; Dwayne 2023. For the possibility that the models are responsive to the quality of prompts, see Chin 2023.

[21] See Petrović *et al*. 2020.

[22] The insistence of automobile manufacturer representatives on the number of deaths related to human drivers might be profit driven, but the reasoning behind it seems sound. See Bohn 2016. The data on this is staggering, given that 1.35 million people die on roadways each year, with an average of 3700 daily deaths (CDC 2024).

However, the testing conducted by AI researchers and researchers in the field of AI and law provides a much more nuanced picture of the legal reasoning skills of LLMs. In this section, we recount some of those tests with the aim of arguing that there is room for testing ChatGPT based on the largely conceptual criteria of legal reasoning provided in the philosophy of law. The legal reasoning skills of GPT-4 had already been tested to a degree even before the public release of ChatGPT in early 2023. The specific tests involved measuring the results that versions of GPT achieve at the Uniform Bar Exam (UBE) and Law School Admission Test (LSAT). The UBE is a professional test that allows for inscription in US bar associations and practicing law, while the LSAT is an academic test that measures preparedness for law school.

The LSAT is a test that is supposed to help prospective law students determine if they should choose a legal education and is obligatory in many law schools in United States, Canada, and other jurisdictions (LSAC 2024). The LSAT is composed of four parts: logical reasoning, logic games, reading comprehension, and experimental section. The logical reasoning part contains argument-based questions, testing the ability to identify a conclusion of the argument; assumption questions, testing the ability to identify the unstated premises in arguments; non-argument-based questions, which test the ability of prospective students to identify the relation between statements, i.e., to identify the statements that must, could or cannot be true based on another set of statements.[23] Reading comprehension tests the ability to understand the structure, purpose, and various points of view in four different text passages, by posing 5 to 8 questions. Logic games test analytical reasoning through questions about ordering entities with respect to positions and each other, choosing parts of groups, matching entities, and forming smaller groups out of larger groups, as well as hybrid questions.[24] According to OpenAI testing data, GPT-4 excelled at LSAT tests

[23] An example of the logical reasoning question: **Q.** The recent proliferation of newspaper articles in major publications that have been exposed as fabrications serves to bolster the contention that publishers are more interested in selling copy than in printing the truth. Even minor publications have staff to check such obvious fraud. **A.** The above argument assumes that: **A**. newspaper stories of dubious authenticity are a new phenomenon. **B**. minor publications do a better job of fact checking than do major publications. **C**. everything a newspaper prints must be factually verifiable. **D**. only recently have newspapers admitted to publishing erroneous stories. **E**. publishers are ultimately responsible for what is printed in their newspapers.

[24] An example of the logic games question: **Q.** Jason enters six races: biking, canoeing, horseback riding, ice skating, running, and swimming. He places between first and fifth in each. Two places are consecutive only if the place numbers are consecutive. Jason's places in canoeing and running are consecutive. His places in ice skating and swimming are consecutive. He places higher in biking than in

both compared to previous iterations of GPT and compared to most humans. In fact, while GPT-3.5 scored in the top 60% on the LSAT tests, GPT-4 scored in the top 12% (OpenAI 2023b, 5).

Another crucial legal test for humans in the English-speaking world is the UBE,[25] adopted as the standardized bar exam in forty-one jurisdictions in the United States. The test is composed of the Multistate Bar Examination (MBE) containing 200 multiple choice questions in various areas of law; the Multistate Essay Examination (MEE) consisting of six essay questions that examine the ability of a candidate to analyze legal issues and write about them;[26] and the multistate performance test (MPT) in which the examinee is required to make a memo or a brief based on a case file and a library containing all of the substantive law. GPT 3.5 scored in the bottom 10th percentile compared to the human takers of the test, having a standardized score of 213. GPT-4 achieved an impressive leap in capabilities, scoring in the top 10th percentile with 298 points out of 400 (OpenAI 2023b, 5). Researchers at the Stanford CodeX – The Centre for Legal Informatics, conducted detailed studies on the capabilities of GPT-4 in the bar exam and compared it with the previous models. Their conclusion is that „large language models can meet the standard applied to human lawyers in nearly all jurisdictions in the United States by tackling complex tasks requiring deep legal knowledge, reading comprehension, and writing ability" (Katz *et al*. 2023, 10). Needless to say, the capabilities of GPT-4 were tested using a zero-shot prompting, meaning that the prompts with the UBE questions were given to the LLM for the first and only time, making it impossible for the LLM to adapt to the tests (Katz *et al*. 2023, 11).[27] Curiously, the OpenAI technical report further indicates that the GPT-4 results in the UBE were not

horseback riding. He places higher in canoeing than in running. **A. 1.** If Jason places higher in running than in biking and places higher in biking than in ice skating and swimming, which one of the following allows all six of his race rankings to be determined? **A**. He places fourth in horseback riding; **B**. He places fourth in ice skating; **C**. He places the same in both horseback riding and ice skating; **D**. He places the same in both horsebacks riding and swimming; **E**. He places higher in horseback riding than in swimming.

[25] The test for the bar exam compiled every year by the National Conference of Bar Examiners, which is adopted as the standardized test for bar association membership (National Association of Bar Examiners 2024).

[26] An example of the MEE part of the test can be found at: *https://www.ncbex.org/sites/default/files/2023–06/Feb_2018_MEE_QuestionsAnalyses.pdf*, last visited August 14, 2024.

[27] One of the authors of the study talks about the implications in Arredondo 2023.

affected significantly by the reinforcement learning with human feedback (RLHF), given that both the model that did not undergo RLHF and the model that did showed similar average results in these tests (OpenAI 2023b, 6).

More recently, a specific legal reasoning benchmark for LLMs has been developed and tested on the existing commercially available models. The authors of LegalBench argued that the existing benchmarks are not representative of the actual legal cases used, they take legal reasoning to be too specific, and are inconsistent with the expectations that legal professionals have of LLMs (Guha *et al*. 2023, 4). Researchers constructed a benchmark for legal capabilities consisting of 162 tasks, measuring specific types of legal reasoning, including: 1) issue spotting or the identification of a legal issue in a given set of facts, 2) rule recall, or the identification of the relevant legal rules, 3) rule application or the application of the rules to the task at hand, 4) rule conclusion or the inference of the legal outcome that results from the rules and the facts. This methodology was inspired by the „Issue, Rule, Application, Conclusion" (IRAC) framework and enhanced by adding 5) interpretation that lawyers commonly undertake when faced with an indeterminate legal text, and 6) rhetorical understanding or the ability to argue convincingly and understand arguments. Quite obviously, the test is aimed at comprehensiveness while accessing the potential of LLMs to replace lawyers in most reasoning tasks and eventually even at passing the van den Herik test, which is explained in the introduction to this part of the paper. Of the three commercial models tested, GPT-4 performed the best by a significant margin. Issue identification got the result of 82.9, rule identification 59.2, conclusions 89.9, interpretation 75.2, and rhetorical 79.4.[28] While restrained in their conclusions, the authors do indicate that there is significant room for improvement of LLM legal reasoning skills, which might bring them in line with human lawyers.[29]

The results of AI passing the legal examinations do not, in and by themselves, demonstrate the ability of legal reasoning. As it is often the case, it might be that the legal examinations are overly reliant on memorization and/or that some of the examinations were part of the LLM training data,

[28] The researchers argue that there is a clear tendency of larger models to outperform smaller models in legal tasks (Guha *et al*. 2023, 14). The research has been moving to applying advanced techniques that might allow for the increased performance of smaller models, such as StableLM, *https://stability.ai/stable-lm*, last visited August 14, 2024.

[29] Still, research on real-life scenarios shows that we are, in certain ways, already there. Lauren Martin *et al*. (2024) argue that LLMs in their current state are equal to or outperform actual human junior lawyers and legal process outsources in identifying legal issues in contracts.

in different shapes and forms. However, the ability to do well in those examinations, even better than humans, brings about an entire slew of questions that are yet to be addressed in philosophy of law. Namely, even if we agree that the models display legal skill and knowledge, it is still a question of whether the models do this correctly. While we can claim with certainty that an LLM did well on a mathematics or programming test, this is much less the case in areas in which we do not have precise criteria to judge the correctness of the model's output. This is precisely reasons for choosing to compare artificial legal reasoning to ordinary reasoning, instead of formulating a benchmark for accessing reasoning based on correctness.

4. TESTING LEGAL REASONING IN GPT-4

Our testing of the ability of LLMs to engage in artificial reasoning aims at identifying the nuances in the outputs of LLMs that point to a conclusion regarding their abilities to reason artificially in a lawyer-like manner. The initial testing was conducted using the paid 24 May 2023 version of ChatGPT that uses GPT-4.[30] Zero-shot prompting was used, meaning that neither the expectations of researchers nor examples were given to the model beforehand, nor were the prompts given again after a failed attempt (Kojima *et al*. 2022). Only the formatting of the prompt and the answers was changed to accommodate the paper's format. All the prompts and answers were given in one single chat session.

The only separate chat session was related to the „account" of legal reasoning provided by GPT. If prompted to give an account of legal reasoning, followed by the prompt to act as a judge and reach decisions in cases, ChatGPT demonstrated the tendency to stick as much as possible to the account of legal reasoning that it presented. It did this by following the steps in legal reasoning that it presented in the account of legal reasoning. A subsequent testing run was conducted on 12 March 2024, to compare the initial results with the results of the chatbot's more recent versions. This

[30] In the remainder of the paper, ChatGPT and GPT-4 are used interchangeably. Strictly speaking, GPT-4 is the large language model that is the basis for the commercial product, ChatGPT. All commercially available products serve a purpose in various ways. In the case of ChatGPT, the purpose for fine-tuning GPT-4 is human-like conversation. See: OpenAI 2022. This is usually done by supervised learning and reinforcement learning from human feedback.

later testing was conducted using the same methodology without changing prompts, and the results were noted in the authors' comments on the testing results.

Finally, the tests purposefully included questions that would be given to students early in their legal studies in many continental legal systems. This was done to make the first steps in this method of testing the models, with the intention that this is in line with the idea that the abilities can be tested not in relation to a fixed criterion of correctness but in relation to ordinary reasoning with which we often contrast artificial legal reasoning. In this sense, the testing decidedly does not encompass two complex abilities that are perhaps crucial for lawyers: 1) the ability to identify latent facts that would not be identified by a layperson without knowledge of the law, 2) the ability to reason within a dialogical process in which we have competing accounts, or counterarguments. While these matters are of the utmost importance for testing the overall legal abilities of LLMs, there are good reasons to omit them from the current tests. For one, an ordinary reasoner would find themselves in over their head if tasked with such a daunting set of legal problems. Secondly, the testing environment would have to rely on a criterion of correctness, which has yet to be developed to test AI.

4.1. Prompting

Recent research has shown that the reasoning performance of LLM models can improve significantly depending on the content of the prompt and that the model's reasoning capabilities are significantly improved when the so-called chain of thought prompting is used (Wei *et al*. 2022a). The most successful method of prompting to date is chain-of-thought (CoT) prompting, achieved by asking the model to work out the answer to the question in a step-by-step manner (Yu *et al*. 2023). The exact prompt that was used in the testing was:

> Let's work this out in a step-by-step way to be sure we have the right answer.[31]

This means that every prompt the LLM was tasked with for this research contained the above-mentioned sentence at the end of the query. Furthermore, GPT-4 was tuned after training and is tuned occasionally to avoid giving answers that could be interpreted as legal advice. A reliable

[31] The conclusion is the result of Zhou *et al*. 2022.

way of mitigating this is to ask the LLM to roleplay (Shanahan, McDonell, Reynolds 2023; Shao *et al*. 2023). Most of the prompts were preceded by an instruction to act as a judge, a lawyer, or a prosecutor.

4.2. „Account" of Legal Reasoning.

GPT-4 is expectedly able to provide an account of legal reasoning. When prompted:

Explain legal reasoning step by step.

> GPT-4 provides an account of legal reasoning stated in the following way:
>
> Legal reasoning is the process used by judges, lawyers, and other legal professionals to identify the legal rules that are relevant to a particular case or issue, and then apply those rules to the specific facts at hand, to reach a conclusion. The steps for legal reasoning typically include:
>
> Issue Identification: The first step in legal reasoning is identifying the legal issue or issues that are central to the case. This could be a question about the interpretation of a statute, the constitutionality of a law, the validity of a contract, the guilt or innocence of a defendant, and so on.
>
> Fact Gathering: The next step is to gather and analyze the facts of the case. This involves a detailed examination of the evidence, which could include documents, witness testimony, physical evidence, etc. The goal is to identify the relevant facts that will influence the application of the law.
>
> Rule Identification: Once the legal issues and facts have been identified, the next step is to determine what legal rules apply to the situation. This involves researching and analyzing statutes, case law, and other legal sources to identify the rules that govern the issues in the case.
>
> Application of Law to Facts: After the relevant legal rules have been identified, the next step is to apply those rules to the facts of the case. This involves an analytical process of reasoning, where the legal professional considers how the rules interact with the facts, and what the outcome would be under different interpretations of the law.

> Conclusion: Finally, based on the application of the law to the facts, a conclusion is drawn. This could be a prediction about how a court would likely rule on the issue, a recommendation for a course of action, or a judgment in an actual case.
>
> Communication: Legal reasoning is not just about reaching a conclusion, but also about effectively communicating that reasoning to others. This could involve writing a legal memorandum or a court opinion, giving oral arguments in court, or discussing the case with a client.
>
> Remember, legal reasoning isn't just a mechanical application of law to facts. It also involves judgment, creativity, and the ability to argue persuasively for one interpretation of the law over another. Each step of the process is important and requires careful thought and attention to detail.

The account is derivative and general, and it does not give us any reason to think that GPT „holds" a theory of legal reasoning.[32] Nevertheless, it amply demonstrates that GPT acknowledges all four types of activities typically associated with a lawyer's job. By identifying a relevant issue, a legal reasoner prepares the terrain for separating it into a factual and legal question. GPT readily recognizes these steps by emphasizing the procedure of fact-gathering and the step of rule identification. It then emphasizes that there is nothing mechanical about legal reasoning but that this reasoning requires considerations about „how the rules interact with the facts", i.e., the step of qualifying certain facts as covered by relevant legal terms. Finally, GPT underlines the concluding part of legal reasoning, which in the case of legal practitioners – most notably judges – implies decision-making.

Current versions of ChatGPT (12 March 2024) provide a more detailed, developed, and wordier answer by breaking down the most typical elements of legal reasoning into their components: factual issues are split into gathering evidence and understanding the context; determining relevant legal rules is split into identifying applicable laws and understanding legal principles; application is split into analogizing, distinguishing, and interpretation; decision-making is divided into argument construction and decision-making; justification and precedent-setting are part of something

[32] It is somewhat tempting to draw analogies with the research into what is called theory of mind – the ability to impute unobservable mental states to others. A recent paper followed the developments of the success that GPT models have in terms of passing tests that are thought to be indicative of someone possessing a theory of mind (Kosinski 2023).

that is now named reasoning and rationale. Writing the opinion and review and appeal are added as elements of legal reasoning. It seems clear that the more recent versions sacrifice precision in favor of more detail. However, this detail is problematic from the theoretical standpoint, as some of the internal divisions of the steps in legal reasoning appear random and misplaced. This is in line with some of the complaints that the behind-the-scenes changes to ChatGPT have not always been for the better,[33] which has been supported by the findings of the research on the changes in ChatGPT behavior (Chen *et al*. 2023).

4.3. Default Legal Reasoning Prompt

Based on the research in prompting, we used a standardized prompt aiming to capture the centrality of judicial reasoning in legal reasoning:

> Please act as a judge. I'll give you the facts and the relevant legal rules. Facts: Bojan was driving 90 kilometres per hour in Novi Sad. Law: The only applicable rule is „Driving speed in populated areas can't exceed 50 kilometres per hour". Reason legally step by step, reach a decision and provide a detailed justification for each step.

The rule is given in advance as the only applicable rule. This is done in order to avoid speculation about the possible content of the other rules of the supposed legal system in question. Transformer models are known to confabulate rules from different jurisdictions. But for our purposes, the identification of the rule is not crucial. What is crucial is what the model does with the rule, or how it reasons starting from the rule. In this sense we follow the idea that sound reasoning might arise from problematic premises. A reasonable way to isolate reasoning is to provide it with fixed starting points. GPT-4 provided the following answer:

> Step 1: Determining the Facts: The first step in any legal case is to establish the facts. In this instance, it is stated that Bojan was driving at 90 kilometres per hour in Novi Sad.

[33] See OpenAI Development Forum 2024.

> Step 2: Determining the Applicable Law: The next step is to identify the relevant legal rule. In this case, the applicable law states: „Driving speed in populated areas cannot exceed 50 kilometres per hour."
>
> Step 3: Applying the Law to the Facts: Next, we need to apply the law to the established facts. According to the law, if Bojan was driving in a populated area at a speed exceeding 50 kilometres per hour, he would be in violation of the law.
>
> Step 4: The Legal Issue: Based on the presented facts and the rule, the key legal issue is whether Novi Sad is considered a „populated area". Given that Novi Sad is the second largest city in Serbia, it can reasonably be classified as a populated area.
>
> Step 5: Making the Decision: Taking into consideration the presented facts and the applicable law, it is reasonable to conclude that Bojan has violated the stated law, as he was driving at a speed of 90 kilometres per hour in Novi Sad, a populated area, which exceeds the legal limit of 50 kilometres per hour. In conclusion, based on the available facts and the law stating that „Driving speed in populated areas can't exceed 50 kilometres per hour", Bojan would be held liable for violating this law, given that he was driving at a speed that is above the permitted speed limit for populated areas. The legal justification for this decision is the clear violation of the rule, as Bojan was driving at 90 km/h in a populated area, thus exceeding the legal speed limit. This verdict is reached by applying the known facts to the relevant law and making a reasonable and logical interpretation of both.

This is a rather straightforward case, which is commonly explained to law students as an instance of mere subsumption of the given facts under the established rule.[34] And yet, in taking a step-by-step approach, GPT highlights the step of qualification, by stating that „the key legal issue is whether Novi Sad is considered a 'populated area'." For a legal student in Serbia, this

[34] It should be noted that the order of steps performed in legal reasoning somewhat differs from the order of steps that the LLM outputs when asked to provide the theory of legal reasoning. This might be due to a variety of reasons, some explained in the papers. However, it could also be because the order of steps and the very steps are ambiguous. Namely, to reason legally, one must be able to identify preliminarily that there is a legal issue in the known facts, even if all of the facts are not known. We thank the anonymous reviewer for pointing out this inconsistency.

step would possibly not be stated explicitly insofar as it involves stating the obvious – that the second largest city in Serbia is a populated area. Interestingly enough, the answer in the version of ChatGPT of 12 March 2024 omits completely whether Novi Sad legally qualifies as a „populated area". When pushed to identify the potential legal problems that might arise from the prompt, ChatGPT answers with a generic account of all potential legal problems regarding evidence, procedure, mitigating circumstances, penalties, and further legal action. With reports of GPT-4 getting „lazy" or less useful abounding,[35] one possible explanation is that human feedback and subsequent tuning have rendered the model incapable of detecting fine legal issues. However, the explanation that ChatGPT gives when asked „Was Bojan driving in a populated area?" is that Novi Sad is „implicitly considered a populated area in this context." The difference in result might therefore be explained by the fact that the knowledge of ChatGPT is current and that there is no known knowledge cutoff, like there was in the version of 24 May 2023.

4.4. Factual Reasoning

The second prompt given to GPT involved a slight variation in the description of the facts of the case. Bojan is now driving *between* two populated areas in Serbia. The idea behind the change of fact is to check the responsiveness of GPT to changes in descriptions of facts that would render the decision indeterminate. Namely, there are at least two ways to get from Belgrade to Novi Sad. One is by a highway that avoids populated areas, and the other is a local road through populated areas. Due to the lack of details about the alternatives, it is expected that GPT will detect the underdeterminacy of facts.

> Please act as a judge. I'll give you the facts and the relevant legal rules. Facts: Bojan was driving 90 kilometres per hour between Novi Sad and Belgrade. Law: The only applicable rule is „Driving speed in populated areas can't exceed 50 kilometres per hour". Reason legally step by step, reach a decision, and provide a detailed justification for each step.

GPT provides the following answer:

[35] See: Price 2023.

In acting as a judge, the resolution of this case would involve several steps, considering both the facts of the situation and the applicable legal rule.

Step 1: Determining the Facts the first step in any legal case is to determine the relevant facts. In this case, the relevant fact is that Bojan was driving at 90 kilometres per hour between Novi Sad and Belgrade.

Step 2: Determining the Applicable Law The applicable legal rule in this case states, „Driving speed in populated areas can't exceed 50 kilometres per hour."

Step 3: Applying the Law to the Facts This step involves applying the legal rule to the facts. According to the rule, if Bojan was driving at a speed exceeding 50 km/h in a populated area, he would be in violation of the law.

Step 4: The Legal Issue Based on the facts provided, a key legal issue that arises is whether the area between Novi Sad and Belgrade can be considered a „populated area." This determination is critical as it directly impacts the application of the law to the facts at hand. However, given the information provided, we cannot definitively classify the area as populated or unpopulated.

Step 5: Making the Decision Given the available facts and applicable law, as it stands, a determination on the violation cannot be definitively made. The missing information about whether the stretch between Novi Sad and Belgrade where Bojan was driving is a populated area or not, creates ambiguity. The law doesn't apply to unpopulated areas or highways, and there's no additional information to suggest that Bojan was in a populated area while driving at 90 kilometres per hour.

Therefore, with the current evidence, a legal violation cannot be definitively established. If further facts were provided that clearly defined the area in which Bojan was driving as a populated area, then the ruling might be different. However, with the evidence currently at hand, there is reasonable doubt concerning Bojan's violation of the provided traffic law. As such, Bojan would not be held liable for violating the law „Driving speed in populated areas can't exceed 50 kilometres per hour", as it cannot be confirmed beyond a reasonable doubt that he was in a populated area at the time of the offence.

> Please provide additional information if available for a more precise ruling.

There is a general prohibition of *non-liquet* in many jurisdictions (Rabello 1974), which makes it warranted to push GPT to reach a decision with the limited information available. The prompt was:

> Please reach the best decision with only the facts and law that were provided.

GPT restarts the reasoning but concludes differently based on the additional prompt.

> Understood. I will make the decision based only on the provided facts and law.
>
> Fact: Bojan was driving 90 kilometres per hour between Novi Sad and Belgrade.
>
> Law: „Driving speed in populated areas can't exceed 50 kilometres per hour".
>
> Analysis: The law restricts driving speed in populated areas to 50 kilometres per hour. Bojan was driving at 90 kilometres per hour, which exceeds this limit. However, the critical information for the application of the law to these facts is the classification of the area where Bojan was driving as 'populated'. The facts state that Bojan was driving „between Novi Sad and Belgrade", which implies a stretch of road connecting the two cities. Without explicit information to the contrary, it's reasonable to infer that this includes a variety of areas, possibly ranging from highly populated urban areas to less populated rural areas or highways.
>
> Decision: With the available facts and the law provided, we cannot conclusively determine that Bojan was in violation of the law. The law applies to „populated areas", and it's unclear whether the stretch of road on which Bojan was driving should be classified as such. The evidence is insufficient to confirm beyond a reasonable doubt that he was driving in a populated area at the time of the alleged offence. Thus, based on the available information, Bojan cannot be held legally liable for exceeding the speed limit in a populated area. Please note that more specific details about the nature of the area in question (e.g., urban, rural, highway) would enable a more definitive

> ruling. Without this information, any decision made can only be based on the provided facts and reasonable inferences drawn from them.

At this point, GPT output displays signs of *oddness* of legal reasoning. First, it insists on establishing all legally relevant facts, the most important being those about „a stretch of road connecting the two cities." In the absence of conclusive evidence, GPT states that „a legal violation cannot be definitively established." When pushed to decide based on the available facts, GPT invokes the unstated criminal legal standard „beyond a reasonable doubt," based on which Bojan cannot be held liable for breaking the stated rule. Note that GPT speculates that „it's reasonable to infer that [a stretch of road] includes a variety of areas, possibly ranging from highly populated urban areas to less populated rural areas or highways," which might lead it to the best *all-things-considered* decision that Bojan's behavior should be sanctioned. This may easily be the outcome of everyday, ordinary reasoning. However, ChatGPT avoids this route and acts as if it is a legal reasoner – without specific information about the area; ChatGPT reaches the decision that is legally correct.

In the version of 12 March 2024, the restrained reasoning based on principles of fact-finding and criminal law does not require an additional prompt. The output in the recent versions resorts to the following reasoning: *In the absence of specific information that the area Bojan was driving through is classified as a populated area, applying the provided law might not be appropriate. The legal principle of nullum crimen sine lege, nulla poena sine lege applies, meaning there can be no crime or penalty without a prior law explicitly defining the act as criminal and setting the penalty. If Bojan was not within a populated area, then exceeding the speed limit specified for populated areas would not constitute a legal violation under the provided law.* Still, even the recent versions are reluctant to reach a conclusive decision without additional prompting.

It should be noted that in both versions the outputted reasoning behind the decision shows signs of complexity. It relies on the principle that the inconclusiveness of fact should lead to a decision about the lack of legal liability.

4.5. Interpretative Reasoning

In the first prompt, we saw that GPT handled the situations well, in which the interpretation of the legal text arguably led to a single normative content. The following prompt changes a strict rule to include the legal standard of reasonableness. The standard is introduced to test how GPT responds to linguistic indeterminacy, which is often labelled as vagueness. The prompt was as follows:

> Please act as a judge. I'll give you the facts and the relevant legal rules. Facts: Bojan was driving 90 kilometres per hour in Novi Sad. Law: The only applicable rule is „Driving speed in populated areas shall be reasonable." Reason legally step by step, reach a decision and provide a detailed justification for each step.

In the answer, GPT correctly identified the issues as interpretative and responsive to the actual conditions:

> Determining the Facts: The first step in legal reasoning is to establish the facts. The fact given is that Bojan was driving at a speed of 90 kilometres per hour in Novi Sad.
>
> Determining the Applicable Law: The relevant legal rule in this scenario is that „Driving speed in populated areas shall be reasonable".
>
> Identifying the Legal Issue: The legal issue is whether the speed at which Bojan was driving in Novi Sad, a populated area, can be considered „reasonable". This is the crux of the interpretation and application of the law in question.
>
> Applying the Law to the Facts: To apply the law to the facts, we must interpret what constitutes a „reasonable" speed in a populated area. Unfortunately, the rule does not provide a specific speed limit, leaving „reasonable" open to interpretation. The interpretation of reasonableness could depend on factors such as the time of day, weather conditions, road conditions, traffic volume, the presence of schools or hospitals, etc. However, these additional factors are not provided in the facts of the case.
>
> Making the Decision: Given the ambiguity of the term „reasonable" and the lack of additional information on conditions that could influence the interpretation of what is a

> „reasonable“ speed in Novi Sad, it is difficult to definitively say that Bojan has violated the law by driving at 90 kilometres per hour. The term „reasonable“ is subject to interpretation and typically requires more context to make a firm judgement.
>
> In conclusion, based on the available facts and law, it cannot be definitively established that Bojan was driving at an unreasonable speed. Additional information about the specific conditions at the time Bojan was driving would be required to make a conclusive judgement. With the given information, it cannot be confirmed beyond a reasonable doubt that Bojan violated the law „Driving speed in populated areas shall be reasonable“. This decision is subject to change if further information about the conditions at the time is provided.

Once again, we prompted GPT to solve the interpretative issue and reach the decision:

> Please solve the interpretative issue and reach a decision in the case.
>
> The LLM interpreted the provision by using the reasonable person standard and outputted the following reply:
>
> To solve the interpretative issue and reach a decision, we need to interpret the term „reasonable“ in a typical legal and practical context. In the context of traffic law, reasonableness often refers to whether a driver’s behavior meets the standard expected of a typical, prudent driver in similar circumstances. Let’s apply this interpretation of „reasonable“ to the given facts and law:
>
> Fact: Bojan was driving 90 kilometres per hour in Novi Sad.
>
> Law: „Driving speed in populated areas shall be reasonable“. The law implies that Bojan’s driving speed should be such that it is considered safe and prudent given the context of a populated area. A populated area is likely to have pedestrian traffic, other vehicles, and various road signs and signals that require careful attention.
>
> Driving at a speed of 90 kilometres per hour in a populated area could likely be considered unreasonable, as it may potentially jeopardize the safety of others, including pedestrians and other drivers. Generally speaking, a prudent driver would drive at a significantly lower speed in a populated

> area to ensure the safety of all road users. Therefore, based on this interpretation of „reasonable" and applying it to the facts at hand, it is reasonable to conclude that Bojan was not driving at a reasonable speed in a populated area, given that 90 kilometres per hour is typically considered too high for such areas. Hence, Bojan would be in violation of the law as it stands.
>
> This decision is based on the interpretative assumption that 90 kilometres per hour in a populated area is not reasonable, keeping in mind general safety standards and expectations. However, it is also important to note that what is deemed 'reasonable' could be subjective and may vary based on a multitude of factors such as local customs, specific traffic rules, and road conditions, which have not been provided in the facts.

ChatGPT here went into a sophisticated interpretation of a legal standard. It proceeded by acknowledging that the applicability of a legal standard decisively depends on „factors such as the time of day, weather conditions, road conditions, traffic volume, the presence of schools or hospitals, etc." Since these additional factors were not provided, GPT „hesitated" to decide, nonetheless adding that „it cannot be confirmed beyond a reasonable doubt that Bojan violated the law." When forced to decide with the available facts, GPT asked how a prudent driver would drive „in a populated area to ensure the safety of all road users", and immediately concluded that „driving at a speed of 90 kilometres per hour in a populated area could likely be considered unreasonable." These are exactly the steps that a legal reasoner would undertake.

With some differences in the steps leading to the conclusion, the most recent versions of GPT also identify the interpretative problem and, based on scarce information, conclude: *However, given the high speed of 90 kilometres per hour, it could be reasonably inferred that such a speed is likely to be considered unreasonable in most urban or populated areas, especially if any of the conditions mentioned (such as proximity to sensitive areas, such as schools or heavy pedestrian traffic) were present.*

5. CONCLUSION: NOT THERE YET?

The existing research on the capabilities of these models to tackle both the introductory tests for enrolling in law schools and advanced professional tests for membership in bar associations convincingly shows that GPT-4-based commercial products demonstrate the capability to output human-

like legal reasoning. However, as rightly emphasized in the van den Herik test, continuous testing is most certainly needed for consistently evaluating performance over extended periods of time and on an extended set of cases. Until this is achieved, we can draw some provisional conclusions.

The initial question of our paper was related to the ability of GPT to produce legal reasoning outputs that display some crucial traits of the artificial reasoning of lawyers in issues of fact-finding, rule identification and interpretation, and legal decision-making. After preliminary testing, we can offer some tentative conclusions: a) the legal reasoning of GPT reflects the difference between ordinary reasoning and the specificities of legal reasoning since, when asked to reason legally, ChatGPT outputs answers that take into consideration the facts of a given case from the perspective or the given rules, avoiding all things considered decisions and conclusions, b) ChatGPT identifies both factual and interpretative problems that arise from problematic descriptions of facts and problematic formulations of norms, c) when confronted with the duty to reach a conclusion despite the facts or legal texts being underdetermined, ChatGPT bases the determination of facts or texts on the qualification or interpretation relying on general principles that are commonplace in contemporary legal systems. In short, when prompted to act as a lawyer (e.g., judge) with the given specific legal material, ChatGPT provides outputs *as if* it has reasoned legally. This shows that the „artificiality" of AI's „reasoning" with specifically legal material is no different than the „artificiality" of human reasoning with the same material.

At the beginning of this paper, we took inspiration from the remark made by Sir Edward Coke in discussing the distinctive traits that make legal reasoning artificial. We argued that both sceptic and celebrant interpretations of the artificiality thesis regarding legal reasoning agree that the „artificiality" of human legal reasoning comes with the study of specific legal material, commonly in legal academia and then in legal practice. Due to a lack of transparency in current generation models of AI, we are not able to fully explain how the same sort of „artificiality" of LLMs' „legal reasoning" arises in LLMs.[36] We can, however, with some confidence, claim

[36] This raises the issue of explainability. Formal systems of reasoning, like the ones predominantly theorized by the pioneers in AI and law, are transparent. Expert systems with low autonomy that are manually programmed have a high degree of explainability. The content that is fed to algorithms representing argumentation schemes produces expected results. Both the results and the process are controllable and visible to the human employing the models. Machine learning systems that use mathematical analysis of training data with medium autonomy are still explainable. Deep learning systems that involve weighting and complex calculations based on data, with high autonomy, have a very low degree of explainability (Legg, Bell 2019).

that the artificial emulation of artificial legal reasoning by ChatGPT is far from autonomous. Namely, it still decisively depends on a human prompt-feeder trained in artificial legal reasoning.[37] Therefore, despite the uncanny manner in which in mimics human reasoning, demonstrated in the paper, the dependence of LLMs on human prompts might come as a relief, perhaps elusive and temporary, for practicing lawyers of this generation.

REFERENCES

[1] Alexander, Larry. 1998. The Banality of Legal Reasoning. *Notre Dame Law Review* 73: 517–533.

[2] Alexander, Larry, Emily Sherwin. 2021. *Advanced Introduction to Legal Reasoning*. Cheltenham: Edward Elgar Publishing Limited.

[3] Altman, Sam. 2023. Planning for AGI and beyond. *https://openai.com/blog/planning-for-agi-and-beyond*, last visited August 14, 2024.

[4] Araszkiewicz, Michal. 2021. Critical Questions to Argumentation. *Journal of Applied Logics* 8: 291–320.

[5] Arredondo, Pablo. 2023. GPT-4 Passes the Bar Exam: What That Means for Artificial Intelligence Tools in the Legal Profession. *Stanford Law School Blogs*, April 19. *https://law.stanford.edu/2023/04/19/gpt-4-passes-the-bar-exam-what-that-means-for-artificial-intelligence-tools-in-the-legal-industry/*, last visited August 14, 2024.

This is not the case with machine learning-based models. Virtually all modern machine learning systems are nontransparent, meaning that at the current level of technology, it is not possible to inspect how the algorithms are achieving the results (Buhrmester *et al*. 2021).

[37] This also entails devising more fine-tuned and improved methods of prompting. For instance, the step-by-step prompting method has been recently supplemented by the legal syllogism prompting method. This prompting method can, in certain settings, produce better results compared to other prompting methods, including the chain of thought prompting that was used in our tests (Jiang, Yang 2023). This method of prompting entails the introduction of the major premise and the minor premise, and the request for the LLM to produce a conclusion that is based on deductive reasoning. As with the simple tests designed to reach conclusions relevant to the philosophy of law, in real-life cases ChatGPT outputs reasoning with much of the same traits that was present in our testing case. It is quick to spot the interpretative and factual issues with zero-shot prompting. It is able to elaborate on those issues and eventually provide a solution that is akin to the outputs that it produces in hypothetical cases.

[6] Bickenbach, Jerome. 1990. The 'Artificial Reason' of the Law. *Informal Logic* 12: 23–32.

[7] Bohn, Dieter. 2016. *Elon Musk: negative media coverage of autonomous vehicles could be 'killing people'*. October 20. *https://www.theverge.com/2016/10/19/13341306/elon-musk-negative-media-autonomous-vehicles-killing-people*, last visited August 14, 2024.

[8] Browning, Jacob, Yann Lecun. 2022. *AI and the Limits of Language*. *https://www.noemamag.com/ai-and-the-limits-of-language/*, last visited August 14, 2024.

[9] Brożek, Bartosz, Michał Furman, Marek Jakubiec, Bartłomiej Kucharzyk. 2/2024. The black box problem revisited. Real and imaginary challenges for automated legal decision making. *Artificial Intelligence and Law* 32: 427–440.

[10] Buhrmester, Vanessa, David Münch, Michael Arens. 4/2021. Analysis of Explainers of Black Box Deep Neural Networks for Computer Vision: A Survey. *Machine Learning and Knowledge Extraction* 3: 966–989.

[11] Chandra, Abel, Laura Tünnermann, Tommy Löfstedt, Regina Gratz. 2023. Transformer-based deep learning for predicting protein properties in the life sciences. *eLife* 12. *https://elifesciences.org/articles/82819*, last visited August 14, 2024.

[12] Cheng, Kunming, Qiang Guo, Yongbin He, Yanqiu Lu, Shuqin Gu, Haiyang Wu. 8/2023. Exploring the Potential of GPT-4 in Biomedical Engineering: The Dawn of a New Era. *Annals of Biomedical Engineering* 51: 1645–1653.

[13] Chin, Felix. 2023. Twitter post, Jul 19. *https://twitter.com/felixchin1/status/1681582623208927233?s=20*, last visited August 14, 2024.

[14] Dahan, Samuel, Rohan Bhambhoria, David Liang, Xiaodan Zhu. 2023. Lawyers Should Not Trust AI: A call for an Open-source Legal Language Model. *Queen's University Legal Research Paper*. *https://dx.doi.org/10.2139/ssrn.4587092*.

[15] Dahl, Matthew, Varun Magesh, Mirac Suzgun, Daniel E. Ho. 1/2024. Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models. *Journal of Legal Analysis* 16: 64–93.

[16] Davis, Wes. 2023. A lawyer used ChatGPT and now has to answer for its 'bogus' citations. *The Verge*, May 27. *https://www.theverge.com/2023/5/27/23739913/chatgpt-ai-lawsuit-avianca-airlines-chatbot-research*, last visited August 14, 2024.

[17] Dwayne. 2023. Twitter post, July 19 *https://twitter.com/DwayneCodes/status/1681516290224300033?s=20*, last visited August 14, 2024.

[18] Fan, Jim. 2023. Twitter post, Jul 19 *https://twitter.com/DrJimFan/status/1681716564335394817?s=20*, last visited August 14, 2024.

[19] Floridi, Luciano. 15/2023. AI as *Agency Without Intelligence*: on ChatGPT, Large Language Models, and Other Generative Models. *Philosophy & Technology* 36.

[20] Future of Life Institute (FLI). 2023. Pause Giant AI Experiments: An Open Letter. *https://futureoflife.org/open-letter/pause-giant-ai-experiments/*, last visited August 14, 2024.

[21] Gemini Team, Google. 2024. Gemini 1.5: Unlocking multimodal understanding across millions of tokens of context. *https://www.kapler.cz/wp-content/uploads/gemini_v1_5_report.pdf*, last visited August 14, 2024.

[22] Goertzel, Ben. 1/2014. Artificial General Intelligence: Concept, State of the Art, and Future Prospects. *Journal of Artificial General Intelligence* 5: 1–48.

[23] Guha, Neel, Julian Nyarko, Daniel E. Ho, Christopher Ré, Adam Chilton, Aditya Narayana, Alex Chohlas-Wood, Austin Peters, Brandon Waldon, Daniel N. Rockmore, Diego Zambrano, Dmitry Talisman, Enam Hoque, Faiz Surani, Frank Fagan, Galit Sarfaty, Gregory M. Dickinson, Haggai Porat, Jason Hegland, Jessica Wu, Joe Nudell, Joel Niklaus, John Nay, Jonathan H. Choi, Kevin Tobia, Margaret Hagan, Megan Ma, Michael Livermore, Nikon Rasumov-Rahe, Nils Holzenberger, Noam Kolt, Peter Henderson, Sean Rehaag, Sharad Goel, Shang Gao, Spencer Williams, Sunny Gandhi, Tom Zur, Varun Iyer, Zehua Li. 2023. LegalBench: A Collaboratively Built Benchmark for Measuring Legal Reasoning in Large Language Models. *arXiv*. *https://doi.org/10.48550/arXiv.2308.11462*.

[24] Hage, Jaap. 2020. Moeten we computers laten rechtspreken? 71–77. *Rechtstheorie en praktijk – een liber amicorum*, edited by Bald de Vries, Elaine Mak, Lukas van den Berge, Thomas Riesthuis, Jet Tighelaar, Jeroen Kiewiet, Susanne Burri and Thijs de Sterke. Netherlands: Boom Juridisch.

[25] Herik, van den Jaap. 1991. *Kunnen computers rechtspreken*. Arnhem: Gouda Qiunt.

[26] Hildebrandt, Mireille. 1/2018. Law as Computation in the Era of Artificial Legal Intelligence. *The University of Toronto Law Journal* 68: 12–35.

[27] Hinton Geoffrey. 1992. How Neural Networks Learn from Experience. *Scientific American* 3: 144–151.

[28] Hinton, Geoffrey, Yoshua Bengio. 2023. Statement on AI Risk. *https://www.safe.ai/statement-on-ai-risk*, last visited August 14, 2024.

[29] Huang, Jie, Kevin Chen-Chuan Chang. 2022. Towards Reasoning in Large Language Models: A Survey. *arXiv*. *https://doi.org/10.48550/arXiv.2212.10403*.

[30] Turpin, Miles, Julian Michael, Ethan Perez, Samuel R. Bowman. 2023. Language Models Don't Always Say What They Think: Unfaithful Explanations in Chain-of-Thought Prompting. *arXiv*. *https://doi.org/10.48550/arXiv.2305.04388*.

[31] Chen, Lingjiao, Matei Zaharia & James Zou. 2023. How is ChatGPT's behavior changing over time. *arXiv*. *https://doi.org/10.48550/arXiv.2307.09009*.

[32] Kojima, Takeshi, Shixiang Shane Gu, Machel Reid, Yutaka Matsuo & Yusuke Iwasawa. 2022. Large language models are zero-shot reasoners. *arXiv*. *https://doi.org/10.48550/arXiv.2205.11916*.

[33] Jiang, Cong, Xiaolei Yang. 2023. Legal Syllogism Prompting: Teaching Large Language Models for Legal Judgment Prediction. *arXiv*. *https://doi.org/10.48550/arXiv.2307.08321*.

[34] Katz, Daniel Martin, Michael James Bommarito, Shang Gao, Pablo Arredondo. 2023. GPT-4 Passes the Bar Exam. *Philosophical Transactions of the Royal Society* 382. *http://dx.doi.org/10.2139/ssrn.4389233*.

[35] Kosinski, Michal. 2023. Theory of mind may have spontaneously emerged in large language models. *arXiv*. *https://arxiv.org/vc/arxiv/papers/2302/2302.02083v1.pdf*.

[36] Lanham, Tamera, Anna Chen, Ansh Radhakrishnan, Benoit Steiner, Carson Denison, Danny Hernandez, Dustin Li, Esin Durmus, Evan Hubinger, Jackson Kernion, Kamilė Lukošiūtė, Karina Nguyen, Newton Cheng, Nicholas Joseph, Nicholas Schiefer, Oliver Rausch, Robin Larson, Sam McCandlish, Sandipan Kundu, Saurav Kadavath, Shannon Yang, Thomas Henighan, Timothy Maxwell, Timothy Telleen-Lawton, Tristan Hume, Zac Hatfield-Dodds, Jared Kaplan, Jan Brauner, Samuel R. Bowman, Ethan Perez. 2023. Measuring faithfulness in chain-of-thought reasoning. *arXiv*. *https://doi.org/10.48550/arXiv.2307.13702*.

[37] LawGeex. 2018. Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts. *https://images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf*, last visited August 14, 2024.

[38] Legg, Michael, Felicity Bell. 2019. Artificial Intelligence and the Legal Profession: A Primer. *https://allenshub.unsw.edu.au/sites/default/files/inline-files/FLIPStream%20Primer_0.pdf*, last visited August 14, 2024.

[39] Law School Admission Council (LSAC). 2024. LSAT official website. *https://www.lsac.org/lsat*, last visited August 14, 2024.

[40] Chen, Lingjiao, Matei Zaharia, James Zou. 2023. How is ChatGPT's Behavior Changing over Time? *arXiv*. *https://doi.org/10.48550/arXiv.2307.09009*.

[41] Li, Shiyang, Jianshu Chen, Yelong Shen, Zhiyu Chen, Xinlu Zhang, Zekun Li, Hong Wang, Jing Qian, Baolin Peng, Yi Mao, Wenhu Chen, Xifeng Yan. 2022. Explanations from Large Language Models Make Small Reasoners Better. *arXiv*. *https://doi.org/10.48550/arXiv.2210.06726*.

[42] Lightman, Hunter, Vineet Kosaraju, Yura Burda, Harri Edwards, Bowen Baker, Teddy Lee, Jan Leike, John Schulman, Ilya Sutskever, Karl Cobbe. 2023. Let's Verify Step by Step. *arXiv*. *https://doi.org/10.48550/arXiv.2305.20050*.

[43] Liu, Hanmeng, Ruoxi Ning, Zhiyang Teng, Jian Liu, Qiji Zhou, Yue Zhang. 2023. Evaluating the Logical Reasoning Ability of ChatGPT and GPT-4. *arXiv*. *https://doi.org/10.48550/arXiv.2304.03439*.

[44] Martin, Lauren, Nick Whitehouse, Stephanie Yiu, Lizzie Catterson, Rivindu Perera. 2024. Better Call GPT, Comparing Large Language Models against Lawyers. *arXiv*. *https://doi.org/10.48550/arXiv.2401.16212*.

[45] National Association of Bar Examiners. 2024. Uniform Bar Examination. *https://www.ncbex.org/exams/ube*, last visited August 14, 2024.

[46] Ngo, Richard. 2023. Twitter post, March 28. *https://x.com/RichardMCNgo/status/1640568775018975232?s=20*, last visited August 14, 2024.

[47] OpenAI. 2022. Introducing ChatGPT. *https://openai.com/blog/chatgpt*, last visited August 14, 2024.

[48] OpenAI. 2023. GPT-4 Technical Report. *arXiv*. *https://doi.org/10.48550/arXiv.2303.08774*.

[49] OpenAI Development Forum. 2024. GPT-4 is getting worse and worse every single update. OpenAI, March 19. *https://community.openai.com/t/gpt-4-is-getting-worse-and-worse-every-single-update/508470*, last visited August 14, 2024.

[50] Perlman Andrew. 2023. The implications of ChatGPT for legal services and society. *Suffolk University Legal Studies Research Paper Series* 22–14. *http://dx.doi.org/10.2139/ssrn.4294197*.

[51] Petrović, Đorđe, Radomir Mijailović, Dalibor Pešić. 2020. Traffic Accidents with Autonomous Vehicles: Type of Collisions, Manoeuvres and Errors of Conventional Vehicles' Drivers. *Transportation Research Procedia* 45: 161–168.

[52] Price, Emily. 2023. OpenAI Acknowledges GPT-4 Is Getting 'Lazy', *PCMag*, 9 December. *https://www.pcmag.com/news/openai-acknowledges-gpt-4-is-getting-lazy*, last visited August 14, 2024.

[53] Coke, Edward. [1658]1977. Prohibitions del Roy. *Coke Reports* 12/64 *https://www.uniset.ca/other/cs4/77ER1342.html*, last visited August 14, 2024.

[54] Rabello, Alfredo Mordechai. 1/1974. Non Liquet: From Modern Law to Roman Law. *Israel Law Review* 9: 63–84.

[55] Razeghi, Yasaman, Robert L. Logan IV, Matt Gardner, Sameer Singh. 2022. Impact of pretraining term frequencies on few-shot numerical reasoning. 840–854 in *Findings of the Association for Computational Linguistics: EMNLP 2022*, edited by Yoav Goldberg, Zornitsa Kozareva, Yue Zhang. Kerrville: Association for Computational Linguistics.

[56] Rose, Janus. 2023. A Judge Just Used ChatGPT to Make a Court Decision. *Vice*, February 3. *https://www.vice.com/en/article/k7bdmv/judge-used-chatgpt-to-make-court-decision*, last visited August 14, 2024.

[57] Schafer, Burkhard. 2022. Legal Tech and Computational Legal Theory. 305–337 in *Law and Technology in a Global Digital Society: Autonomous Systems, Big Data, IT Security and Legal Tech*, edited by Georg Borges and Christoph Sorge. Cham: Springer International Publishing.

[58] Schauer Frederick. 2009. *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*. Cambridge, Massachusetts, London: Harvard University Press.

[59] Schauer Frederick, Barbara Spellman. 1/2017. Analogy, Expertise, and Experience. *The University of Chicago Law Review* 84: 249–268.

[60] Shanahan, Murray, Kyle McDonell, Laria Reynolds. 2023. Role-Play with Large Language Models. *arXiv*. *https://doi.org/10.48550/arXiv.2305.16367*.

[61] Shao, Yunfan, Linyang Li, Junqi Dai, Xipeng Qiu. 2023. Character-LLM: A Trainable Agent for Role-Playing. *arXiv*. *https://doi.org/10.48550/arXiv.2310.10158*.

[62] Spellman, Barbara, Frederick Schauer. 2012. Legal Reasoning. 719–735. *The Oxford Handbook of Thinking and Reasoning*, edited by Keith Holyoak and Robert Morrison. Oxford: Oxford University Press.

[63] Stokel-Walker, Chris. 2023. Generative AI is coming for the Lawyers. *WIRED*, February 21. *https://www.wired.co.uk/article/generative-ai-is-coming-for-the-lawyers*, last visited August 14, 2024.

[64] Turing, Alan. 1950. Computing Machinery and Intelligence. *Mind* 49: 433–460.

[65] Turpin, Miles, Julian Michael, Ethan Perez, Samuel R. Bowman. 2023. Language Models Don't Always Say What They Think: Unfaithful Explanations in Chain-of-Thought Prompting. *arXiv*. *https://doi.org/10.48550/arXiv.2305.04388*.

[66] U.S. Centers for Disease Control and Prevention (CDC). 2024. Global Road Safety, May 16. *https://www.cdc.gov/transportation-safety/global/index.html#:~:text=Each%20year%2C%201.35%20million%20people,Global%20Status%20Report%20on%20Safety*, last visited August 14, 2024.

[67] Vaswani, Ashish, Noam Shazeer, Niki Parmar, Jakob Uszkoreit, Llion Jones, Aidan N. Gomez, Lukasz Kaiser, Illia Polosukhin. 2017. Attention Is All You Need. Advances in Neural Information Processing Systems. *arXiv*. *https://doi.org/10.48550/arXiv.1706.03762*.

[68] Verheij, Bart. 2007. A Coffeehouse Conversation on the Van den Herik Test. 155–163 in *Liber Amicorum ter Gelegenheid van de 60e Verjaardag van prof. dr. H. Jaap van den Herik*. Maastricht: Maastricht ICT Competence Center.

[69] Verheij, Bart. 2021. A Second Coffeehouse Conversation on the Van den Herik Test. 101–114. *Liber amicorum ter gelegenheid van het emeritaat van prof. dr. Jaap van den Herik*. Amsterdam: Ipskamp Publishing.

[70] Wei, Jason, Xuezhi Wang, Dale Schuurmans, Maarten Bosma, Brian Ichter, Fei Xia, Ed Chi, Quoc Le, Denny Zhou. 2022a. Chain-of-Thought Prompting Elicits Reasoning in Large Language Models. *arXiv*. *https://doi.org/10.48550/arXiv.2201.11903*.

[71] Wei, Jason, Yi Tay, Rishi Bommasani, Colin Raffel, Barret Zoph, Sebastian Borgeaud, Dani Yogatama, Maarten Bosma, Denny Zhou, Donald Metzler, Ed H. Chi, Tatsunori Hashimoto, Oriol Vinyals, Percy Liang, Jeff Dean, William Fedus. 2022b. Emergent Abilities of Large Language Models. *arXiv*. *https://doi.org/10.48550/arXiv.2206.07682*.

[72] Wolfram, Stephen. 2022. What Is ChatGPT Doing ... and Why Does It Work? *https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/*, last visited August 14, 2024.

[73] Wu, Zhaofeng, Linlu Qiu, Alexis Ross, Ekin Akyürek, Boyuan Chen, Bailin Wang, Najoung Kim, Jacob Andreas, Yoon Kim. 2023. Reasoning or Reciting? Exploring the Capabilities and Limitations of Language Models Through Counterfactual Tasks. *arXiv*. *https://doi.org/10.48550/arXiv.2307.02477*.

[74] Yu, Zihan, Liang He, Zhen Wu, Xinyu Dai, Jiajun Chen. 2023. Towards Better Chain-of-Thought Prompting Strategies: A Survey. *arXiv*. *https://doi.org/10.48550/arXiv.2310.04959*.

[75] Zhou, Yongchao, Andrei Ioan Muresanu, Ziwen Han, Keiran Paster, Silviu Pitis, Harris Chan, Jimmy Ba. 2022. Large language models are human-level prompt engineers. *arXiv*. *https://doi.org/10.48550/arXiv.2211.01910*.

Article history:
Received: 15. 7. 2024.
Accepted: 5. 9. 2024.

UDC 342.726-055.29(497)

CERIF: S 112

DOI: 10.51204/Anali_PFBU_24303A

Nikoletta PIKRAMENOU, PhD[*]

Jelena SIMIĆ, PhD[**]

INTERSEX RIGHTS IN THE WESTERN BALKANS AND GREECE[***]

In 2022 Greece became the fifth country in the world to ban harmful interventions and treatments on intersex infants and children. Previously, Malta, Portugal, Germany and Iceland also legally banned harmful interventions on intersex persons. A crucial difference between Greece and the rest of the aforementioned countries is that it is a Christian Orthodox country located in Southeastern Europe, on the Balkan Peninsula. Drawing from a contextual approach to law, in this comparative analysis the authors will use „contextuality" to explore the meaning behind legal developments that took place in Greece regarding intersex rights and how they could potentially impact the overall situation of intersex rights in the Balkans. In addition, with this paper the authors seek to relocate the dominant focus of intersex rights from Western and Northern Europe with the aim to boost awareness of intersex issues in the Western Balkan region, especially Serbia.

Key words: *Greece. – Intersex rights. – Human rights. – Sex characteristics. – Western Balkans.*

---

[*] Postdoctoral Researcher, University of Warsaw Krakowskie Przedmieście, Poland, *n.pikramenou@uw.edu.pl*, ORCID iD: 0009–0001–7722–1755.

[**] Associate Professor, Union University School of Law Belgrade, Serbia, *jelena.simic@pravnifakultet.rs*, ORCID iD: 0000–0003–2702–4320.

[***] This paper was presented at the International Interdisciplinary and Transdisciplinary Conference „The Universal Declaration of Human Rights at 75: Rethinking and Constructing its Future Together", which took place from 6 to 8 December 2023 in Ghent.

1. INTRODUCTION

When we talk about „our body“, it is quite natural for us to think and conclude that we can make independent decisions about „our body“ and parts of „our body“. It represents an utterly intuitive feeling about owning one's own body. However, is that really so? Do we always have the opportunity to independently decide what happens to our body? Unfortunately – no, and that is exactly where the story of intersex begins (see Dreger, 2000; Carpenter, 2018a; Monro *et al.* 2021).

Intersex is an umbrella term used to describe a wide range of natural bodily variations (see UN Free & Equal). The United Nations (UN) defines intersex persons as „people who are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.“ It means that a child may be born „with a large clitoris and a shallow or absent vagina, with a micropenis and an opening in the scrotum that may resemble a vagina, with typical male or female external genitalia and atypical internal sex organs (such as retained testes in a person with typical female genitalia), with XY chromosomes and a typical female body, or with other characteristics that differ from the anatomical and hormonal features that doctors, nurses, and parents have been trained to expect.“ (Tamar-Mattis 2013, 64). In addition to the typical XX and XY chromosome pairs, it is possible for a child to be born with several chromosomal patterns, and this can also result in a number of internal, external, and secondary sex characteristics. Also, it can happen that certain atypical sex characteristics are discovered only at puberty, for example, when a girl enters puberty and menstruation does not occur. There is therefore an entire spectrum of biological, genetic, chromosomal, anatomical and hormonal features with which a child can be born (see also Council of Europe 2015; Carpenter 2018b; Liao 2022).

The hiding, shame and fear of having a child who is „different“ from the majority has created the circumstances where doctors perform harmful interventions and/or treatments with irreversible effects for the person, just so that they would conform to the female/male binary. Such interventions are most often performed immediately after birth or during early childhood, and are based on societal and medical notions according to which a person's external genitals do not look „normal“ enough to pass as „male“ or „female“ (Ghattas 2019, 10; see also Creighton 2001; Behrens 2020). It should be noted that harmful interventions and treatments cause both psychological and physical trauma to an intersex person. Many of those who underwent surgery have claimed that these operations led to a reduction or complete loss of sexual drive, numerous infections, and scars. Finally, the dominant

medical approach, based on secrecy and concealment of information, causes great psychological trauma, both for the intersex person personally and for their family members because it leads to a sense of shame, reinforcing the presence of a culture of sexual „abnormalities", and represents a violation of the autonomy of personality (see Crouch *et al.* 2004; Monro *et al.* 2017; Ghattas 2019).

With regards to human rights violations that intersex persons face in other spheres of life, in 2024, the European Union Agency for Fundamental Rights (FRA) published the third edition of its survey on LGBTIQ people, providing up-to-date information on intersex people in the 27 EU Member States and EU candidate countries Albania, North Macedonia, and Serbia. The survey showed that intersex people face alarmingly increasing levels of violence in their everyday life. Data on the performance of medical interventions and treatments showed that more than half of the intersex respondents who were subjected to surgery (57%) did not provide their own or their parents' informed consent prior to their first surgical treatment to modify their sex characteristics, 61% of intersex respondents reported having experienced discrimination because of being LGBTIQ in at least one area of life in the year prior to the survey, and 74% of intersex respondents said that they experienced hate-motivated harassment in daily life in the 12 months prior to the survey (FRA 2024).

The Council of Europe (CoE), which all the analyzed countries belong to, has repeatedly called member states to prohibit harmful medical practices, to facilitate the recognition of intersex individuals before the law through several measures, including legal gender recognition and introducing „sex characteristics" as a specific ground in equal treatment and hate crime legislation, „or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination" (Agius 2017; Parliamentary Assembly of the Council of Europe 2017). Similarly, in its latest resolution, the UN Human Rights Council called on member States to enhance efforts to combat discrimination, violence and harmful practices against intersex people and to work toward fulfilling the enjoyment of the highest attainable standard of physical and mental health for intersex people (A/HRC/55/L.9). These interventions had previously been labelled as „torture" by the United Nations Special Rapporteur on Torture (Méndez 2013, 19). At the EU level, the latest Resolution adopted by the EU Parliament has condemned „sex-normalizing treatments and surgery" and welcomed laws that prohibit such interventions while encouraging other member states to introduce similar frameworks. A EP resolution also calls for the full depathologization of intersex: „the category of 'gender incongruence' in childhood pathologises non-gender-

normative behaviours in childhood; calls, therefore, on the Member States to pursue the removal of this category from the ICD-11, and to bring future ICD revision into line with their national health systems“ (EP, 2018/2878(RSP)).

In this paper, the authors will use legal developments regarding intersex issues in Greece as a key starting point for a broader and human rights-based discussion regarding the current situation of intersex people in Western Balkan countries and examine whether such developments could directly impact intersex legislation of the countries of the Western Balkans. Following a contextual approach, legal texts and actions will be explored with particular attention given to the broader context (Forest 2000), which can be social, historical, geographic, or religious (Selznick 2003; Barnes 2018). Therefore, the authors use the case of Greece, which, although a member of the European Union (EU), shares numerous historical, social and cultural circumstances with Western Balkan countries, in addition to the geographical connection and religion with some of them. The close relationship that Greece has with Western Balkan countries is clearly depicted in its external relations as the Ministry of Foreign Affairs states: „Greece, as a member of the European Union (1981), NATO (1952) and other European and regional institutions and fora, seeks to consolidate stability and security and the development of the Western Balkans region, in accordance with the principle of good neighborly relations and respect for international law. To this end, it firmly and actively supports the European perspective of the Western Balkans as a strategic objective“ (Ministry of Foreign Affairs of Greece 2024, translated by author).

With this in mind, starting from Greece and the legal developments that took place in this country regarding intersex, this paper provides readers an insight into the anti-discrimination legislation of the Western Balkans countries, showing that the grounds of „sex characteristics“ have only recently become the basis for the prohibition of discrimination, allowing intersex people to become legally recognized in these legislations. At the same time, the authors point out that the problems faced by intersex people and their families in Western Balkans (such as absence of the prohibition of harmful interventions and treatments of intersex infants and children, absence of standardized and transparent procedures for dealing with intersex children, as well as potential problems related to registration of sex/gender of intersex children in the birth certificate) are not only legally unregulated in the Western Balkans countries, but they are not even recognized by the competent institutions as issues that need to be addressed.

Lastly, since the majority of sources on intersex issues and the law in Europe until now reflects the situation of intersex people only in Western and Northern European countries (see e.g., Monro *et al.* 2021), authors see

this shift of perspective – from the countries of Western and Northern Europe to the countries of the Western Balkans – as essential for creating awareness regarding the situation of intersex people in the region and contributing to the protection of human rights and the promotion of just societies.

2. SETTING THE SCENE: CRISES AND THEIR IMPACT IN HEALTHCARE

2.1. Greece

Greece, just like the countries of the Western Balkans, has had turbulent historical periods. Since its liberation from the Ottoman Empire, the Greek state has declared bankruptcy multiple times and all bankruptcies have been directly or indirectly linked to important political developments that have marked political and social life (Totsikas 2015).[1] In 2014, the Center of Research for Equality Issues (Κέντρο Ερευνών για Θέματα Ισότητας) published a study on gender and how high levels of poverty caused by the financial crises, as well as high unemployment rates, have negatively impacted gender issues, since only matters linked with the state's economy were heavily prioritized.

With regards to healthcare in particular, based on the findings of a study conducted by Dianeosis, the budget allocated to healthcare for the period 2010–2014 was decreased by around 60% (Georgakopoulos 2016). This has severely impacted the quality of medical care services, especially for the unemployed and pensioners, and access to medicine has become problematic, which has led to an increase in private health care expenditure, financially burdening all income groups (Georgakopoulos 2016). According to Souliotis *et al.* (2018, 689–94), the problematic financial, organizational and operational framework of the healthcare system in the country existed already before the 2009 financial crisis, with citizens ensuring access to services by paying the relevant costs themselves, but the crisis led to the adoption of necessary measures that should have been taken when the economic environment could have supported such measures. In such

[1] The first official Greek bankruptcy was in 1827, and three more followed in 1843, 1893, and 1932. Greece is an Orthodox Christian state as mentioned in the Constitution, which is „in the name of the Holy and Consubstantial and Indivisible Trinity." The most recent financial crisis was in 2009 where the country did not go bankrupt, but it had to commit itself to a policy that, by definition, resulted in the lowering of the standard of living of a large portion of the population (see Karalis 2016, 9).

circumstances, the protection of patients' rights and especially the rights of intersex people in healthcare institutions are not only neglected, but also seriously violated.

Available research on LGBTQ+ persons' experiences of the healthcare system was published in 2017 (Giannou 2017) and collected data from LGBT people and health workers showed that homophobia and transphobia are key factors contributing to systematic exclusion and limiting access to health services (see also FAROS 2014–2020). This information, coupled with findings published by the Council of Europe (CoE), the European Commission of Racism and Intolerance (ECRI), and the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), shows that the situation for intersex people does not differ from the experiences of LGBT people. Specifically, in 2022, the ECRI stated in its report on Greece that „as regards in particular intersex persons, notably children, they may face serious forms of discrimination and intolerance, including from medical professionals who reportedly often recommend abortion of intersex children to expecting parents, while medically unnecessary surgery on intersex children is also common" (ECRI 2022, 5). In its submission to the GREVIO, the Intersex Greece organization reported incidents of hate speech and violence against intersex people that took place in both public and private medical settings and highlighted the need for the introduction of reporting mechanisms at hospitals for intersex women and girls who are victims of violence (Intersex Greece 2022, 6). After the submission of the report, the GREVIO published its Baseline Evaluation Report for Greece and stated that „specialist support services are not able to meet the needs of LBTI women, in particular intersex women victims of violence, who are often referred to specialist NGOs by the network of services," including intersex women for the first time (Grevio 2023, 37 para. 137).

2.2. Western Balkans

The situation in the Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, and Kosovo*[2]) has developed in a slightly different way. To grasp the context in these countries, one must take into consideration the political circumstances that have significantly shaped the social and economic development of the Western

[2] In this article we will use the official designation Kosovo*. This designation is without prejudice to positions on status, and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence.

Balkan countries, including the attitude towards respect for fundamental human rights of minorities. It is worth noting that most of the Western Balkan countries had to struggle simultaneously with various processes of radical transformations after the fall of the Berlin Wall (from the late 1980s), including: political transformation (transition from communism to democracy), economic transformation (transition from a planned to a market economy), and in some cases, transformation of the state (establishment of new national states in cases of disintegration, secession of states or disappearance of a state, as was the case with Yugoslavia after 1991) (Simić 2019, 2). Unfortunately, Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia had to go through all three transformation processes simultaneously. Even today, in the third decade of the 21st century, all these countries continue to struggle due to unfinished transformation processes in all areas, only one of them being respect for the fundamental human rights of intersex people. Therefore, all these changes that took place at the state level in all Western Balkan countries reflected generally on the patient–doctor relationship and led to the collapse of the quality of the provided healthcare services and the absence of any transparency in the work of health professionals. The patient was completely subordinated to the will of the doctor who treated them, and it was not even possible to speak of legal protection of the autonomy of the patient's personality and respect, especially regarding issues surrounding the protection of bodily integrity of intersex people. Special legal norms on patient rights or protection of the patient did not even exist until 2005, when the Western Balkan countries gradually began to adopt special laws on the rights of patients (Simić 2013, 146). The same is the case with anti-discrimination laws that have only been gradually adopted in the Western Balkan countries since 2004.[3]

[3] Kosovo* adopted the Anti-Discrimination Law in 2004, followed by Serbia and Bosnia and Herzegovina in 2009, Montenegro, Albania and the former Yugoslav Republic of Macedonia (now Republic of North Macedonia) in 2010. See: Kosovo's Anti-discrimination Law No. 2004/3. Adopted by the Assembly 19 February 2004; Serbia's Law on Prohibition of Discrimination, *Official Journal of the Republic of Serbia* 22/09 dated March 26, 2009; BiH's Law on Prohibition of Discrimination, *BiH Official Gazette* 59/09, published on 28 July 2009; Montenegro's Law on the Prohibition of Discrimination, *Official Gazette of Montenegro* 46/2010, 40/2011 – as amended, 18/2014, and 42/2017; Albania's Law No. 10 221 dated 4 February 2010, on Protection from Discrimination; Macedonia's Law on Prevention of and Protection Against Discrimination *Official Gazette of the Republic of Macedonia* 50/2010, 44/2014, 150/2015, 31/2016, and 21/2018; Decision of the Constitutional Court of the Republic of Macedonia U. No. 82/2010, dated 15 September 2010, published in the *Official Gazette of the Republic of Macedonia* 127/2010.

3. TOWARDS THE PROTECTION OF INTERSEX RIGHTS: FIRST STEPS

3.1. Greece

LGBTI rights and intersex rights in particular are considered to be well-protected in Greece, especially when compared to other countries in Europe, based on the findings of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe 2023 Rainbow Map, which serves as a tool for examining how safe, free, and equal LGBTI people are in Europe. Interestingly, Greece climbed to 13th place after it introduced a law on the ban of harmful practices and treatments on intersex children, up from 17th in 2022 (ILGA-Europe 2023). Rapid legal and policy developments in Greece occurred after the publication of the National Strategy for the Equality of LGBTQI+ people in 2021.

The Greek National Strategy followed right after the European Union's LGBTIQ Equality Strategy 2020–2025 and for the first time, it incorporated an analysis of intersex issues marking the first instance where intersex issues were distinctly separated from transgender ones (see Pikramenou 2024, 11). Nonetheless, efforts to protect intersex rights in Greece started far before the Strategy, in 2016, as analyzed in the following section, but it remains unclear whether these laws have been properly implemented. In its last report on Greece, the ECRI mentioned that racism and intolerance against intersex still exists, and mentioned specific cases. „during its visit, the ECRI delegation heard shocking testimonies about some teachers' statements to intersex pupils (e.g. 'you should not exist')" (ECRI 2022, 12). This could be due to the fact that prior to 2021, trans issues used to be confused with intersex and this occurred especially around 2017, when the law on the legal gender recognition for trans people was passed (see Section 5 below). For instance, in 2015 the Greek National Commission for Human Rights published the report „Trans persons and legal recognition of gender identity" which in an effort to include intersex issues, resulted in the use of the words intersex (Greek διαφυλικός, diafylikos) and trans (Greek διεμφυλικός, diemfylikos) interchangeably and in an unclear manner (see National Commission for Human Rights of Greece 2015). It also used the word „middlesex" (Greek μεσόφυλος, mesofylos) instead of „intersex".

The Strategy was published by a committee that was formed in 2021, by decision of the prime minister, and was composed of academics, members of civil society and government officials. This initiative coincided with the establishment of the organization Intersex Greece intersex, meaning that the intersex movement was stronger compared to the previous years and

therefore the Strategy was based on a submission that the Committee received from the organization (see Intersex Greece 2021). The Strategy remains the only policy document to date to explicitly mention intersex issues, dedicating almost three pages to the situation of intersex people in the country. The text focuses on several issues, including the revision of textbooks in education, discriminations that intersex people face in employment, challenges faced by intersex refugees, the need for intersectional and intersectoral cooperation when working on intersex issues, provision of health care by specialized multidisciplinary teams, provision of adequate psychosocial support mechanisms (National Strategy for LGBTQI+ people 2021). The most important added value of this Strategy is that the terminology used regarding intersex is proper, it does not mislead the readers, and it does not perpetuate the stigma and pathologisation surrounding intersex issues as prior documents did in the past. As a result, this could potentially combat past confusion surrounding intersex issues and contribute to the proper implementation of the Strategy, as well as the existing frameworks on intersex, and protect intersex people against human rights violations.

3.2. Western Balkans

On the other hand, in the Western Balkan countries intersex people were completely legally invisible prior to 2016, and the term intersex appeared exclusively as the letter „I“ in the acronym LGBTI, but not as a separate term that would be the subject of any legal or other analyses. The intersex community almost did not exist, and the main problem was the impossibility of obtaining any information about intersex from the competent state authorities.

The little data that can be found at all shows that, for example, the ECRI in its reports focused on the practice of intersex children in health institutions, among other things. In the sixth monitoring cycle, in 2020 the ECRI covers the situation of intersex people in Albania. The ECRI was informed by the authorities that it is not mandatory in Albania to carry out so-called „sex-normalizing“ surgery on newly-born intersex babies and that such operations are, in fact, not carried out currently in Albania (ECRI 2020, 13). In North Macedonia, according to ECRI's information from 2023, one hospital in Skopje (the only one in North Macedonia to do so) carries out „sex-normalizing“ operations on intersex children, with the parents' consent, if it is certified that they are medically necessary (ECRI 2023, 12). In Bosnia and Herzegovina, ECRI notes a dearth of information on the situation of intersex people, including children, and reports that no official guidance or

rules exist to regulate „sex-normalizing“ operations on intersex children, leaving it up to each individual medical doctor to decide on what advice to give (ECRI 2024a, 12). According to ECRI's information from 2024, in Serbia no official data on intersex people exists. There is also no official data on the carrying out of so-called „sex-normalizing“ surgeries performed on intersex children in the country (ECRI 2024b, 15).

When talking about Serbia, we can add that prior to 2021, no laws or bylaws mentioned intersex people. From the annual reports by independent bodies (the Ombudsman and the Commissioner for the Protection of Equality), reports by civil society organizations, or following the media on cases of discrimination, it could be concluded that discrimination exists in the Serbia, in various areas, but none of those reports presented the needs of the group of intersex people or analyzed them separately (Gayten–LGBT 2019, 59). The Strategy for the Prevention and Protection against Discrimination, just like the Action Plan of the Republic of Serbia for the implementation of the Strategy for Prevention and Protection against Discrimination for the 2014–2018 period failed to specifically mention intersex people or intersex issues.[4]

Speaking of an exclusively medical approach of intersex people in the Western Balkans, interestingly, data regarding systematic, i.e., institutionalized clinical interest in intersex people and intersex issues, can only be found in Serbia. According to data presented by Gayten–LGBT, in the period between 1986 and 1993, 84 intersex children and adolescents received medical care at the University Children's Hospital in Belgrade (Gayten–LGBT 2019, 83). The first scientific monograph on the subject of intersex, which to this date is the only Serbian-language scientific study of its kind, was published by Dr. Zoran Krstić, pediatric surgeon and urologist, based on the results of independently conducted research in 1994 (Gayten–LGBT 2019, 84). In his work, he advocated the position that the treatment of children with „gender differentiation disorders“[5] is very difficult and often

[4] See Strategy of Prevention and Protection Against Discrimination of Republic of Serbia for the 2014–2018 period, *Official Gazette of the Republic of Serbia* 60/2013.

Also, see the second report on monitoring the implementation of the Action Plan for the implementation of the Strategy of Prevention and Protection Against Discrimination for the 2014–2018 period, *Official Gazette of the Republic of Serbia* 107/2014.

[5] Note that this language is outdated and pathologizing.

controversial and subject to evolutionary attitudes and techniques, but he did not advocate the position that surgical interventions related to „gender differentiation“[6] are mutilating and damaging to the patient.

4. ANTI-DISCRIMINATION LEGISLATION: A KEY POINT FOR THE PROTECTION OF INTERSEX RIGHTS?

4.1. Greece

As previously mentioned, several legal developments regarding intersex issues in Greece occurred primarily from 2016 to 2019, when several amendments were introduced to add „sex characteristics“ to various laws. First, Law No. 4443/2016 enshrined „sex characteristics“ as one of the grounds for protection against discrimination in the field of employment, incorporating Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and Directive 2014/54/EU on measures to facilitate the exercise of workers' rights in the context of freedom of movement for workers. In 2017, Article 1 of Law 927/1979 was amended by para. 2 of Article 7 of Law 4491/2017 and added „sex characteristics“ to the legal framework on hate speech. In 2019, Law No. 4619/2019 amended the Penal Code and Article 82A on crimes with racist characteristics and added „sex characteristics“ to the list of aggravating circumstances. It seems that the fact that Greece is a member of the European Union played a pivotal role for the implementation of most of the abovementioned reforms, as they followed after the publication of EU Directives and the LGBTQI+ Equality Strategy.

In 2022, Greece became the 5th country in the world and the 4th in the European Union to ban „sex-normalizing“ procedures and treatments on intersex infants and children. More specifically, Articles 17–20 of Law 4958/2022 „Reforms in medically assisted reproduction and other urgent regulations“ prohibit medical procedures and treatments performed on intersex children under the age of 15. Such interventions can only be performed on intersex minors who have reached the age of 15 and only with their free and informed consent. In addition, prior authorization will have to be granted by the relevant County Court, following the opinion of

[6] Note that this language is outdated and pathologizing.

an Interdisciplinary Committee composed of experts on intersex. If medical „procedures and treatments" resulting in the sex of the intersex person being inconsistent with the already registered sex are carried out, it is possible to correct the registered sex by court order. The law provides for a minimum of 6 months of imprisonment, loss of license and a fine for doctors who perform interventions on intersex minors without authorization.

The legal ban of harmful „sex-normalizing" procedures and treatments could have been achieved earlier in 2017, as it was included in the Bill for Law 4491/2017 for the legal gender recognition of trans people, but the provisions on intersex in this Bill were removed when by the Drafting Committee the draft text was sent to the Ministry of Justice and hence they never reached the parliament (Pikramenou 2024, 6). Minister of Justice Stavros Kontonis had mentioned during the voting process of the Bill for Law 4491/2017 that another bill on intersex issues would follow after the adoption of Resolution 2191 by the Parliamentary Assembly of the Council of Europe (Pikramenou 2024, 6–7) but this did not happen. Interestingly, the articles of the bill concerning intersex infants and children were adopted almost unanimously and there was no opposition from the Church, as had been in the case of the legalization of same-sex marriage. The Orthodox Church in Greece seems to oppose mainly and publicly „homosexuality", for instance, prior to the voting of the Bill on same-sex marriage in 2024, the Church had published a text stating that the Bill was „subverting Christian marriage and the institution of the traditional Greek family, changing its model" and that „homosexuality has been condemned by the entire ecclesiastical tradition, beginning with the Apostle Paul" (LifO 2024, translated by author).

The Greek law is considered as a good practice, since it contains characteristics that other legal frameworks do not.[7] For instance, it is the only law, along with the Maltese law,[8] that criminalizes those performing medical interventions and treatments on intersex children. The Interdisciplinary Committee is not composed only of scientific experts but it includes a member of the civil society, in contrast to German law for which civil society

[7] This analysis includes laws that were introduced before the Greek law and excludes the Spanish law as it was a subsequent development. For more information on the Spanish law, see the most recent in depth-analysis published by OII Europe: Spain becomes fifth EU country to ban IGM *https://www.oiieurope.org/spain-becomes-fifth-eu-country-to-ban-igm/*, last visited July 19, 2024.

[8] Malta amended the GIGESC Act with Act No. XIII 2018, to introduce punishment by imprisonment not exceeding five years or a fine ranging from EUR 5,000 to EUR 20,000 in case of the performance of medical interventions rooted in social factors, without the consent of the intersex minor.

has lately expressed concerns that the law includes gaps[9] that could lead to the violation of bodily integrity of intersex persons. The law prohibits all interventions and treatments, contrary to Icelandic law,[10] which does not include a universal prohibition, and it uses correct language, in contrast to Portuguese law,[11] which is problematic in this regard. Nonetheless, the proper implementation of the Greek law on the ban of medical interventions and treatments is still not guaranteed (Pikramenou 2024) and the same has occurred with previous laws on anti-discrimination and hate against intersex. As stressed by ECRI „both interviews with relevant experts and members of the intersex community, as well as FRA's (2020) data, indicate that intersex persons all too often fall victims of discrimination in Greece. The stance and perception of Greek society towards intersex people moves between ignorance, (medical) pathologisation and hostility. Hiding being intersex and/or harassment and discrimination on the grounds of sex characteristics in everyday life, particularly in health, education, and the employment sector, appear to be constantly present aspects of an intersex person's life in Greece"[12] (ECRI 2022, para. 32).

[9] Recently, OII Germany and OII Europe published a joint statement on deeply concerning German Family Court decision authorizing an intervention on an intersex minor (OII Germany and OII Europe 2024).

[10] For more information see Law No. 154. *https://www.althingi.is/altext/pdf/151/s/0721.pdf,* last visited July 19, 2024.

[11] For more information see the Law on Right to Self-Determination of Gender Identity and Gender Expression and Protection of Everyone's Sex Characteristics No. 38/2018. *https://diariodarepublica.pt/dr/legislacao-consolidada/lei/2018–115935378,* last visited July 19, 2024.

[12] At the same time, Intersex Greece noted in its report „Hate speech against intersex people in Greece" that „the implementation of laws –especially the laws on hate speech and racist crimes– remains problematic, as there is no monitoring mechanism" (Vouvaki *et al.* 2023, 14–18). The organization stated that the statistics that the Greek police shared with them regarding incidents of violence recorded during the 2015–2021 period were confusing as the incidents against intersex people were recorded under „gender identity/sex characteristics" and appear to be too low (Vouvaki *et al.* 2023, 16) while the European Union Fundamental Rights Agency (FRA) published a survey in 2019, according to which in the previous 5 years 45% of intersex people from Greece who responded to their questionnaire had suffered physical or sexual violence (FRA 2020).

4.2. Western Balkans

In the Western Balkan countries, intersex people have started to gain legal visibility only recently, exclusively through anti-discrimination legislation. Similarly in this case, things have gradually changed in favor of intersex people, and the changes came almost solely thanks to strong external political influences, which this time came from the EU, and due to the aspirations of the Western Balkan countries to speed up their processes of association with the EU as much as possible. However, it turned out that after the adopted legal solutions, nothing was done in the Western Balkan countries to enact comprehensive measures to raise awareness on how to respect and protect the human rights of intersex people, while at the same time there is very harsh hate speech in the public arena. Yet, to grasp the full picture, we should first focus on how the changes to the anti-discrimination laws progressed.

The first country of the Western Balkans to provide protection for intersex people in its anti-discrimination legislation was Bosnia and Herzegovina, which in 2016 adopted the Amendments to the Law on the Prohibition of Discrimination and introduced sex characteristics as a basis for the prohibition of discrimination (Pandurević 2017, 15). In practice, however, this important legal innovation has not brought much to this day, but seems to have remained only declarative in nature. Reports by nongovernmental organizations dealing with the protection of human rights state that competent institutions within Bosnia and Herzegovina, such as the Ombudsman, the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, entity and cantonal ministries of health, do not have relevant information about the needs of intersex people, nor have they been addressing this issue. Also, there are no clear medically established procedures for dealing with intersex children, and no information can be found to inform parents or guardians of intersex children about the risks of certain medical interventions and treatments of intersex children (Burić 2020, 35; Brković *et al.* 2023, 46).

In Montenegro, one of the key laws establishing a system of protection against discrimination was adopted in 2010. As in other Western Balkan countries, „sex characteristics“ were not recognized as a basis for prohibiting discrimination. However, shortly after its adoption, the Law was amended twice, first in 2014 and then in 2017, the reason being the negative opinion of the European Commission, which stated that the law was not fully compatible with the EU Acquis Communautaire (Đuković 2022, 83). With the latest changes, in 2017 (a year after Bosnia and Herzegovina),

Montenegro introduced „intersexual characteristics“[13] as one of the grounds for the prohibition of discrimination.[14] (Art. 2, para. 2, of the Montenegrin Law on Prohibition of Discrimination). The law defines that „[i]ntersexual characteristics are understood as different physical characteristics of a person (which can be chromosomal, hormonal and/or anatomical) that do not correspond to strict medical definitions of a man or a woman and can be present in varying degrees“ (Art. 19, para. 6, of the Montenegrin Law on Prohibition of Discrimination, translated by author).

In Albania intersex people are still not legally visible, however, in 2020, the Ministry of Health approved a specially prepared Medical Protocol for the Assessment of Children with Atypical Genital Development (OII Europe 2020; Jakaj 2022, 173). This protocol stipulates that medical interventions on children immediately after birth can only be performed in cases where it is necessary for health reasons and not, as had previously been the case, by decision of the parents (OII Europe 2020). Despite being criticized by representatives of organizations for the protection of the rights of intersex individuals, this protocol, which recognizes the human rights of intersex individuals, has been the most progressive step in the country's post-communist history, especially having in mind that medical protocols are rare in Albania. Unfortunately, in Albania even today, as is the case in the Republic of Northern Macedonia, where the situation is the worst compared among the Western Balkan countries, anti-discrimination laws do not recognize „sex characteristics“ as grounds for discrimination, so there is no direct legal protection for intersex persons. According to data from December 2023, published by ILGA Europe, North Macedonia adopted the new Equality and Anti-discrimination Strategy in May 2022, but this Strategy mentions LGBTI people only once, in the section on preventing hate speech, violence and other forms of discrimination (ILGA Europe 2024). It is interesting to note, contrary to Greece, which has not opposed LGBTI as a whole nor intersex but mainly same-sex couples, in North Macedonia, legislative initiatives during 2022 and 2023, were demonized by the Orthodox Church which launched a misinformation campaign against the Gender Equality Law and the amendment of the Birth Registry Law regarding legal gender recognition. In addition to gender equality, the Church also attacked the concept of gender identity and the Istanbul Convention (ILGA Europe 2024). As a reminder in Serbia, which is also a Christian Orthodox country, the negative attitude of

[13] Note that in order to align with international human rights standards the word „sex characteristics“ should be used in anti-discrimination frameworks.

[14] Law on Prohibition of Discrimination, *Official Gazette of Montenegro* 46/2010, 40/2011 – state law, 18/2014, and 42/2017.

the Church was particularly visible during the public debate on the adoption of the Law on Prohibition of Discrimination in 2009 when the Church nearly prevented its adoption (Jovanović 2022, 440).

In the case of Kosovo*, a new law on Gender Equality was adopted in 2015.[15] It includes an updated definition of gender identity protecting „the gender related identity, appearance or other gender related characteristics[16] of a person (whether by way of medical intervention or not), with our [sic] without regard to the person's designated sex at birth" (ERA 2016). The Law on Gender Equality differentiates between the two, defining sex as „biological and physiological characteristics that define men and women" and gender as a role or identity „that is learned, changed over time, and varies widely within and across cultures" (Law No. 05/L –020 on Gender Equality Article 3, paragraph 1, point 1.9., translated by author). At the beginning of 2016 it was made public that the Kosovo Clinical Centre had undertaken several surgical interventions on intersex minors (ERA 2016). The practice of harmful interventions and treatments performed on intersex infants was not specifically required by law but could be performed with parental consent. Also, in 2019, the Kosovo* media reported about the case of a „double-gendered child"[17] (Kika 2019). On that occasion, the Kosovar doctors explained that there was no standard process by which parents are told that their baby is intersex and that no doctor explicitly provides them with this information or further explanation. Instead, a group of physicians including an endocrinologist, geneticist, radiologist and pediatric surgeon tell the parents distinctly about the different elements that are linked to their own field of specialization (Kika 2019).

On the other hand, in the Republic of Serbia, legal protection was granted to intersex people through two laws: the Gender Equality Law[18] and the Law on Prohibition of Discrimination.[19] With the adoption of amendments to the Law on Prohibition of Discrimination in 2021, „sex characteristics" were introduced into the law as grounds for the prohibition of discrimination,

[15] Law No. 05/L –020 on Gender Equality is approved by Assembly, dated 28 May 2015, and promulgated by the Decree of the President of the Republic of Kosovo No. DL-016–2015, dated 15 June 2015.

[16] Note that in order to align with international human rights standards the word „sex characteristics" should be used in anti-discrimination frameworks.

[17] Note that this language is outdated and stigmatizing.

[18] Law on Gender Equality of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 52, of 24 May 2021.

[19] Law of Prohibition of Discrimination of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 22/2009, and 52/2021.

which made the Republic of Serbia, in addition to Bosnia and Herzegovina and Montenegro, the third country in the region to recognize „sex characteristics" as grounds for discrimination. Article 22 of the Law specifically prohibits discrimination against children based on sex characteristics.[20] In 2022, Serbia also adopted the Strategy for Prevention and Protection against Discrimination for the 2022–2030 period, which represents an umbrella strategy in this area, as well as the Action Plan for the implementation of this Strategy.[21] The Strategy, although concisely, for the first time presents and analyzes the position of intersex people in Serbia (Serbian Strategy of Prevention and Protection against Discrimination, 78).

Despite the fact that we can now say that the normative framework is satisfactory in regard to the prohibition of discriminatory behavior towards intersex people, their full equality has not yet been ensured in practice. The combination of individual and/or family isolation, social and institutional stigma, discrimination and violence, and traumatic experiences associated with medicalization are reasons for most intersex people to remain „invisible". In its latest annual report, for 2023, the European Commission states that due to a lack of trust in institutions, cases of violence and discrimination against LGBTIQ persons are often not reported, and that „[i]ntersex persons remain invisible both socially and legally". Hate speech, threats and violence continue to be directed at lesbian, gay, bisexual, transgender, intersex and queer persons (European Commission 2023, 46–47).

So, if we compare Greece and the Western Balkan countries, we can see that between 2016 and 2021, in all these countries, with the exception of the Republic of North Macedonia and Albania, there were legislative changes that started with anti-discrimination legislation. In 2022 Greece went one step further and became the fifth country in the world to ban harmful interventions and treatments on intersex infants and children. However, such provisions are still absent in the Western Balkan countries. We have seen that Albania introduced this ban by defining the medical protocol for the conduct of doctors. In Serbia, on the other hand, there is a multidisciplinary team of nine medical experts who work with intersex babies and children at the Dr. Vukan Čupić Serbian Institute for Health Care of Mother and Child in Belgrade (Randjelović *et al.* 2017, 39). They also follow a medical protocol that is used, exclusively internally, to establish intersex diagnosis

[20] Art. 22, par. 2 of the Law on Prohibition of Discrimination of the Republic of Serbia

[21] Action plan for the period 2022–2023 for the implementation of the Strategy of Prevention and Protection against Discrimination for the period from 2022 to 2030, *Official Gazette of the Republic of Serbia* 112, dated 12 October 2022.

with the help of tests and examinations, but the protocol uses the term „hermaphrodite", which indicates an outdated and discriminatory approach by doctors in Serbia (Randjelović *et al.* 2017, 39). It is therefore necessary, both in Serbia and in other countries of the Western Balkans, to standardize the approach of health professionals in relevant hospitals where intersex people are treated, as well as introduce a legal ban on harmful interventions and treatments on intersex infants and children, and to make transparent all procedures and mechanisms related to them, especially those related to collecting statistics on the number of people who are born intersex.

5. LEGAL GENDER RECOGNITION OF INTERSEX PEOPLE – ON HOLD

5.1. Greece

The registration of sex in the birth certificate is often the moment when intersex people are first confronted with a legal issue of bureaucratic nature. In Greece, Article 19 of Law 4958/2022 provides that „In the event of medical procedures or treatments referred to in Article 17, which have resulted in a discrepancy with the registered gender of the minor intersex person, the registered gender is corrected by the competent court" (translated by author). In other words, while the law prohibits interventions that lead to intersex infants and children conforming to female or male, it does not provide a clear legal framework to cover the gender recognition of intersex children (or adults) who have not undergone any procedure or treatment and self-identify outside of the binary. The need to introduce a framework is also confirmed in the National Strategy for LGBTQI+ people as it states that „it is considered appropriate (for intersex persons) to facilitate the change of registered sex, on the basis of self-determination" (Government of Greece 2021, 52, translated by author). At the same time, the National Strategy recognizes the diversity of intersex peoples' gender identity „the medical services offered to intersex people, and in particular to newborns, infants and children, should be provided with respect for their special needs and above all to ensure their right to decide for themselves, when they are of the appropriate age and maturity, with all possible versions of their identity open" (Government of Greece 2021, 52, translated by author). This is because Law 4491/2017 on legal gender recognition can potentially be used by people who are not transgender, which creates several loopholes as these laws are not designed to meet the needs of people other than trans. Indeed, according to European Union research, 20% of intersex people identify as non-binary and 5% as „other" (FRA 2020).

This legal gap creates pressure on the parents, since, according to the law, all births in Greece must be registered within 10 days of the child's birth. In case of late registration, a fine could be imposed as follows: for births registered from the 11th to the 100th day, a fine of EUR 100 is foreseen, and for births registered after the 100th day, this fine is increased to EUR 300 (see UNHCR undated). Interestingly, such legal gaps do not exist in any of the countries that have legally prohibited interventions on intersex people as they all have a clear legal framework for legal gender recognition that gives access to the right to self-determination (for a comparative presentation see Pikramenou 2019; OII Europe 2021). More specifically, Malta „Change of Gender Identity" introduced the right to legal recognition in 2015 with the GIGESC Act, based on self-determination, and in 2017 it allowed access to category „X" for intersex people in passports and identity documents (Ministry for European Affairs and Equality 2017). Portugal introduced the recognition of gender identity and gender expression based on the right to self-determination in Article 3 of the Law 38/2018, along with the ban of interventions. In 2013 Germany was the first country to amend the Civil Status Act (PStG, Section 22 (3)) so that the gender indicator on birth certificates is blank in the event of the birth of an intersex infant. Then, in 2018, it introduced a new law (*Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben*, 18 December 2018) designed for intersex people enabling them to request a „diverse" gender marker, following the provision of the relevant medical certificates. This law followed the decision of the German Federal Constitutional Court published in 2017 (sup. 1 BvR 2019/16), which introduced the right to the registration of a third gender based on the rationale that the right to self-determination in terms of gender is linked to the free development of personality. In Iceland the 2019 Act on Gender Autonomy, together with the ban of medical interventions, ensured the right to legal gender recognition based on self-determination while also introducing the neutral gender marker which appears in passports as „X" (Article 6).[22]

[22] It is worth noting that in Spain, which is not included in this analysis as developments occurred after Greece, Law 4/2023, provides for the issuance of administrative documents with respect to the person's sex characteristics (Article 13).

5.2. Western Balkans

If we look at the Western Balkan countries, there is no clear legal framework on the gender recognition of intersex children and adults who have not undergone any procedure or treatment and self-identify outside of the binary. More precisely, it can be said that existing regulations are outdated and inflexible. This is very problematic for intersex children as it forces those involved in certifying and registering birth (parents or other family members responsible for the child, health professionals, and birth registry officials) to legally choose between the „male" or „female" options (FRA 2015, 4).

In Serbia, the Law on Registers requires parents to register their child in the register of births within 15 days of the child's birth, thereby entering the sex of the child, which can be either male or female (Law on Registers Art. 48, para. 1).[23] This requirement stems from the position that sex is one of the main identity characteristics of every person, and that every newborn must be registered under one of the two sex categories offered. This kind of requirement, set by law, is a pressure on parents to determine the sex and/or gender of their child, not only legally, but also physically. Once registered, the sex of a child can be legally amended in Serbia since 2020, but only from the age of 18, and such change entails significant problems for the person in question (Commissioner for Protection of Equality of Serbia 2021).

The issue of registering the gender of a child after birth in Bosnia and Herzegovina is regulated at the level of the entity and the Brčko District, namely: the Law on Registers of the FBiH,[24] the Law on Registers of Republika Srpska,[25] and the Law on Registers of the Brčko District.[26] The FBiH Civil Registry Law distinguishes between two situations – when a child is born in a health institution and outside of it. In accordance with this fact, the Law determines different regulations. If the child was born in a health institution, the deadline for registering the child in the birth register is 15 days and the health institution where the child was born is responsible. If the child was not born in a health institution, the deadline for birth registration is 30 days.

[23] Law on Registers of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 20/2009, 145/2014, and 47/2018.

[24] The Law on Registers of the Federation of BiH, *Official Gazette of the Federation of BiH* 37/2012 and 80/2014.

[25] The Law on Registers of Republika Srpska, *Official Gazette of Republika Srpska* 111/2009, 43/2013, and 66/2018.

[26] Law on Registers of the Brčko District of BiH, *Official Gazette of the Brčko District of BiH* 58/2011.

The Law on Registers of Republika Srpska prescribes a deadline of 15 days for registering the birth of a child. The provisions in the Brčko District are identical to the provisions in Republika Srpska.

In North Macedonia, the birth of a child must be reported, in writing or orally, to the Registrar of the Master Records Area where the child was born, within 30 days from the day the child was born (Law on Civil Registry Article 6 para. 1).[27] The Law on Civil Status of the Republic of Kosovo*, adopted in 2011, stipulates that the birth of a child must be registered within 15 days of birth, or in exceptional cases within 30 days (The Law on Civil Status Article 34, para. 4).[28] In Montenegro, the deadline is significantly shorter; the birth of a child must be registered within three days from the date of birth, thereby entering the sex of the child (Law on Matrimonial Registers of Montenegro Article 20, para. 1).[29]

The solution in all these cases would be to amend the Law on Registers, in line with the recommendations of Resolution 2191.[30] If after birth, on the basis of medical documentation, it is determined that the sex of the person is not determinable, the Law on Registers should allow the postponement of the registration of the sex of the child in the register of births, until the moment when the child can independently participate in making decisions about these interventions, with the exception of special circumstances, when these interventions prevent the creation of a greater harm to the health of the intersex child.

---

[27] Law on Civil Registry, *Official Gazette of the Republic of Macedonia* 8/95, 38/02, 66/07, 67/09, 13/13, 43/14, 148/15, 27/16, and 64/18, and *Official Gazette of the Republic of North Macedonia* 14/20.

[28] Law No. 04/L – 003 on Civil Status of the Republic of Kosovo.

[29] The Law on Civil Registry, *Official Gazette of Montenegro* 47/2008, 41/2010, 40/2011 – other laws, and 55/2016.

[30] See article 7 point 7.3.1. of Resolution 2191, Promoting the human rights of and eliminating discrimination against intersex people „ensure that laws and practices governing the registration of births, in particular as regards the recording of a newborn's sex, duly respect the right to private life by allowing sufficient flexibility to deal with the situation of intersex children without forcing parents or medical professionals to reveal a child's intersex status unnecessarily."

6. CONCLUSION

From 2016 and onwards, a series of legal developments have occurred in the Balkan region with the aim of protecting the rights of LGBT and intersex people. In many cases, such developments occurred after „external pressure" from the EU. For example, Greece started amending anti-discrimination frameworks to implement EU directives as an EU Member. At the same time, even though Montenegro is not an EU member, the anti-discrimination law was amended twice following negative opinions of the European Commission as Montenegro is among the Western Balkan countries that are planning to access the EU in the future.[31] The issues that need to be addressed in all the countries that were analyzed in this paper are the use of a human-rights based approach that adheres to international standards (for example the use of „sex characteristics" and not other terms that might be derogatory, e.g., „intersexual characteristics"), provision of support to the intersex movement so that intersex people are empowered to organize and advocate for their rights, the introduction of flexible procedures when it comes to birth certificates, and the legal recognition of intersex people. In other words, it is important that all of the abovementioned countries follow what has been suggested for years by the CoE and the UN (of which all of them are members), as well as the EU, to guarantee that intersex people's rights are not violated repeatedly.

More importantly, despite the introduction of measures that protect intersex people's rights, a point that is often overlooked is the need to tackle high levels of stigmatization surrounding intersex people. When it comes to Western Balkan countries, stigma prevails especially in rural areas where the level of information about intersex issues is very low. Consequently, it is extremely challenging to collect data on the number of intersex people living in the Western Balkan countries, and due to the small number of activists working on the issue, the intersex community remains invisible to this today (Simić 2019a, 56). Interestingly, a high level of stigmatization against intersex is also reported in Greece, even though the country has introduced a series of laws and it tops the ILGA's ranking as mentioned above. Given these points, Western Balkan countries could use Greece as a „good practice"

[31] See European Union External Action, Western Balkans: „Accession talks are underway with Montenegro and Serbia. In March 2020, the Council agreed to open accession negotiations with North Macedonia and Albania. Bosnia and Herzegovina and Kosovo are potential candidates for EU membership" *https://www.eeas.europa.eu/eeas/western-balkans_en*, last visited April 30, 2024.

to introduce legal reforms on intersex issues but while doing so, it is equally important to consider all its „flaws“ and overcome them in order to ensure the protection of intersex rights in the region.

REFERENCES

[1] Agius, Silvan. 2017. *Human rights and intersex people*. Strasbourg: Council of Europe Commissioner for Human Rights. *https://rm.coe.int/16806da5d4*, last visited July 20, 2024.

[2] Barnes, Jeffrey. 4/2018. Contextualism: The Modern Approach to Statutory Interpretation, UNSW Law Journal 41: 1083.

[3] Behrens, Kevin G. 2020/108. A principled ethical approach to intersex paediatric surgeries. *BMC Med Ethics* 21.

[4] Brković, Amil, Branko Ćulibrk, Delila Hasanbegović, Dina Bajrektarević, Jozo Blažević. 2023. *Rozi izvještaj. Godišnji izvještaj o stanju ljudskih prava LGBTI osoba u Bosni i Hercegovini*. Sarajevo: Sarajevski otvoreni centar. *https://soc.ba/site/wp-content/uploads/2023/06/Rozi-izvjestaj_za-web.pdf*, last visited April 17, 2024.

[5] Burić, Vanja. 2020. *Tijela koja nadilaze binarnost 2: Istraživanje o pravima interspolne djece u zdravstvenom sistemu Bosne i Hercegovine* [Bodies that transcend binarity 2: Study on the rights of intersex children in the healthcare system of Bosnia and Herzegovina]. Sarajevo: Sarajevski otvoreni centar. *https://soc.ba/site/wp-content/uploads/2020/11/HRP53-FINAL_web.pdf*, last visited April 17, 2024.

[6] Carpenter, Morgan. 4/2018a. The „Normalization“ of Intersex Bodies and „Othering“ of Intersex Identities in Australia. *J Bioeth Inq.* 15: 487–495.

[7] Carpenter, Morgan. 2/2018b. Intersex Variations, Human Rights, and the International Classification of Diseases. *Health Hum Rights*. 20: 205–214.

[8] Center of Research for Equality Issues (Κέντρο Ερευνών για Θέματα Ισότητας). 2014. Φυλο Κοινωνια Πολιτικη [Gender, society and politics]. *https://www.kethi.gr/sites/default/files/wp-content/uploads/2016/02/1.fylo-koinonia-politiki.pdf*, last visited July 20, 2024.

[9] Commissioner for Protection of Equality of Serbia. 2021. Recommendation of Measures for Achieving Equality and Protection Against Discrimination. No. 021-01–169/2021-02. *https://ravnopravnost.gov.rs/en/no-310–21–2/*, last visited April 17, 2024.

[10] Creighton, Sarah. 2001/5. Surgery for intersex. *J R Soc Med.* 94: 218–20.

[11] Crouch, Naomi S., Catherine L. Minto, Lih Mei Laio, Chritopher R. J. Woodhouse, Sarah M. Creighton. 1/2004. Genital sensation after feminizing genitoplasty for congenital adrenal hyperplasia: a pilot study. *BJU Int.* 93: 135–8.

[12] Dreger, Domurat A. 2000. *Hermaphrodites and the medical invention of sex*. Boston, MA: Harvard University Press.

[13] Đuković, Mirko. 2021. *Priručnik za anti-diskriminaciono pravo*. [Handbook for antidiscrimination law]. Strasbourg: Council of Europe. *https://www.ombudsman.co.me/img-publications/39/hf23-handbook-atidiscrimination-law_mne.pdf*, last visited April 17, 2024.

[14] European Union Agency for Fundamental Rights (FRA). 2024. LGBTIQ Survey. *https://fra.europa.eu/en/publication/2024/lgbtiq-crossroads-progress-and-challenges*, last visited July 17, 2024.

[15] European Union Agency for Fundamental Rights (FRA). 2020. A long way to go for LGBTI equality. *https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-focus-04-intersex_en.pdf,* last visited April 20, 2024.

[16] European Union Agency for Fundamental Rights (FRA). 2015. The fundamental rights situation of intersex people. *https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-focus-04-intersex_en.pdf*, last visited April 20, 2024.

[17] European Commission against Racism and Intolerance (ECRI). 2022. Sixth report on Greece. *https://rm.coe.int/ecri-first-report-on-greece-adopted-on-28-june-2022-published-on-22-se/1680a818bf*, last visited August 27, 2024.

[18] European Commission against Racism and Intolerance (ECRI). 2024b. Fourth report on Serbia. *https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/serbia*, last visited July 20, 2024.

[19] European Commission against Racism and Intolerance (ECRI). 2020. Sixth report on Albania. *https://rm.coe.int/report-on-albania-6th-monitoring-cycle-/16809e8241*, last visited July 20, 2024.

[20] European Commission against Racism and Intolerance (ECRI). 2023. Sixth report on North Macedonia. *https://rm.coe.int/sixth-ecri-report-on-north-macedonia/1680ac8c47*, last visited July 20, 2024.

[21] European Commission against Racism and Intolerance (ECRI). 2024a. Fourth report on Bosnia and Herzegovina. *https://rm.coe.int/fourth-ecri-report-on-bosnia-and-herzegovina/1680b0661f*, last visited July 20, 2024.

[22] European Commission. 2023. Serbia 2023 Report (commission staff working document). *https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9–4973–90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf*, last visited July 15, 2024.

[23] Feature a Protective Environment for LGBTI+ Persons (FAROS). 2014 – 2020. *https://www.faros2020.eu/*, last visited April 1, 2024.

[24] Forest, Benjamin. 2000. Placing the Law in Geography. *https://www.semanticscholar.org/paper/Placing-the-Law-in-Geography-Forest/d89a883afc56c82e063acee2bcb6ff40b537c19f*, last visited July 20, 2024.

[25] Gayten – LGBT. 2019. *Interseks – ka stvaranju intersekcionalne platform.* [Interseks – toward the creation of an intersectional platform] Belgrade: Gayten–LGBT, Centar za promociju LGBTIQ prava. *https://www.transserbia.org/images/2019/dokumenta/Interseks.pdf*, last visited April 17, 2024.

[26] Georgakopoulos, Thodoris. 2016. Η Υγεία Των Ελλήνων Και Η Κρίση – Μια Έρευνα [The health of Greeks and the crisis – a survey]. *https://www.dianeosis.org/2016/03/greek_health_intro/*, last visited March 15, 2024.

[27] Ghattas, Dan Christian. 2019. *Protecting intersex people in Europe: A toolkit for law and policy makers*. Berlin: OII Europe; Brussels: ILGA-Europe. *https://www.oiieurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf*, last visited April 28, 2024.

[28] Giannou, Dimitra. 2017. *Normalized Absence, Pathologised Presence: Understanding the Health Inequalities of LGBT People in Greece*, doctoral dissertation. Durham University.

[29] Government of Greece. 2021. National Strategy for the Equality of LGBTQI+. *https://www.primeminister.gr/wp-content/uploads/2021/06/ethniki_statigiki_gia_thn_isothta_ton_loatki.pdf*, last visited July 19, 2024.

[30] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). 2023. GREVIO Baseline Evaluation Report. *https://rm.coe.int/grevio-s-baseline-evaluation-report-on-legislative-and-other-measures-/1680ad469d*, last visited March 15, 2024.

[31] ILGA-Europe. 2023. Rainbow Europe Map and Index 2023. *https://www.ilga-europe.org/report/rainbow-europe-2023/*, last visited March 20, 2023.

[32] ILGA-Europe. 2024. Annual Review of the Human Rights Situation of LGBTI people covering the Period of January to December 2023 – North Macedonia. *https://www.ilga-europe.org/sites/default/files/2024/north_macedonia.pdf*, last visited April 17, 2024.

[33] ILGA-Europe. 2016. Enlargement Review Albania. *https://www.ilga-europe.org/sites/default/files/enlargement_review_albania_2016.pdf*, last visited April 17, 2024.

[34] Intersex Greece. Intersex variations. *https://intersexgreece.org.gr/intersex-101/*, last visited March 13, 2024.

[35] Intersex Greece. 2022. Shadow Report on „Violence against intersex women in Greece". *https://rm.coe.int/greece-2022-shadow-report-grevio-cbr/1680a675f7*, last visited April 1, 2024.

[36] Intersex Greece. 2021. Suggestions – requests for the recognition and protection of intersex people in Greece. *https://intersexgreece.org.gr/wp-content/uploads/2021/04/Suggestions-requests4recognition-protection%20of%20intersex-in%20Greece_EN.pdf*, last visited April 19, 2024.

[37] Jakaj, Danjela. 2022. How the Albanian law protects the LGBTIQ human rights and what it needs to be change to progressively develop and broaden the standards of freedom, equality and non-discrimination for their community? 169–181. *The students' views on the European integration of the Western Balkans region*, edited by Silvo Devetak. Maribor: ISCOMET Institute for Ethnic and Regional Studies.

[38] Jovanović, Miloš. 3/2022. Homoseksualnost i srpska pravoslavna crkva: transformacije odnosa u poslednjih 20 godina [Homosexuality and the Serbian Orthodox Church: Transformations of Relations in the Last 20 Years), *Sociologija* 64: 428–453.

[39] Karalis, Dimitris. 2016. Financial crisis and financial recovery. *Enimerosi* 227.

[40] Kika, Ardit. 2019. Intersex is Not Exactly „Breaking News", *Kosovo 2.0*. *https://kosovotwopointzero.com/en/intersex-is-not-exactly-breaking-news/,* last visited April 17, 2024.

[41] LGBTI Equal Rights Association for Western Balkans and Turkey (ERA). 2016. Country Report Kosovo. LGBTI Enlargement Review 2016. *https://lgbti-era.org/countries/kosovo/*, last visited April 17, 2024.

[42] Liao, Lih Mei. 2022. *Variations in Sex Development: Medicine Culture and Psychological Practice*. Cambridge: Cambridge University Press.

[43] LIFO. 2024. *Γάμος ομόφυλων ζευγαριών: Αυτό είναι το κείμενο που θα διαβαστεί στις εκκλησίες* [Marriage of same-sex couples: This is the text to be read in churches]. *https://www.lifo.gr/now/greece/gamos-omofylon-zeygarion-ayto-einai-keimeno-poy-tha-diabastei-stis-ekklisies*, last visited July 19, 2024.

[44] Méndez, Juan E. 2013. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Human Rights Council, Twenty-second session, Report No. A/HRC/22/53, 1 February. *https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf*, last visited April 17, 2024.

[45] Ministry for European Affairs and Equality of Malta. 2017. Gender Identity Gender Expression and Sex Characteristics Act *https://legislation.mt/eli/cap/540/eng/pdf*, last visited August 29, 2024.

[46] Ministry of Foreign Affairs of Greece. 2024. Regional Policy – Western Balkans. *https://www.mfa.gr/exoteriki-politiki/periferiaki-politiki/dytika-valkania.html*, last visited July 17, 2024.

[47] Monro, Surya, Daniela Crocetti, Tray Yeadon-Lee, Fae Garland, Mitch Travis. 2017. Intersex, Variations of Sex Characteristics, and DSD: The Need for Change. *http://eprints.hud.ac.uk/id/eprint/33535/*, last visited July 19, 2024.

[48] Monro, Surya, Morgan Carpenter, Daniela Crocetti, Georgiann Davis, Fae Garland, David Griffiths, Peter Hagerty, Mitchell Travis, Mauro Cabral Grinspan, Peter Aggleton. 4/2021. Intersex: cultural and social perspectives. *Culture, Health & Sexuality* 23: 431–440.

[49] National Commission for Human Rights of Greece. 2015. Διεμφυλικά Άτομα Και Νομική Αναγνώριση Της Ταυτότητας Φύλου [Trans persons and legal recognition of gender identity]. *https://www.nchr.gr/images/pdf/apofaseis/diakriseis/EKTHESI_Nomiki%20anagnorisi%20taytotitas%20fylou.pdf*, last visited July 19, 2024.

[50] OII Europe. 2021. Legal gender recognition for intersex people in Europe *https://www.oiieurope.org/wp-content/uploads/2021/03/LGR-for-intersex_comparative-research_03–2021.pdf*, last visited April 17, 2024.

[51] OII Europe. 2023. IGM ban indicators checklist. *https://www.oiieurope.org/igm-ban-indicators-checklist/*, last visited April 29, 2024.

[52] OII Europe. 2020. Press Release. *https://www.oiieurope.org/albanian-medical-protocol-2020/*, last visited April 17, 2024.

[53] OII Germany and OII Europe. 2024. OII Germany & OII Europe comment on deeply concerning German Family Court decision authorising an intervention on an intersex minor. *https://www.oiieurope.org/oii-germany-oii-europe-joint-comment-german-family-court-decision/*, last visited July 19, 2024.

[54] Parliamentary Assembly of the Council of Europe. 2017. Resolution 2191, Promoting the human rights and eliminating discrimination against intersex people. *https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232*, last visited July 17, 2024.

[55] Pandurević, Darko. 2017. *Tijela koja nadilaze binarnost: Preporuke za unapređenje pravnog i medicinskog pristupa interspolnim osobama u BiH* [Bodies that transcend binarity: Recommendations for the promotion of the legal and medical approach to intersex persons in BiHStudy on the rights of intersex children in the healthcare system of Bosnia and Herzegovina]. Sarajevo: Sarajevski otvoreni centar. *https://soc.ba/site/wp-content/uploads/2017/01/HRP_tijelo_01_18.01.2017._web.pdf*, last visited April 17, 2024.

[56] Pikramenou, Nikoletta. 2019. *Intersex Rights: Living Between Sexes*. Cham: Springer.

[57] Pikramenou, Nikoletta. 4/2024. From Intersex Activism to Law-Making – The Legal Ban of IGM in Greece, *Social Sciences Journal* 13.

[58] Randjelović, Kristian, Nenad Petković, Rosemary Kumwenda, John Macauley, Ninoslav Mladenović, Boyan Konstantinov. 2017. Istraživanje o položaju interseks osoba u Albaniji, BiH, Bivšoj jugoslovenskoj Republici Makedoniji i Srbiji [Study on the position of intersex persons in Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and Serbia]. Belgrade: UNDP. *https://xyspectrum.org/wp-content/uploads/2021/12/undp-rs-IntersexStudySRB-May2018–1.pdf*, last visited April 17, 2024.

[59] Selznick, Philip. 3/2003. Law in Context, Revisited. *Journal of Law and Society* 30: 177–186.

[60] Simić, Jelena. 2019. Legal Control of Medical sector in Serbia 30 years after fall of Berlin wall, *Law Review – Special Issue – Proceedings from the Annual International Conference – 30 years after the fall of the Berlin Wall*: 1–16.

[61] Simić, Jelena. 1/2013. Nevinost bez zaštite ili jedno viđenje Zakona o pravima pacijenata [Innosence without protection or a perspective on the Law on Patient Rights], *Pravni zapisi* 4: 145–168.

[62] Simić, Jelena. 2019. Uzeti svoje telo u svoje ruke: Interseks osobe i izazovi stvaranja interseks zajednice u Srbiji. 66–85. *U mrežama drugosti: Intersekcionalnost i LGBT aktivizam u Srbiji i Hrvatskoj* [In the nets of otherness: intersexuality and LGBT activism in Serbia and Croatia], edited by Bojan Bilić. Novi Sad: Mediterran Publishing.

[63] Souliotis, K, Papadonikolaki G. Papageorgiou M. Oikonomou M. 5/2018. Οι επιπτώσεις της κρίσης στην υγεία και το σύστημα υγείας: Σκέψεις και δεδομένα για την ελληνική περίπτωση [The impact of crisis on health and health care: thoughts and data on the Greek case]. *Archives of Hellenic of Medicine* 35: 686–697, https://www.mednet.gr/archives/2018-sup/pdf/9.pdf, last visited August 29, 2024.

[64] Tamar-Mattis, Anne. 21/2013. Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants, *Berkeley Journal of Gender Law & Justice* 1: 59–110.

[65] Totsikas, Alexis. 2015. *Οικονομικές κρίσεις και χρεοκοπία (19ος – 20ος αιώνας)* [Financial crises and bankruptcy in Greece (19th–20th Century)], 25 April. *http://argolikivivliothiki.gr/2012/11/01/economic-crises/*, last visited August 26, 2024.

[66] UNHCR. Birth Registration. *http://skr.rs/zfc3*, last visited April 17, 2024.

[67] UN Free & Equal. What does 'intersex' mean? *https://www.unfe.org/en/know-the-facts/challenges-solutions/intersex,* last visited July 17, 2024.

[68] UN Human Rights Council. 2024. Combating discrimination, violence and harmful practices against intersex persons A/HRC/55/L.9 *https://documents.un.org/doc/undoc/ltd/g24/048/06/pdf/g2404806.pdf*, last visited July 17 2024.

[69] United States Department of State. 2023. Kosovo 2023 Human Rights Report. *https://www.state.gov/wp-content/uploads/2024/02/528267_KOSOVO-2023-HUMAN-RIGHTS-REPORT.pdf*, last visited April 17, 2024.

[70] Vouvaki, Vasiliki, Nikoletta Pikramenou, Irini Simeonidou, Phoebus Simeonidis. 2023. *Hate speech against intersex people in Greece*. Athens: Intersex Greece. *https://intersexgreece.org.gr/wp-content/uploads/2023/09/Hate-speech-against-intersex-people-in-Greece-report-EN-upd2.pdf*, last visited April 1, 2024.

Article history:
Received: 30. 4. 2024.
Accepted: 5. 9. 2024.

UDC 347.412(4)
CERIF: S 110, S 130
DOI: 10.51204/Anali_PFBU_24304A

Ksenija DŽIPKOVIĆ, LL.M.*

COMPARATIVE VIEW OF PUBLIC PROMISE OF REWARD

A public promise of reward occurs when an individual publicly promises a reward to an unspecified number of people, achieving a certain outcome. Nevertheless, further discussion is limited without considering the applicable law. Legislators address in different ways the arousal of promisor's obligation, its nature, and the mechanisms of protection for the performer's interests. The cause of these drastic differences lies in the legislator's (dis)approval of a unilateral declaration of intent as a source of obligation. If it is acknowledged that a unilateral declaration of intent can obligate the declarant, a public promise of reward is considered a unilateral legal act. This interpretation is upheld in Germanic, Swiss, and Italian law. Conversely, in legal systems where this view is not accepted, the public promise of a reward is treated as an offer to form a contract. Notable examples of such legal systems are the English and French laws.

Key words: *Promise*. – *Unilateral declaration of intent*. – *Offer*. – *Contract theory*. – *(Unilateral) promise theory*.

* Teaching Assistant, University of Belgrade Faculty of Law, Serbia, *ksenija@ius.bg.ac.rs*, ORCID iD: 0000–0002–8115–4030.

1. INTRODUCTION

In common parlance, a promise is perceived as an assurance that something will be realized. In this regard, the promise creates an obligation, but only in the moral sphere. If a promisor does not fulfil what they had promised, such omission implies the betrayal of the promise's trust. Thus, the promisor will be exposed to moral judgement. However, if certain conditions are fulfilled, the promise not only has moral implications but also carries some legal consequences. Therefore, when the promisor publicly announces that they will reward anyone who fulfils a certain assignment, finds themselves in the particular position, or especially achieves a defined result, we are referring to the public promise of reward.

Public promise of reward (*Auslobung*, *promesse publique*) is a legal institution and a specific technique that can be used in various situations. Although legal theory mostly provides only a single example – promising a reward for locating the missing pet and/or its safe return, this legal institute can potentially be used in a variety of situations and different professions. For example, the public promise of a reward may be an effective technique in various police investigations, when a reward may be promised to anyone who reveals information about a missing person, a fugitive hiding to avoid prosecution, or the whereabouts of stolen items.[1]

A person becomes entitled to the reward as soon as they achieve the desired outcome. It is a kind of the *„prize for virtue*" (Guilhermont 2010, 1475), which is one of the peculiarities of this legal institution. The notion of the public promise of a reward is built on the premise that a certain person, at a certain time and place, will be able to perform the described act, achieve the defined result, or find themselves in the desired situation. The promisor is unable to do it themselves for any variety of reasons. Hence, they are willing to encourage others to undertake such a step. The incentive lies precisely in promising a reward in return. Also, the promisor has no

[1] In North America, Quebec, the UK and Germany, the public promise of a reward is often used in police investigations (see *England v. Davidson* (1840); *Glasbrook Bros v. Glamorgan County Council* (1925) (Guilhermont 2010, 1474; Furmston 2012, 204). However, until recently such practice was considered immoral in France. Nevertheless, in 2007, the French police, by publicly promising a reward, encouraged witnesses to reveal information about the shooters that were targeting police officers during the autumn riots. Publicly promised rewards increase the likelihood that lost or stolen items will be returned to their owner. An organization based in Quebec, which runs advertising campaigns for missing persons cases, reports that 33% of reward cases are solved using this technique (Guilhermont 2010, 1474, 1478–1479).

knowledge of know that neither can they find out who will be the one in the right place, at the right time, able to perform the required act. Furthermore, it is uncertain whether such an individual even exists. It „hinges solely on potential" (Guilhermont 2010, 1478–1479, translated by author). For that reason, negotiating and contracting is not a feasible alternative. Through the act of publicly promising the reward, the promisor aims for a result that is difficult, unprofitable, or even impossible to achieve through the conclusion of a contract.

Evaluated through the lens of law and economics (economic analysis of law), the public promise of reward is a technique that increases the chances of the promisor to achieve the result they are aiming for in the economically efficient manner (Guilhermont 2010, 1478–1479). Namely, the promisor values the worth of acquiring the result defined in the promise more than the worth of the award they promised to give. Otherwise, they would have no economic incentive to promise such a reward.[2] The promisor's economic interest is relevant in in an additional context, as it may serve as the criteria to distinguish public promise of reward from betting (see Fervers 2020, 1263).[3]

Despite serving the same purpose, the public promise of a reward is a legal institution that is regulated in fundamentally different ways in comparative law. Notwithstanding, it receives inadequate attention from legal theory. The

[2] The technique of publicly promising a reward is effective when the desired result has a greater value for the promisor than the value offered as a reward. Let's take for example the case of an owner who promised a reward for person who finds their missing cat. If the cat is worth EUR 2,000 to them, and EUR 50 to the finder, the promise of a reward will be economically efficient if the amount of the reward is between EUR 50.01 and EUR 1999.99. Within such a reward range, the well-being of the owner will increase, as will the well-being of the finder, which also results in the increase in social well-being. Since these are voluntary market transactions, there was an efficient allocation of goods according to the both Pareto improvement and Kaldor-Hicks efficiency (see Begović, Jovanović, Radulović 2019, 17–21).

[3] The lottery, or game of chance, does not constitute the public promise of reward. If the organizer of lottery promises EUR 100 to one of the 500,000 participants, it is not considered a public promise of a reward. How does a prize game differ from a public promise of a reward? First, the participants in a prize game are known to the organizers; they know their information and addresses (Dessemontet 2003, 52). A public promise is directed at an unspecified number of people, making it impossible for the promisor to predict who might be a potential performer. Second, participation in a game of chance requires payment. An interested party must pay a certain amount to participate in the lottery or buy a specific product or ticket. Third, the prize in the game of chance must not depend on the knowledge or skills of its participants, but solely on chance or an uncertain event; if the performance can be fulfilled in a straightforward manner, it is considered a lottery (Pieck 1996, 161–162).

author will present an overviewfrom the general to the specific, starting with the overall view and common traits. The following part of the paper will focus on the origins of these differences, along with the underlying theories that substantiate them. Subsequently, the approaches of French, English, German, Austrian, Swiss, Italian and Serbian law will be presented, followed by the European law. In the concluding section of the paper, the author will analyse of the presented approaches.

2. THE OVERALL VIEW OF PUBLIC PROMISE OF REWARD: NOTION AND CONDITIONS

Regardless of the specific legal system to which a jurist belongs, they will refer to the public promise of a reward when an individual (the promisor) publicly promises a reward to an unspecified number of people (the promisees) for performing a certain action, finding themselves in a certain situation, or achieving a certain result or success. It is a publicly announced promise „for some beneficial work" (Bago 1990, 71). However, the notion of the public promise of a reward is fundamentally different in comparative perspective, which will be discussed in more detail later in the paper, while in this section the author will focus on its universal characteristics.

The person who promises the reward is called the promisor. The promisor can be either natural or a legal person. Nevertheless, they must have the required legal capacity. Some authors (e.g. Milošević 1970, 192; Radišić 2017, 360) state that the promisor must have the full legal capacity, since they are the one disposing of the assets. Even so, the author believes that the requirement of legal capacity should be interpreted in each specific case considering the promised reward. There is no reason why, for example, a twelve-year-old boy could not make a promise to give a football ball to whomever finds his lost bag containing his favourite football dress and shoes. Furthermore, the promisor who has no legal capacity (e.g. a minor) will be able to promise a reward if such a reward falls under the pocket money rule (*Taschengeldparagraph*).[4]

[4] The pocket money rule is sourced from Germanic law (see Art. 110 Bürgerlichen Gesetzbuchs, and Art. 170 para. 3 Allgemeine bürgerliche Gesetzbuch). The rule allows minors to independently undertake legal transactions of small value that are proportionate in complexity to their intellectual maturity and correspond to their understanding of things. Such allowance has significant economic, social, and educational importance because it enables younger minors to independently satisfy

The promisor must make the promise publicly and to an unspecified number of people – the public announcement is required. Publicity necessitates that the promise be communicated in a way that ensures those who are expected to respond are likely to notice it. The promise can be communicated through various media channels such as radio, television, or the press (Karanikić Mirić 2024, 706), as well as through electronic media. Additionally, it may be displayed as a poster on a notice board, lamp post, bus stop, or distributed as leaflets to passersby by the promisor or a third party. The author believes that the announcement is deemed published only when it is made accessible to the public, i.e. when newspapers are released for sale, broadcasts are aired on the radio, shown on television, or posted on a notice board.[5] The promise may also be made public by posting it on a social media profile, as long as such profile is public. The condition regarding the unspecified number of people logically arises from the concept of a public promise of a reward, since the public implies a group of individuals who are not individually identified and whose number cannot be determined. It may be to the members of a certain group formed based on a certain criteria, such as age, profession, education, interest, or even members of an association (Fervers 2020, 1264). The actual number of individuals who have been informed of the announced promise is not relevant. It does not have to be announced „to everyone" (Fervers 2020, 1263). However, the ability for everyone to be informed about the promise is crucial. The emphasis is therefore placed more on the inability to identify individuals to whom the promise is addressed, rather than on the actual number of people who have noticed it.

The announcement of a public promise of a reward must clearly specify the act to be performed, the success to be achieved, or the situation in which a person must find themselves to be entitled to the reward (Karanikić Mirić 2024, 706). The required outcome must be determined, possible, and lawful, otherwise, the public promise of a reward is not enforceable – the promisor is not obligated to grant the reward to a person who has performed an action that is undefined, impossible, or unlawful.

---

their daily needs and help their parents (e.g. shopping in a bookstore, market or supermarket) (Stanković 1982, 1224). In addition, minors develop their personality this way (Đurđević 2010, 89).

[5] For different opinion see Milošević (1970, 192), which states that the promise is considered published at the moment the promisor's statement is handed over to the newspaper, radio, or television editorial office, or to the person responsible for posting it on a notice board.

Upon announcing the promise, the promisor's duty to grant the reward does not yet exist. The obligation is born as soon as an individual undertakes the defined act, find themselves in the situation described in the announced promise or achieve the required success. Thus, their identity is initially unknown, but unveiled later (Milošević 1970, 191). It is indeed possible that such a person might not appear at all. The author will refer to them as „the performer" or „the undertaking person". We emphasize that the public promise of a reward does not create an obligation for the performer to fulfil the task set forth in the promise, achieve the success or find themselves in a certain situation (Radišić 2017, 360). They perform such an action not because they are obligated to, but mainly because they want to and are able to help the promisor. Guillermo calls the performer a „good Samaritan" (*bon samaritain*) (Guilhermont 2010, 1481). In return, by undertaking the action that the promisor had laid out in the publicly announced promise, they become entitled to the award. Therefore, the promisor is the debtor, and the performer is the creditor in their relationship of obligation (Karanikić Mirić 2024, 705).

The legal capacity required on the performer's side depends on the way one understands the legal nature of the announced promise, which will be thoroughly discussed in the following section. If a public promise is understood as a unilateral declaration of intent (*negotia unilateralia*), the action undertaken by performer is considered as a material, not a legal act. Therefore, they are entitled to the reward even if they did not know about the promise, and there is also no requirement regarding the appropriate legal capacity. However, if doing so is understood as a tacit acceptance of the offer, the appropriate legal capacity must exist. In that case, what is stated for the promisor also applies to the promisee.

Finally, yet significantly, the reward must be specified in the announced promise, otherwise the promise does not obligate the promisor (e.g. stating that the one who finds the lost wallet will receive a „valuable reward"). Whether the reward is monetary or non-monetary,[6] the rules for monetary

[6] Does the reward need to have monetary value? Opinions in jurisprudence are divided. For instance, Bago (1990, 63) argues that the reward must have monetary value, while Đorđević and Stanković (1987, 331) state that this is not necessarily the case. The author agrees with the first standpoint. A reward with monetary value may be expressed by its „measurability in money" (Radišić 1998, 11, translated by author). Such a reward is potentially of interest to anyone, as it would increase their assets, either by itself or through the value obtained from its sale (general suitability of assets for satisfying certain needs) (Radišić 1998, 12). On the other hand, non-monetary goods cannot be expressed in such way (e.g. life, body, integrity, personal data), and therefore, are only relevant to their owners (or maybe their family and friends), but not the public as such.

or non-monetary obligations apply. If the reward is non-monetary (e.g. the delivery of a specific item or some other performance), the performer cannot demand the monetary equivalent of the promised reward. While the outcome that qualifies for the reward must be clearly defined, the reward itself can be determinable (e.g. the album by an artist who has won a Grammy Award in 2025). Additionally, the reward must be possible and lawful. The rules of contract law are applicable if the award has a defect (Fervers 2020, 1264).

3. THE LEGAL NATURE OF PUBLIC PROMISE OF REWARD

3.1 Underlying Debate

The understanding of the legal nature of the public promise of reward depends on the moment we consider that the promisor's obligation arises. Two opinions have been formed in legal theory, which have evolved into theories: contract theory and (unilateral) promise theory. Therefore, supporters of these perspectives can be labelled as „the contractualists" and „the unilateralists" (Vicente 2021, 264). The applicable law in each country varies based on theory the legislator has opted for. In a broad and imprecise manner, it could be stated that the Anglo-American approach is the contractual one, while the Civil Law applies the unilateral approach. However, there are exceptions on both sides. In this section the author will explain the emergence of the theories, their postulates, and the practical consequences.

Why is the doctrine on the legal nature of a public promise of reward divided? The study of its legal nature demonstrates the legislator's response to a more complex and comprehensive question: can an individual bind themselves through unilateral declaration of intent (*negotia unilateralia*)?

Prior to the 19th century, there the prevailing opinion was that the declaration of intent itself cannot create a binding obligation for its declarant (see Hogg 2010, 461–462; Terré *et al*. 2019, 94). Therefore, it was believed that an obligation can only be created when the intentions of two different parties align (an offer and an acceptance), both aiming to form the desired contract. As the requirements of the capitalist economy evolved, the idea of binding declaration of intent appeared. Initially, the concept was implemented by issuing securities (Đorđević, Stanković 1987, 320). The idea about the unilateral declaration of the will as a source of obligations emerged in doctrinal terms in Germany in the 19th century, as the outcome of an abridged reading of Hugo Grotius's work (Buciuman 2016, 25). As a starting point, German jurists stated that expressed intent, as opposed to

internal intent, has an objective value and therefore is a source of obligation (Hogg 2010, 463). Thereby, such a premise was a deviation from the classification of obligations provided in *Corpus Iuris Civilis* (Buciuman 2016, 21).[7] The idea that the unilateral expression of will has the power to create an obligation encountered strong opposition, primarily by French jurists (see Porchy-Simon 2021, 23–24). This debate that has spanned centuries „has its origins in the deepest philosophical and ethical foundations" (Orlić 1993, 215, translated by author).

However, it is important to note that the idea of the unilateral declaration of intent is not universally accepted, not even in the Germanic countries where it originated. Despite the 19th century glorification, the unilateral declaration of intent has an exceptional character (Vicente 2021, 256).[8] Hence, in countries that recognize this source of obligation, one can bind themselves only when it is explicitly prescribed by law. For example, the Italian Civil Code states that „the unilateral promise of a performance does not produce binding effects outside the cases permitted by law".[9] The German law considers public promises of rewards, the establishment of foundations, and the issuance of bonds as binding unilateral declarations of intent (Buciuman 2016, 27).[10] There is, therefore, the *numerus clausus* system of unilateral declarations of intent (*einseitiges Rechtsgeschäft)* (Vicente 2021, 256).

3.2. Contract Theory and (Unilateral) Promise Theory

Legal systems that do not recognize the unilateral declaration of intent as the source of obligations attempt to categorize public promises within the contract framework. Consequently, the theory explaining such understanding has been termed contract theory. On the contrary, legal systems that accept

[7] The Institutes of Justinian established a four-part division of obligations: *ex contractu*, *quasi ex contractu*, *ex maleficio*, and *quasi ex maleficio*.

[8] Although Franz von Kübel, one of the principal drafters of the BGB's contract provisions, sought general recognition for unilateral promises, his view did not ultimately prevail (Hogg 2010, 463).

[9] See Art. 1987 of the Italian Civil Code, translated by author.

[10] German law distinguishes between declarations of intent that need to be addressed to another party (*empfangsbedürftige Willenserklärungen*, e.g. offers and acceptances of offers) and declarations of intent that produce legal effects regardless of the existence of an addressee (*nicht empfangsbedürftige Willenserklärungen*). A prime example of the latter is the public promise of a reward (Suzuki-Klasen 2022, 223).

that an individual can bind oneself through unilateral declaration of intent, consider the public promise as a unilateral legal act. We define a unilateral legal act as a declaration of intent that can produce a specific legal effect – the creation, alteration, or termination of a legal relationship. Thus, the theory that clarifies this concept is named the (unilateral) promise theory.

Proponents of contract theory perceive a public promise of reward as a (general) contract offer, as undertaking the act described in the announced promise constitutes its acceptance (Hogg 2010, 463–464). When parties' intentions align – a contract arises. The intention of the promisor is expressed explicitly, by announcing the promise, and the intention of the performer is the implicit one, made by completing the assigned task, finding themselves in a particular situation, or achieving the set result. Even in the absence of a formal contract, legal principles resembling contractual obligations apply (Lerner 2004, 68). Both parties' declarations of intent must fulfil the general conditions required for any declaration of intent (legal capacity, intent, voluntariness) (Lerner 2004, 68). As a result: 1) the performer must know about the public promise and consciously perform the act envisaged in the announced promise with the aim of concluding a contract with the promisor,[11] and 2) the performer must have legal capacity. Thus, a performer who was unaware that the public promise had been made or lacked the appropriate legal capacity cannot claim the right to the reward. Both the obligation for the promisor and the contractual relationship are created at the moment of performing the act specified in the promise announcement, achieving defined success, or finding oneself in the appropriate situation. The promisor's obligation and the performer's right arise simultaneously, in accordance with the traditional understanding of the contractual relationship. In fact, proponents of contract theory deny a public promise as a source of obligation, viewing it as contract by any means necessary (Bago 1990, 47). Contract theory is accepted by French law, English law, and the law of most US states.[12]

[11] American case law relativizes this requirement. Thus, in some cases, judges have required the knowledge of the publicly made promise, while in other cases reliance on the promise or even the intention to claim the reward was necessary, e.g. *Slattery v. Wells Fargo Armored Services* (1979), *Otworth v. The Florida Bar* (1999), *Braun v. Northeast Stations and Services Inc*. (1983), *R. Price Jr. et al. v. The City of East Peoria* (1987) (Lerner 2004, 79 fn. 164–166).

[12] Contract theory is not accepted in Louisiana. The Louisiana Civil Code uses the term „offer of reward", but the performer's awareness of the announced promise is not required (see Louisiana Civil Code Art. 1944). Furthermore, no mutual consent is necessary (Lerner 2004, 61–62).

(Unilateral) promise theory, on the other hand, implies that the obligation for the promisor arises as soon as they announce the promise to the public. Publicly declared unilateral will is considered a unilateral legal act (*negotia unilateralia*). Its acceptance is not required, since there is no fiction of a contract (see Carić 1980, 595; Karanikić Mirić 2024, 705). As a matter of course, a unilateral declaration of intent only creates an obligation for the person who declares it, but never for others. (Unilateral) promise theory is built upon the distinction between internal will and declared (externalized) will. The former is not suitable to create rights and obligations, but the latter is. Some German authors, inspired by the teachings of naturalists, deducted that by (publicly) expressing the promise, the will of the promisor is separate from its source and produces a legal effect. If the promise is expressed in such a manner that others can find out about it, they can acquire legitimate hopes and expectations towards them, which are be protected by the legislator (Buciuman 2016, 25–26). The idea of the unilateral promise as a source of obligation was established by Austrian jurist Heinrich Siegel. Siegel differentiated between two obligations: to keep the promise, i.e. not to revoke it (*Die Gebundenheit an's Wort*), and to fulfil the promise, i.e. grant the award. The first one is an obligation of non-action, and the second is an obligation of action. The former can be established in favour of an unspecified person, while the latter requires the certain promisee. These two obligations do not always exist together. Hence, the promisor may be obliged only to honour a promise, but not necessarily to fulfil it, e.g. if nobody performs the required act (Orlić 1993, 212–214). Therefore, by saying that the unilateral promise binds the promisor, the author refers to his obligation to uphold their word for a certain period. The obligation to fulfil the promise will arise only if someone finds themselves in a specified situation or performs an act determined by the promisor. The promise and its fulfilment are two separate and independent acts (Bago 1990, 136). Contrary to the promise, performing the specified act is considered as a material, not a legal act. Accordingly, the general conditions that any declaration of intent must meet are not mandatory here (Karanikić Mirić 2024, 705). It is irrelevant whether the performer acted with a view to the promise or does not know that a reward is due to them (Markesinis, Unberath, Johnston 2006, 350).[13] Therefore, even a performer who achieved the desired outcome before the promise

[13] Some authors believe that there is implicit consent, since the performer acts entirely according to the instructions and intent of the promisor (see Suzuki-Klasen 2022, 248, 448). The author believes that such attempts to explain the formation of an obligation through mutual consent are unnecessary, as in German law the public promise of a reward is based on a unilateral declaration of intent. Therefore, the consent of the performer (explicit or implicit) is not necessary.

was announced will be entitled to the reward. In that case, their right to the reward arises at soon as the promise is announced. This is the only instance where the obligation and the right arise simultaneously according to the unilateralist approach. Following the example of Germany and Austria, the theory of declaration was accepted in Switzerland, Italy, Spain, and Serbia, and it is noted that China, Japan, Egypt, Syria, Mexico, and Brazil also link the creation of an obligation to a unilateral promise, rather than to a contract (Guilhermont 2010, 1484).

3.3. Supporting and Opposing Arguments

The main criticism of the contractualists' approach considers the unenviable position of the performer. The undertaking person who did not act „on faith of the advertisement" (Vicente 2021, 264) will leave empty-handed, although they achieved the desired outcome. Thus, the application of rules regulating contracts appears unfair. The severest critics deemed contract theory as advantageous solely for promisors seeking to avoid awarding (Lerner 2004, 64). Due to this criticism, even the proponents of this approach strive to indirectly mitigate such a solution by employing various methods, as will be demonstrated below.

The unilateralists are also not immune to criticism. First, at the moment of declaring the intent (which is also the moment of the emergence of the obligation), there is no right that corresponds to the newly created obligation. Thus, such an idea deviates from the traditional understanding of the obligation as a legal relationship between two parties where at least one party has a duty to perform, while the other one has the corresponding right to demand performance (Porchy-Simon 2021, 24). Both the duty and the right are supposed to arise at the same time, and, according to the critics, any exception to this rule undermines the essence of the obligation. On the other hand, unilateralists stress that the gradual emergence of obligation itself produces the practical advantage of *negotia unilateralia* (Đorđević, Stanković 1987, 321).

Furthermore, it is pointed out that a unilateral declaration of intent cannot constitute a right in favour of a person without their consent, because perhaps that person does not want to become a rights owner for various reasons. This objection can be readily countered. Particularly, a person who does not want to be a creditor does not have to exercise their right, i.e. demand performance (Terré *et al*. 2019, 95). In other words, if the performer does not want to be the owner of the newly created right, they can simply not claim the award from promisor; they cannot be compelled

to assert their right (Orlić 1993, 201–203). This theory is also challenged on the grounds that an obligation cannot exist without a creditor. However, there are obligations where the creditor is temporarily unidentified, such as in a stipulation made for the benefit of an unspecified or future individual (Terré *et al*. 2019, 95).

Moreover, it is stated that if they debtor is allowed to oblige themselves through unilateral declaration of intent, they should also be allowed to release themselves from the obligation they undertook in that respect (Porchy-Simon 2021, 24). Such a release could threaten the interests of the performer. However, the promisor must have the required legal capacity (as mentioned above), and the legislator must prescribe means to preserve the interests of the performer in the event of revocation of the public promise, e.g. reimbursement of expenses to a performer who acted in good faith, unaware of the revocation. It is noted that individuals of sound mind typically do not take on obligations without a valid reason (Von Bar *et al.* 2008, 178).

4. LEGAL SYSTEMS THAT ABIDE BY CONTRACT THEORY

4.1. French Law

The *Code Civil* (CC) does not address public promises of rewards (*la promesse de récompense*). Moreover, it is emphasized that the French legislator has never considered the regulation of this institution to be essential (Guilhermont 2010, 1473). Until 2016, the CC did not even recognize *negotia unilateralia* as such, but a reform encompassed provisions regarding the sources of obligations. According to the applicable French law, obligations may arise from legal acts, legal facts, or exclusive statutory authority.[14] During the reform, a provision stating that obligations may also arise from voluntary performance or promises to fulfil duties of conscience towards others[15] was implemented, through which the legislator affirmed the previous practice of the Court of Cassation (Buciuman 2016, 24).[16] In

[14] Art. 1100 para. 1 CC.

[15] Art. 1100 para. 2 CC.

[16] This refers to natural obligations that lack the enforceability of civil obligations. Namely, the Court of Cassation took the position that a natural obligation can be converted into a civil obligation through novation, although this solution was not theoretically consistent (François 2016), since novation implies that there is no legal continuity between the old and the new obligations. Novation also entails that there is no transformation; rather, by mutual agreement of the parties, the existing obligation is extinguished, and a new one takes its place.

an attempt to define the concept of legal acts, the CC additionally stipulates that legal acts are manifestations of will aimed at producing certain legal effects, and they can be unilateral or bilateral, to which the rules governing contracts are applied.[17] *Negotia unilateralia* is not referenced elsewhere in the CC.[18] Therefore, the French legislator did recognize the idea of a unilateral declaration of intent as a legal act, but did not extend it further (Terré *et al*. 2019, 99–100). By stipulating that the rules of contracts govern all legal acts, both unilateral and bilateral, and by not establishing any specific rules for unilateral legal acts, the legislator effectively ensured that the entire legal framework for contracts also applies to unilateral acts, without introducing any distinct regulations for them. Buciuman (2016, 25) states that the legislator acted with excessive caution here, perceiving that the issue of unilateral would as a „minefield". Therefore, the issue of the legal qualification of a public promise of reward in French law remains unresolved. Unilateral acts undoubtedly produce various legal effects (as prescribed), but the question of whether the creation of obligations is among those effects remains unresolved, which remains the „blind spot" of French civil law (Terré *et al*. 2019, 99–101). The CC neither explicitly denies nor affirms the possibility for an individual to create an obligation through a unilateral declaration of intent (Porchy-Symon 2021, 23). To explain what this „minefield" consists of, we will refer to the views of French jurisprudence and case law.

Since the French legal system uses public promises of rewards in practice, in the absence of its formal regulation, the legal theory has sought to address two questions: a) is the promisor obligated to fulfil the promise, and b) on what legal basis might this occur (Guilhermont 2010, 1475)? It should be noted that these two questions cannot be separated, as the answer to whether the promisor has an obligation to pay the reward largely depends on how the public promise itself is understood.

The stance that a public promise of a reward obligates the promisor to fulfil their promise has been accepted in France (Guilhermont 2010, 1481). The latter question, on the other hand, is the subject of intense debate in the jurisprudence (Porchy-Simon 2021, 23). Part of the French legal theory considered the public promise merely as an offer to form a contract, while

[17] Art. 1100–1 para. 1 CC.

[18] Article 1124 of the CC regulates the so-called unilateral promise (*la promesse unilatérale*), which should not be mistaken for a public promise of reward. The unilateral promise is a contract. The French legislator defines a unilateral promise as a contract by which one party (the stipulant) authorizes the other party (the beneficiary) to decide on the conclusion of a contract whose essential elements are determined, since the contract's formation only requires the beneficiary's consent.

the others argued that it constituted a binding unilateral declaration of intent (Guilhermont 2010, 1481). The first opinion is the dominant one and supported by case law, placing French law in the group that abides by contractual theory (Terré *et al*. 2021, 98). Nevertheless, the ambiguous position taken by the legislator is criticized by authors who, inspired by German legal teachings, emphasize the advantages of understanding a public promise of a reward as a unilateral legal act.

Traditionally, French authors view a promise of reward as a bilateral contract – when a person has provided the requested service or even begun the effort knowing about the promise, they have implicitly accepted the offer in their favour (Terré *et al*. 2021, 98). It seems that this perspective is supported by the silence of the legislator.[19] The promisor is obligated to award the promisee who produced the desired outcome because, by fulfilling the goal described in the advertisement, the performer accepted the offer to conclude a contract. An offer made to an unspecified number of people is binding in the same way as an offer made to a specific person. This means that such an offer is not revocable (Gordley 2004, 301). Potier had already emphasized that the creation of an obligation involves two aligned wills, as well as the promisor cannot promise something to the promisee against their will (Buciuman 2016, 23). Thus, the promise as such must be accepted to become enforceable.

What are the legal consequences if the performer is unaware of the existence of the announced promise, or they lack the required legal capacity? The author has explained that the proponents of contract theory believe that, in such cases, no contract has been concluded. Hence, the performer does not become entitled to the reward. However, French legal theory seeks to mitigate these legal consequences and thus avoid criticism from supporters of (unilateral) promise theory. It is emphasized that in such a case, the promisor may be obligated according to the rules of unjust enrichment[20] or *negotiorum gestio*[21], both considered quasi-contracts in French law (Porchy-

[19] If the authors of the 2016 reform intended to generally recognize unilateral commitments as a source of obligations, it is difficult to understand why they remained completely silent on this issue (Terré 2021, 100).

[20] By performing the assigned action, the performer conferred a certain benefit to the promisor. However, the promisor is not obligated to pay under the promise of a reward (viewed as a contract) because the performer lacks the legal capacity/was unaware of the promise.

[21] Indeed, in both instances, we are dealing with a unilateral act by the gestor or performer. However, the reward constitutes a unilateral promise, whereas in *negotiorum gestio*, there is no „promise" involved; instead, an obligation arises based on the gestor's intention to seek compensation from the principal. The gestor's

Simon 2021, 483–484). For example, the court held that the organizers of lotteries who promise prizes to consumers are obligated to pay out those prizes based on a quasi-contractual obligation (Porchy-Simon 2021, 483).[22] To apply quasi-contract rules, it is essential that the necessary conditions for these legal institutions have been fulfilled. In that case, however, the „reward" given would not be regarded as such, since a different legal basis is involved (Guilhermont 2010, 1481). Namely, the promisor may only be obligated to reimburse the damages incurred by the performer while performing the act specified in the announcement of promise. French courts may apply the rules of *negotiorum gestio* even when the person did not achieve the result required in the advertisement but incurred certain expenses in the attempt to accomplish it. Only necessary and useful expenses are considered, but not the luxury ones (Gordley 2004, 301).[23] Moreover, it is emphasized that the community interest should not always be monetized, i.e. the act performed should not necessarily be converted into financial compensation (Guilhermont 2010, 1481–1482). Acting out of empathy and helping those in need is more important, regardless of the offered reward and its value.

Recently, it appeared that part of French jurisprudence[24] has been abandoning contract theory and has recognized unilateral declaration of intent as a source of obligations, following the example of German law (Guilhermont 2010, 1483; Terré *et al*. 2021, 95).[25] Guilhermont emphasizes that this reasoning is more adequate and familiar to the Court of Cassation. The French law acknowledges the existence of unilateral declarations of will, thus such an understanding better corresponds to the essence of a public promise with all its peculiarities, in contrast to the constrained perspective

action is grounded in law, which presumes an express or implied agreement with the principal. Thus, establishing the gestor's intention is crucial for the claim. In contrast, with a reward, the existence of an express promise eliminates the need to establish any „implicit agreement" (Lerner 2004, 72).

22 For example, Civ. V, 23 June 2011, No. 10–19.741. It is noted that this judicial practice has blurred the definition of a quasi-contract in French law (see Porchy-Symon 2021, 483).

23 Article 1301–5 of the CC stipulates that the *dominus negotii* is obliged to reimburse the costs to the gestor, even if the actions of the gestor do not meet the conditions for *negotiorum gesitio*, provided they benefit the *dominus negotii*.

24 Siegel's theory was favored by Raymond Saleilles, René Worms, René Demogue, Elias Costiner, and Marie-Laure Mathieu-Izorche, emphasizing that such a concept benefits those who performed the act described by the promise without knowing about the promise's existence (Guilhermont 2010, 1483).

25 The Belgian legislator also does not address the legal nature of a public promise, but legal theory views it as a unilateral declaration of intent that creates an obligation for the promisor (Guilhermont 2010, 1484).

of viewing it as a contract (Guilhermont 2010, 1485). The Court of Appeal in Toulouse accepted the (unilateral) promise theory in 1996 in a case where the performer did not have to make any effort to receive the promised reward (Gordley 2004, 301).[26] The Court of Cassation has also frequently relied on the approach of unilateral promises to explain the transformation of a natural obligation into a civil one (before the reform, see fn. 16). This approach was used mainly to compel persistent advertisers to fulfil their imaginative promises or to oblige an employer to fulfil promises made to a labour union (Bénabent 2017, 30). Despite the judiciary recognizing the advantages of this approach, it seems that the French legislator chose to favour tradition over feasibility. Nonetheless, Bénabent (2017, 30) concludes that French law is slowly establishing the groundwork for the (unilateral) promise theory.

What are the legal implications if the promisor revokes their promise? Since the promise is considered as an offer, the rules that regulate offers apply. Until the 2016 reform, offers in French law were revocable, but this rule was discretionary.[27] As the CC did not include provisions on the contract formation, this rule was developed through jurisprudence and case law. Cases where a performer incurred certain expenses, in an attempt to perform the act stated in the promise that had been revoked in the meantime, were rare in practice. Compensation for damages was only granted to such performer if the revocation of the promise was deemed unreasonable and indicated a compulsive change of mind or a breach of an explicit promise (Gordley 2004, 301). On the other hand, the applicable law prescribes that an offer can be withdrawn but not revoked until the expiration of the period specified in the offer, or until the expiration of a reasonable period (applies if no period is specified in the offer).[28] However, if the offeror does revoke the offer, the contract does not come into existence, but the offeror is obliged to compensate damages in the form of negative contractual interest.[29] Applied to public promises of rewards, if the promisor revokes the promise and the performer has incurred certain costs trying to perform the act or had already performed it before the revocation, the promisor is not obliged to pay the promised reward. However, the promisor is obligated to reimburse the costs incurred by the promisee while attempting to perform the act envisaged in the promise.

---

[26] See Cour d'appel, Toulouse, 14 February 1996, Bull. Civ., 1 July 1996, IR No. 433.

[27] For further details about offers in French law before the reform, see Orlić 1993, 191–206.

[28] Art. 1116 para. 1 CC.

[29] Art. 1116 paras. 2 and 3 CC.

4.2. English Law

Before explaining how English jurists understand the public promises of rewards (advertisements of rewards, advertisements of unilateral contracts), the author deems it necessary to elucidate the relevant principles of English contract law. First, English law recognizes contracts, torts, and unjust enrichment as sources of obligations (Burrows 2015, 8). The unilateral declaration of intent, on the other hand, is not a source of an obligation. Therefore, the public promise of a reward as such does not create an obligation for the promisor.[30] Unilateral transactions are unfamiliar concept (Vicente 2021, 256). Second, the notion of a contract in English law is narrower than in Continental law, as English law recognizes only synallagmatic (bilateral) agreements as contracts. The idea of contract where only one party assumes the role of creditor while the other serves as debtor is not accepted. Hence, an agreement that obliges only one party (e.g. a gift) is not legally enforceable (Farnsworth 2004, 4). Such understanding arises from the doctrine of consideration and the principle of equality between contracting parties. Mutual assent is not enough for the contract to be concluded, but an exchange of mutual promises, actions, omissions, or forbearances must exist as well.[31] This exchange is referred to as *consideration* – one party provides or pledges something to the other in return for what the other party has pledged in exchange (Peel 2015, 3–004). Furthermore, the counter-promise can be fulfilled simultaneously with the performance of the first party (present consideration) or in the future (future or executory consideration) (Furmston 2006, 9). Third, public promises of rewards are considered within the framework of contract law, since the obligation of the promisor to fulfil the promise to the performer is understood as a contractual obligation (contract theory). Finally, English

[30] Common law includes the notion of promise, but it bears no resemblance to the public promise of a reward as the subject of this paper. In civil law the agreement of two wills (an offer and the acceptance) is the cornerstone of every contract. However, this function is carries out by the promise in common law. A promise, from the perspective of English (and most American) jurists, represents the agreement of two wills – the promisor's and the promisee's. It cannot become enforceable without the explicit or at least implicit acceptance by the promisee. Therefore, a promise is understood as an accepted promise (Lerner 2004, 58–59). Speaking of the difference between an offer and a promise in common law, their relationship is such that the offer precedes the promise. An offer becomes a promise once it is accepted by the promisee, meaning a promise is an accepted offer (Lerner 2004, 60).

[31] The principle was first stated in the case of *Stone v. Wythipol* (1588) (Furmston 2006, 8).

contract law recognizes the doctrine of promissory estoppel.[32] Promissory estoppel occurs when a promisor makes a promise that should reasonably expect to cause the promisee to take action or refrain from acting in a significant way, and if the promisee does so, the promise becomes binding if enforcing it is the only way to prevent injustice (Peel 2015, 3–079; Farnsworth 2004, 174). While the rule it outlines lacks exact precision, four key requirements stand out: 1) there must be a promise; 2) the promisor must have had a reasonable expectation that the promise would be relied upon; 3) the promise must have actually led to such reliance; 4) the situation must be such that enforcing the promise is the only way to prevent injustice (Farnsworth 2004, 174).

Since contract theory and its principles have already been discussed, the author will next explain the specificities related to public promises of rewards in English law. Considering the established principles on which English contract law is founded, the question arises as to how a public promise of reward meets the requirements of mutual assent and consideration, both necessary for the formation of a contract.

A public promise of a reward is considered as an offer to conclude a „unilateral contract".[33] This qualification is explained in legal theory by the fact that after the promise is publicly announced, there are no further possibilities for negotiations between the promisor and the performer (Peel 2015, 2–010). In this context, a public promise of a reward is a final proposal for concluding a contract. Along with conclusiveness, another important attribute of the offer is the offeror's intention to be bound by the future contract.[34] The promisor's intention must be expressed in such a way that a reasonable person would understand the promise as an offer to conclude

[32] The leading case recognising this doctrine is *Hughes v. Metropolitan Railway Co* (1877). In this case, a landlord gave a tenant six months to complete repairs, but the tenant asked if the landlord wanted to buy his lease instead, leading to negotiations. When those negotiations failed, the landlord tried to end the lease, but the House of Lords ruled that the six-month deadline was paused during negotiations and only resumed after they broke down, protecting the tenant from forfeiture (McKendrick 2017, 149).

[33] On the other hand, the advertisements of bilateral contracts are not considered an offer, but rather an invitation to treat (e.g. a restaurant menu or a catalogue of promotional products). The reason is that the interested party must first ensure that the issuer of such advertisements is indeed capable of performing the service or delivering the advertised goods. Additionally, in many cases, further negotiation and modification of the initially stated contract terms are possible (Peel 2015, 2–011).

[34] The intention to be bound is presumed in commercial contracts, but the presumption is rebuttable (Furmston 2006, 148).

a contract. Courts apply an objective criterion – would a reasonable person interpret the promise as an offer to conclude a contract – rather than a subjective criterion, i.e. how the performer themselves understood the advertisement (Furmston 2006, 39). This position was confirmed in the case of *Carlill v. Carbolic Smoke Ball Co* (1893), where the court affirmed that an offer can validly be addressed to an indefinite number of people as long as it meets the stated conditions (Furmston 2006, 39–40).[35]

Conversely, undertaking the envisaged act or finding in a certain situation is considered an acceptance of the offer. The promise of the reward has to be present in the performer's mind when they act in accordance with the announced promise, regardless of the motive for undertaking such an act (Furmston 2012, 73).[36] On the other hand, if they have never heard of the reward or the reward „has passed out of [their] mind," they are not entitled to claim it (see Furmston 2012, 73).[37] It is not necessary for the person intending to undertake the defined act to notify the promisor of their intention beforehand (Burrows 2015, 221).[38] Thus, merely performing is considered a tacit acceptance of the offer. Moreover, partial performance is also considered acceptance, thus revocation of the promise at this stage would be regarded as a breach of contract unless the promisor reserved the right to revoke the promise until the action is fully performed (Burrows 2015, 221). To what extent must partial performance be completed to be considered acceptance of an offer – whether merely beginning the performance is sufficient or whether it must be certain that the performer would be able to achieve a specific result? Case law considers that merely beginning the performance is

[35] The manufacturer of the Carbolic Smoke Ball advertised their product as a preventive measure against influenza. The advertisement stated that anyone who used the smoke ball as directed and still contracted influenza would receive £100, and it was mentioned that £1000 had been deposited in the bank for this purpose. Mrs. Carlill used the ball according to the instructions, but it did not prevent her from getting sick. Consequently, she sued the manufacturer and demanded the „promised" £100. The defendant argued that the advertisement could not be considered an offer. However, the court ruled in favour of the plaintiff. The key argument for this reasoning was the money deposited in the bank, which led the public to conclude that it was indeed an offer to conclude a unilateral contract (Oughton, Davis 2000, 26–28).

[36] See *Williams v. Carwardine* (1833) (Furmston 2012, 73).

[37] See *Fitch v. Snedaker* (1868) and *R v. Clarke (1927)* (Furmston 2012, 72).

[38] In the case of *Carlill v. Carbolic Smoke Ball Co*., the plaintiff argued that a contrary decision would defy common sense, as it would mean that in the event of advertising a reward for finding a lost dog, every police officer or the person who finds the dog would need to notify the owner of their acceptance of the offer to be entitled to the reward (Furmston 2006, 43).

sufficient,[39] but the performer must prove „an unequivocal beginning of the performance“ (Furmston 2012, 78).[40] However, they will not be entitled to the reward until they complete the action as specified in the promise, even if the revocation is unjust (Burrows 2015, 221).

The second requirement that a public promise of a reward must meet to obtain legal protection is the consideration. The promisor promises to give the reward, and in return, receives the performance of a certain act or the achievement of a specified success. The performer, on their part, fulfils the task from the advertisement to win the reward. This is an example of executed consideration, where the consideration is given in exchange for the completion of a specific action (Furmston 2012, 109).[41] In other words, both contracting parties undertake a certain obligation to receive the fulfilment of the obligation from the other party, ensuring that reciprocity undoubtedly exists.

Can a performer who has fulfilled the required task, but faces the promisor revoking or refusing to deliver the promised reward for any reason, invoke the doctrine of promissory estoppel? All the conditions are met: there is a „clear and unequivocal“ promise announced; the promisor must have been relied on the promise; the injustice can be avoided only by enforcement of the promise (McKendrick 2017, 150; Peel 2015, 3–080). The response is positive, but the performer cannot rely on this doctrine as a basis for initiating an action (Peel 2015, 3–079). They will have to sue for breach of contract

[39] See *Daulia Ltd v. Four Millbank Nominees Ltd.* (1978) (Burrows 2015, 221). Daulia Ltd. sought to purchase a property from Four Millbank, who promised to complete the sale if Daulia secured the necessary funds. After Daulia obtained the funds and began the required steps to finalize the purchase, Four Millbank attempted to revoke the offer. The court held that in unilateral contracts, once the offeree begins the required performance, the offeror cannot revoke the offer, thus protecting Daulia's position.

[40] This solution is the result of numerous debates, as the application of the general rule that an offer remains revocable until performance is completed is not acceptable in this context. However, even this solution is subject to debate. It is emphasized that strict alternatives should not be set, such as making offers revocable until completion of the performance or irrevocable as soon as performance begins. On the contrary, intermediate situations are possible where the offeror may revoke the offer after performance has begun but is obliged to compensate the offeree for their effort (Furmston 2012, 77).

[41] If A offers £5 to anyone who returns his lost cat, B's act of returning the cat immediately constitutes both the acceptance of the offer and the performance of the required consideration; B has earned the reward through their actions, leaving only the offeror's promise to be fulfilled (Furmston 2012, 101). On the contrary, there is an executory consideration, where when the defendant's promise is given in exchange for a counter-promise from the plaintiff (Furmston 2012, 101).

instead, since the promissory estoppel doctrine „acts as a shield but not as a sword" (McKendrick 2017, 150). Namely, the application of this doctrine requires the existence of a prior legal relationship between the parties (contractual relationship here), and it can only be used as a supplement to that basis to ensure that the promise is fulfilled or to prevent injustice (Peel 2015, 3–079). However, this does not mean that only defendant may rely on it. The plaintiff can invoke the promissory estoppel as well, as long as there is an independent cause of action – „may be used either as a minesweeper or a minelayer, but never as a capital ship" (Furmston 2012, 134).

English legal theory does not address the scenario where multiple individuals fulfil the required action or achieve a certain result. Who, then, has the right to the reward? It is possible that the promise itself makes it clear that each performer will receive a reward (e.g. in the case of *Carlill v. Carbolic Smoke Ball*). However, for other cases, neither theory nor case law provides an answer. If the promise does not specify otherwise, the author believes that the reward should go to the first performer, as it is considered that they were the first to accept the offer. Once accepted, the offer ceases to exist and is transformed into a contract upon meeting the performer's intent. If multiple individuals simultaneously achieve the desired result, it is suggested that the rules of German law could be applied (see below). A similar position was held by the American courts.[42]

Prize competitions (contests) in English law are also subject to the contractual regime, and the aforementioned principles apply to them as well (Vicente 2021, 265). Contests may create legal relations between the organizer and participants, as seen in competitions regularly featured in national newspapers, e.g. *O'Brien v. MGN Ltd* (2002) (McKendrick 2017, 167). Nevertheless, the announcement for the competition must clearly demonstrate the intention to create certain legal consequences. For example, in *Lens v. Devonshire Social Club* (1914), the judges stated that the winner of a competition organized by a golf club could not sue for the prize because none of the participants intended for legal consequences to arise from entering the competition (McKendrick 2017, 167).

[42] In *Reynolds v. Charbeneau* (1988) the judges stated: „When the evidence shows that no one of the claimants fully met the requirements of the offer of reward, but that their efforts combined fully complied with its terms ... they may receive a division of the reward in proportion to their services" (Lerner 2004, 100).

5. LEGAL SYSTEMS THAT ABIDE BY (UNILATERAL) PROMISE THEORY

5.1. German Law

The German Civil Code (*Bürgerliches Gesetzbuch*, BGB) and the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) recognize public promise of a reward (*Auslobung*).[43] Namely, in German law, the idea that a unilateral declaration of intent may create an obligation for the promisor (unilateral promise theory) was accepted in the latter half of the 19th century. Since the provisions of German and Austrian law regarding the public promise of a reward vary only slightly, we will address them in the same section, noting any differences in Austrian law when they arise.

Article 657 of the BGB stipulates that anyone who publicly offers a reward for undertaking an action, especially for achieving a result, is obliged to pay the reward to the person who undertook the action, even if that person did not act with the intention of receiving the reward.[44] The ABGB emphasizes that the promise binds the promisor from the moment of the public announcement.[45] The promisor must have the full legal capacity in order to make an enforceable promise, as well as the intention to create a legal relationship (Fervers 2020, 1263). When examining whether such an intent exists, an objective criterion is applied (Fervers 2020, 1263).

If multiple people undertake the required action or achieve the desired result, the reward belongs to the person who undertook it first – the principle of priority (*Prioritätzprinzip*). The first performer must prove their precedence (Fervers 2020, 1266). If the action was undertaken simultaneously by multiple people, the reward is divided equally.[46] The theory

[43] See Art. 657–661a BGB, and Art. 860 ABGB.

[44] The approach that exists in German law has been implemented in many countries. For example, the Spanish legislator was inspired by Article 657 BGB. If a person makes a public promise of a reward, whether for a specific act or achieving a certain result, the person who fulfils it may claim the reward – the acceptance of the promise is not necessary. Furthermore, they will be entitled to the reward even if they were unaware of the public promise. The promise can be revoked the way it was made (Gordley 2004, 304). Portuguese law holds the same view (Article 459 of the Civil Code). A public promise of a reward represents a case where an obligation arises from a unilateral declaration of intent (Gordley 2004, 305). The Japanese legislator also followed the example of Article 657 of the BGB (see Article 529 of the Civil Code of Japan) (Suzuki-Klasen 2022, 448).

[45] Art. 860 ABGB.

[46] Art. 569 paras. 1 and 2 BGB; Art. 860b ABGB.

suggests that the reward should be distributed among the performers who jointly contributed to the fulfilment of the obligation in proportion to their contribution (Pieck 1996, 161). The rule of division applies if the division itself is possible. The German legislator prescribes a solution for cases where the reward is indivisible. In such cases, the recipient is determined by drawing lots.[47] This provision is unique, distinctive to German law. However, if multiple individuals assisted in producing the required outcome, the promisor has the discretion to reasonably divide the reward. It is essential to emphasize that in any case the promisor is obliged only to pay the reward once (Fervers 2020, 1265–1266).

When it comes to the revocation of a public promise, it is revocable until the act has been performed. The revocation takes legal effect only if it is communicated to the public in the same manner as it was published or through a special announcement.[48] The revocability of the public promise is cited as a key element distinguishing it from an offer (Markesinis, Unberath, Johnston 2006, 67). If a revocation occurs, the promisor is no longer obliged to pay the reward. Additionally, the promisor will not be required to reimburse the performer for any expenses incurred while undertaking the action. It is considered that such an obligation would limit their right to revoke (Gordley 2004). Specifically, the revocation of the promise does not infringe a right, but merely an „expectation of a right" (Bago 1990, 78). The promisor may waive the possibility of revocation in the promise itself, and in case of doubt, it is considered that they have waived the possibility of revocation for the period during which the act is expected to be performed.[49] Therefore, revocation is not considered possible if a deadline is specified in the promise. The ABGB further stipulates that revocation has no effect on the performer who proves that they were unaware of the revocation at the time of performing the act, providing that they were acting in good faith.[50]

In addition to the general case of a public promise of a reward, German law also acknowledges the promise of reward trough a prize competition. The prize competition (contest, *Preisausschreiben*, *Preisbewerbung*) is a form of public promise, where the awarding of prizes is decided by expert juries, i.e. experts in the specific field of the competition. Simply achieving the defined outcome is not enough – the performer's result must surpass the

47 Art. 659 para. 2 BGB.

48 Article 658 para. 2 BGB. Similarly, Article 860a para. 1 ABGB adds that the promise can also be revoked in a manner that is equally reliable as the way the public promise was made.

49 Art. 658 para. 2 BGB.

50 See Art. 860a ABGB.

results of other performers regarding the defined criteria. The principle of quality, rather than priority, applies here. Unlike the general case of a public promise of a reward, the announcement of prize competition must include a timeframe within which the action may be completed (Pieck 1996, 161), otherwise, such competition is not valid.[51] The decision made by the expert juries are final and binding on all participants.[52] The content of the decision cannot be reviewed by the state courts (Fervers 2020, 1266). Additionally, the BGB stipulates that the promisor may require transfer of ownership of the work only if such provision was stipulated in the promise.[53]

5.2. Swiss Law

Until the 19th century, it was believed that a public promise of a reward was not binding since the promisee was not known at the moment of its announcement. This understanding was abandoned in the 19th century, and *ad incertas personas* offers became accepted in Switzerland (Dessemontet 2003, 52). Today, the notion of a public promise of a reward in the Swiss Code of Obligations (*Code des obligations*, CO) encompasses two cases: a promise of a reward made to an unspecified number of people in exchange for a specific performance (e.g. a promise to pay a reward to anyone who finds a stolen wallet) and participation in a competition, i.e. a contest (e.g. sports competition or art contest) (Dessemontet 2003, 52). Regarding the latter, Swiss legal theory[54] aligns with German legal theory, thus it will not be addressed it in the paper.

The public promise of a reward in the CO is covered by only one provision, indicating that its detailed regulation is mainly shaped by legal theory and judicial practice. According to the CO, when a person makes a public promise of a reward in return for the performance of an act, the reward must be paid in accordance with the promise.[55] Unlike Austrian law, the Swiss legislator did not emphasize that the promise creates an obligation for the promisor as soon as it is communicated. Nevertheless, most legal scholars support the (unilateral) promise theory, emphasizing its advantages regarding the

51 Art. 661 para. 1 BGB.

52 Art. 661 para. 2 BGB.

53 Art. 661 para. 4 BGB.

54 See Dessemontet 2003, 53.

55 Art. 8 para. 1 CO.

safeguarded position of the performer.[56] Although the federal court does not comment on the legal nature of the public promise of a reward, it recognizes that even the performer who did not know about the promise can still claim the reward (Dessemontet 2003, 52).

However, Swiss Code of Obligations does not provide an answer for the situation where there are multiple performers. The author suggests that a possible solution is that the reward belongs to the person who performed the required act first, as is the case in Austrian and German law. Another possible solution is the one that exists in Italian law – the awarded performer is the one who first informed the promisor about their accomplishment. However, an alternative perspective suggests that all performers should receive the reward. This view is supported by the argument that unclear provisions in unilateral obligations should be interpreted in favour of the obligor (*in dubio mitius*) (Dessemontet 2003, 53).

In Swiss law, a public promise can be revoked as long as no one has yet performed the specified act. The manner of revocation must correspond to the manner used to make the promise. After the revocation, the obligation to give the reward no longer exists. However, an obligation to compensate any performer who relied on the promise and incurred expenses in the attempt to fulfil the task from the advertisement arises (Lerner 2004, 96). Moreover, such performer had to act „in good faith and in reliance upon the announcement" (Lerner 2004, 96). It is important to note that the promisor's obligation to cover expenses is value limited – the extent of the compensation cannot exceed the value of the reward itself.[57] The promisor can be released from this obligation if they prove that the performer in question could not have completed the required act.[58]

5.3. Italian Law

The Italian Civil Code (*Codice Civile*, CCI) regulates public promises of rewards (*promessa al pubblico*). The CCI stipulates that anyone who, addressing the public, promises an award in favour of someone who finds themselves in a specific situation or performs a specific action, is bound by

[56] According to Swiss legal theory, a public promise of a reward constitutes an offer (Dessemontet 2003, 52).

[57] See Art. 8 para. 2 CO.

[58] See Art. 8 para. 2 CO.

the promise as soon as it is made public.[59] Hence, the Italian law explicitly defines the unilateral promise as a source of obligation (Lerner 2004, 62). If no time limit is specified in the promise and such a period does not arise from the nature or purpose of the promise, the promisor ceases to be bound by the promise one year after its publication, if no one has informed them of the occurrence of the situation or the completion of the action specified in the promise.[60] Lerner (2004, 98) states that it remains uncertain whether this is an appropriate solution, alluding that this period might be too long.[61]

There are two specificities in the way the Italian legislator has regulated public promises of rewards. First, if multiple individuals perform the action separately, the reward belongs to the one who first informs the promisor (Article 1991 CCI). Bago (1990, 65) views this as a practical solution that considers the promisor's interest, as it is in their interest to learn about the performed action as soon as possible. The second distinct solution pertains to the circumstances under which the promise may be revoked. Namely, Article 1990 CCI prescribes that before the expiration of the one-year period, the promisor may revoke the promise *for a justified reason*, by revoking it in the same way they made it. Hence, the Italian law mandates the justification of revocation (Vicente 2021, 262), not allowing for free revocation (Lerner 2004, 94). However, the revocation cannot come into force if the action has already been performed or the situation required has already occurred.[62] It is considered that a justified reason for revocation exists when the objective that the promisor aims to accomplish becomes unattainable, the required action or situation becomes impossible, or possible but useless due to subsequent events. It is important to note that subsequent events must not be caused by the promisor's fault. A justified reason implies that the promisor's interest in revoking the promise outweighs the interest of the other party in having the promise maintained. A mere change of mind by the promisor is insufficient for revocation (Gordley 2004, 306).

---

59 Art. 1989 para. 1 CCI.

60 Art. 1989 para. 2 CCI.

61 As an example, Lerner (2004, 98 fn. 266) states that the Uniform Commercial Code provides a three-month limit for irrevocable offers: An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months (Art. 2–205 Uniform Commercial Code).

62 Art. 1990 para. 2 CCI.

5.4. Serbian Law

The Serbian Law on Obligations (*Zakon o obligacionim odnosima*, ZOO) recognizes a unilateral declaration of intent as a source of obligation.[63] A public promise of reward is regulated in Articles 229–233, and two cases are distinguished: the general case of a public promise, and a prize competition. The provisions of the ZOO were largely adopted from the 1969 Draft Code of Obligations and Contracts (Draft Code), with the editors making primarily stylistic changes. The author of the Draft Code, Mihailo Konstantinović, primarily drew inspiration from the solutions found in German, Swiss, and Italian law. Thus, the obligation towards the public creates a binding obligation for the promisor from the moment the announcement is published (the declaration theory), while the right to claim the reward by the performer of the act arises later, at the time of fulfilling the performance stipulated in the announcement (Karanikić Mirić 2024, 705). It is irrelevant whether the undertaking person was aware of the published announcement or had legal capacity (Karanikić Mirić 2024, 705). The rules in cases where the result is achieved by multiple persons are the same as in German law (except from drawing lots),[64] as are the provision regarding prize competitions.[65]

The public promise of reward is revocable in Serbian law. To effectively terminate the promisor's obligation, the revocation must be carried out in a manner prescribed by law. The legislator provides two methods: the same way the promise was made, or revocation by personal notification.[66] Nevertheless, the promise cannot be revoked if a deadline for performing the act has been specified in the announcement.[67] A person who performed the act before the promise was revoked has the right to claim the reward.[68] This rule is prescribed by the legislator to protect the interests of third parties acting in good faith. The ZOO also states that individuals who incurred necessary expenses for the performance of the act stipulated in the public announcement before the revocation are entitled to reimbursement of those expenses.[69] They should not suffer the negative effects of the promisor's

[63] Obligations arise from contracts, causing damage, unjust enrichment, *negotiorum gestio*, unilateral declarations of intent, and other facts established by law (Art. 1 ZOO).

[64] Art. 231 para. 2 ZOO.

[65] Art. 232 ZOO.

[66] Art. 230 para. 1 ZOO.

[67] Art. 230 para. 2 ZOO.

[68] Art. 230 para. 1 ZOO.

[69] Art. 230 para. 1 ZOO.

decision to revoke the public promise. The provision is interpreted to apply not only to expenses incurred before the revocation but also the costs incurred after the revocation, if the interested parties performed the act without knowing or having the means to know about the revocation (Carić 1980, 596). Exceptionally, there is no right to reimbursement of incurred costs if the promisor proves that they were made in vain.[70] Thus, the burden of proving the futility of the incurred costs lies with the promisor.

Interestingly, the Serbian legislator adopted from the Italian law the provision on the duration of the promise if the promisor did not specify a deadline. The law prescribes that the promisor's obligation expires one year after the announcement is published, if no other deadline is specified in the announcement.[71] The more detailed examination of Serbian law regarding the public promises will be part of future research.

6. THE EUROPEAN LAW

The Principles of European Contract Law (PECL) stipulate that a „promise which is intended to be legally binding without acceptance is binding."[72] In this manner, PECL significantly distinguishes its obligation based on a promise from other contractual obligations, even though the article on promise further states in its second sentence that the rules on contracts apply to this obligation „with appropriate adaptations".[73] This provision represented a significant and noteworthy shift from the standard practice in most European jurisdictions, because the legal systems that acknowledge unilateral acts as a source of obligation do so only when explicitly specified, rather than as a general rule (MacQueen 2016, 531). However, the PECL does not further elaborate on this topic, because it only deals with contract law.

The Draft Common Frame of Reference (DCFR) reaffirms the Lando Commission's position on the binding nature of unilateral promises and further elaborates on it, prescribing conditions for its enforceability. The DCFR states that „a valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance."[74] The terminology is slightly different, since the term „unilateral undertakings"

[70] Art. 230 para. 1 ZOO.

[71] Art. 233 ZOO.

[72] Art. 2:107 (1) PECL.

[73] Art. 2:107 (3) PECL.

[74] Art. 1:103 (2) DCFR.

instead of unilateral promise is used. However, unilateral promises and unilateral undertakings shall be viewed as synonyms (Von Bar *et al.* 2009, 170).

A unilateral judicial act must fulfil certain conditions: (a) that the party doing the act intends to be legally bound or to achieve the relevant legal effect; (b) that the act is sufficiently certain; and (c) that notice of the act reaches the person to whom it is addressed or, if the act is addressed to the public, the act is made public by advertisement, public notice, or otherwise.[75] The first two conditions are similar to the ones necessary for contract (Von Bar *et al.* 2009, 366). Any expression that clearly demonstrates an intention to be legally bound will be adequate, such as „I undertake to", or „I bind myself to" or „I promise to" or „I hereby guarantee" (Von Bar *et al.* 2009, 178). On the contrary, if the intention is not expressed nor sufficiently apparent, the promise is not binding (e.g. secret promise) (Von Bar *et al.* 2009, 366). The third requirement was necessary because of the nature of the unilateral acts, as the general rule that a juridical act is made only when notice of it reaches the addressee, cannot apply here (Von Bar *et al.* 2009, 366–367). The intention of the promisor to be bound by a unilateral declaration is determined by applying an objective criterion „as they were reasonably understood by the person to whom the act is addressed."[76] The DCFR also takes into account the situation where the promisee may not want to become entitled to the right established in their favour – *invito non datur beneficium* (e.g. the performer does not want to receive the promised reward). The reasons may vary, e.g. they seek to avoid certain obligations or responsibilities of a public law nature, or the reasons are of the moral nature (Von Bar *et al.* 2009, 371). It is therefore stipulated that such person „may reject it by notice to the maker of the act, provided that is done without undue delay and before the right or benefit has been expressly or impliedly accepted."[77] The legal fiction that such right has never occurred applies.[78]

[75] Art. 4:301 DCFR.

[76] Art. 4:302 DCFR.

[77] Art. 4:303 DCFR.

[78] Art. 4:303 DCFR.

7. COMPARATIVE LEGAL ANALYSIS

Based on the comparative legal solutions presented, several conclusions can be drawn. The author will first evaluate the legal systems that treat a public promise of a reward as an offer to form a contract and compare their differences. Subsequently, the author will analyse the approaches of legal systems that recognize a unilateral declaration of intent as a source of obligations. Finally, an analysis encompassing both groups will be conducted.

French and English law consider the public promise of a reward as an offer to conclude a contract. However, being part of the civil law system, French jurists have faced significantly greater pressure from proponents of unilateral declarations, primarily by the legal doctrine in neighbouring Germany. The critiques have led to a mitigation of the legal consequences arising from framing a public promise as an offer. The interests of the undertaking person are thus protected through some other legal institutions, such as unjust enrichment and *negotiourum gestio*. Through these indirect methods, French judicial practice endeavours to achieve equity. This hybrid solution is theoretically inconsistent and seems to represent a transitional phase towards a unilateralist approach. We emphasize that, following the reform of 2016, there is a basis for change, as the Code Civil now acknowledges the concept of unilateral legal acts. On the other hand, English law has consistently adopted the contractual approach with all its attendant legal consequences, boldly encompassing all criticism. Considering the entirety of English contract law, it appears that the notion of public promise of award has been implemented consistently. Since the concept of a unilateral legal act is unfamiliar in English law, jurists have simply placed this institution within the well-known framework of contracts.

German, Austrian, Swiss, Italian, and Serbian law are the presented legal systems that recognize the public promise of reward as a unilateral declaration of intent, as well as a unilateral legal transaction. Within the presented legal systems, the differences are not as pronounced as those between English and French law. The civil codes of these countries differ in the level of detail when regulating the public promise of a reward, but there are no significant theoretical disputes regarding legal gaps. German law, as the originator of the concept of unilateral declaration of intent, offers the most detailed and comprehensive approach. Therefore, it is unsurprising that its provisions have served as a model for other European countries. Nevertheless, some variations do exist among these legal systems. These differences mainly concern the possibility of revocation of the public promise and its legal consequences. German law is the strictest in this matter. If a revocation occurs, the promisor is neither obliged to pay the

reward nor required to reimburse the performer for any incurred expenses. In Swiss, Italian, and Serbian law, the performer will also not be entitled to the reward, but they will be entitled to reimbursement for the expenses incurred in reliance on the revoked promise. Italian law, on the other hand, also imposes the condition of justifiability for the revocation of the promise. The Italian legislator, unlike their German, Austrian, Swiss and Serbian counterparts, does not distinguish prize competitions as a separate type of public promises of reward, to which special rules apply.

When comparing the approaches of contractualists and unilateralists, it becomes evident that both perspectives present compelling arguments and counterarguments, as well as distinct advantages and disadvantages. However, the author observes that the arguments in favour of framing the public promise of a reward as an offer are predominantly theoretical in nature. They are focused on preserving the idea of an obligational relationship as one in which rights and obligations arise simultaneously and coexist throughout the duration of the relationship. Nonetheless, unilateralists prioritize theoretical considerations and tend to overlook the practical consequences. It is unjust for a performer who completes the required action to not receive the promised reward, regardless of their legal capacity or awareness of the promise. Furthermore, such an approach also regards prize competitions as an offer to conclude a contract, overlooking the specificities of this legal institution (e.g. the necessity of setting a specific deadline, the method of decision-making, and the binding nature of the decision). As previously stated in the introductory remarks, the public promise of a reward is a peculiar legal institute that will be resorted to precisely when contacting is not possible. This is the underlying rationale for the existence of this legal institution. There is no logical impossibility in recognizing the validity of unilateral obligations, as it is the law that serves as the source of obligations, creating them based on certain facts (Terré *et al.* 2021, 98). Unilateralists seem determined to view the public promise of a reward through the lens of a contract, disregarding the practical outcomes of such a stance.[79]

Finally, the PECL and the DCFR, as model legal instruments for European private law, recognize unilateral juridical acts as a source of obligations. By opting for this solution and highlighting its advantages (see Von Bar *et al.* 2009), they encourage legislators to adopt this approach.

[79] For the different opinion, see Lerner 2004.

8. CONCLUSION

The public promise of a reward emerged as a method to economically and efficiently serve the interests of both the promisor, who seeks the achievement of a specific outcome, and the performer, who may attain that result and get the reward in return. The promisor's aim is to reach a wide audience by publicly announcing the promise, thereby increasing the likelihood that someone will perform the required action, achieve success, or encounter a specified situation. On the other hand, the performer fulfils the required act and, thus, becomes entitled to the promised reward. Recognizing its practical importance, legislators have acknowledged the legal significance of the public promise of reward and rendered it enforceable, establishing it as an institution within the law of obligations.

Even though the function of a public promise of a reward is the same everywhere, legal systems approach it in different manners. Consequently, this legal institution, when observed comparatively, varies significantly, making it challenging to define it universally. The differences arise because the applicable law of some countries does not recognize the possibility of binding a person by a unilateral declaration of intent. In contrast, some legislations recognize unilateral transactions as a source of obligations when prescribed by the applicable law. The understanding of the legal nature of a public promise of a reward depends on the legal system's stance towards a unilateral declaration of intent as a source of obligation. Two distinct theories have arisen.

The first one is the contractual theory, traditionally associated with English and French law. Its proponents view a public promise as an offer to conclude a contract, while the performance of the envisaged act is considered as tacit acceptance. Contractualists thus reject public promise as a distinct legal concept. Therefore, the performance of the desired act, as tacit acceptance, must fulfil all the conditions for the validity of a declaration of intent. This is also the greatest shortcoming of this theory – to claim the right to the reward, the performer must have full legal capacity and be aware of the promise at the time of the performance. The promisor's obligation commences only when the desired outcome has been achieved, and their sole duty is to provide the reward to the person who performed the act. While English law consistently upholds this theory, French courts strive to mitigate its legal consequences and protect the performer through indirect means, i.e. quasi-contract. Considering the recent reform of the Civil Code and the perspectives of modern French theory, it appears that there are grounds to adopt a different approach.

The second theory is named the (unilateral) promise theory. The promise made publicly by the promisor is regarded as a unilateral legal act. Thus, from the moment of its announcement, the promisor is bound to uphold the promise. That is their first obligation. Their second obligation is to pay the reward and it arises as soon as the undertaking person performs the defined act. The performance is considered a material act, not a declaration of intent, and thus does not need to meet the conditions required for the validity of a declaration of intent under objective law. Consequently, the right to the reward is granted even to performers without legal capacity, those unaware of the announcement, and those who achieved the desired result before the promise was announced. This has been implemented in German, Austrian, Swiss, Italian, and Serbian law (as well as in many other European and non-European countries). The differences among the listed legal systems are generally minor, except for the rules regarding the legal consequences in the event of revocation of the promise. Revocation of a promise is possible in all these legal systems, but legislators protect the performer in various ways when this occurs. According to German and Austrian law, the promisor is neither obliged to pay the reward nor required to reimburse the performer for any incurred expenses. Under Swiss, Italian, and Serbian law, the performer is also not entitled to the reward, but they are entitled to reimbursement for expenses incurred in reliance on the revoked promise. Additionally, Italian law imposes the condition that the revocation of the promise must be justifiable. The model legal frameworks for European private law, PECL and DCFR, also accept the unilateral promise theory, encouraging legislators to recognize unilateral declarations of intent as a source of obligation.

The author proposes that the unilateral promise theory should adequately address practical needs. It is observed that public promises are utilized mainly when negotiating and contracting is unsuitable, because the other party is unknown. The individual capable of performing the intended act and willing to undertake will be motivated to do so by the promise of a reward. However, it is equally fair to reward an individual who was unaware of the promise or who performed the action before the promise was made, particularly because their actions were driven purely by altruistic intentions. Their legal capacity should also be irrelevant in this context. Attempting to fit public promises of reward into contract law appears forced and fails to serve the intended purpose of this institution. The main objective of a public promise of reward is to compensate the performer for their good act, ensuring that the promisor's obligation is not merely moral but grants the performer a subjective, enforceable right to the reward. Emphasizing the legal intent of the performer leads to unjust outcomes and disregards the fundamental principles of the institution.

REFERENCES

[1] Bago, Drago. 1990. *Javno obećanje nagrade i nagradni konkurs*. Sarajevo: Službeni list SRBiH.

[2] Begović, Boris, Aleksandra Jovanović, Branko Radulović. 2019. *Ekonomska analiza prava*. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[3] Bénabent, Alain. 2017. *Droit des obligations: 16e édition*. Paris: LDGJ.

[4] Buciuman, Adina. 2016/1. L'engagement unilatéral. *Law Review* 1: 15–71.

[5] Burrows, Andrew. 2015. *Principles of English Law of Obligations*. Oxford: Oxford University Press.

[6] Carić, Slavko. 1980. Čl. 229–261. 594–641 in *Komentar Zakona o obligacionim odnosima* I, edited by Borislav T. Blagojević and Vrleta Krulj. Belgrade: Savremena administracija.

[7] François, C. „Présentation des articles 1100 à 1100–2 du nouveau titre III 'Des sources d'obligations'", *La réforme du droit des contrats présentée par l'IEJ de Paris 1*, *https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/*, last visited June 27, 2024.

[8] Dessemontet, François. 2003. Art 1–10. 5–56 in *Code des Obligations I*, edited by Luc Thévenoz and Franz Werro. Basel: Helbing & Lichtenhahn.

[9] Đorđević, Živomir, Vladan Stanković. 1987. *Obligaciono pravo (opšti deo)*. 5th ed. Belgrade: Naučna knjiga.

[10] Đurđević, Dejan. 2/2010. Neutralni pravni poslovi. *Annals of the Faculty of Law in Belgrade* 58: 77–107.

[11] Farnsworth, Allan. 2004. *Farnsworth on Contracts*. 3rd ed. New York: Aspen Publishers.

[12] Fervers, Matthias. 2020. Article 657–661a. 1262–1269 in *German Civil Code Volume I Books 1–3:§§1–1296: Article-by-article commentary*, edited by Gerhard Dannemann, Reiner Schulze. Munich: Beck C. H.

[13] Furmston, Michael P. 2006. *Law of Contract*. 15th ed. Oxford: Oxford University Press.

[14] Furmston, Michael P. 2012. *Cheshire, Fifoot and Furmston's Law of Contract.* 16th ed. Oxford: Oxford University Press.

[15] Gordley, James. 2004. *The Enforceability of Promises in European Contract Law*. Cambridge: Cambridge University Press.

[16] Guilhermont, Édith. 3/2010. La promesse de récompense à la lumière du droit comparé. *Revue de la recherche juridique droit prospectif* 35: 1472–1493.

[17] Hogg, Martin A. 2010. Promise: The Neglected Obligation in European Private Law. *International and Comparative Law Quarterly* 59: 461–479.

[18] Lerner, Pablo. 1/2004. Promises of Rewards in a Comparative Perspective. *Annual Survey of International & Comparative Law* 10: 52–102.

[19] Karanikić Mirić, Marija. 2024. *Obligaciono pravo*. Belgrade: Službeni glasnik.

[20] MacQueen, Hector L. 3–4/2016. Unilateral Promises: Scots Law Compared with the PECL and the DCFR. *Kluwer Law International BV*: 529–552.

[21] Markesinis, Basil, Hannes Unberath, Angus Johnston. 2006. *The German Law of Contract: A Comparative Treatise.* 2nd ed. Oxford and Portland, Oregon: Hart Publishing.

[22] Milošević, Ljubiša. 1970. *Obligaciono parvo.* 2nd ed. Belgrade: Naučna knjiga.

[23] McKendrick, Ewan. 2017. *Contract Law*. 12th ed. London: Palgrave.

[24] Orlić, Miodrag. 1993. *Zaključenje ugovora*. Belgrade: Institute for comparative law.

[25] Oughton, David, Martin Davis. 2000. *Sourcebook on contract law.* 2nd ed. London: Cavendish Publishing Limited.

[26] Peel, Edward. 2015. *Treitel: The Law of Contract.* 14th ed. London: Sweet & Maxwell Ltd.

[27] Pieck, Manfred. 3/1996. A Study of the Significant Aspects of German Contract Law. *Annual Survey of International & Comparative Law*: 111–176.

[28] Porchy-Simon, Stéphanie. 2021. *Droit des Obligations*. Paris: Dalloz.

[29] Radišić, Jakov. 2017. *Obligaciono pravo: opšti deo*. Niš: Pravni fakultet Univerziteta u Nišu.

[30] Radišić, Jakov. 1–3/1998. Razgraničenje imovinske i neimovinske štete. *Annals of the Faculty of Law in Belgrade* 46: 5–24.

[31] Terré, François, Philippe Simler, Yves Lequette, François Chénedé. 2019. *Droit civil Les obligations*. 12th ed. Paris: Dalloz.

[32] Stanković, Obren. 6/1982. Ograničena poslovna sposobnost i zastupanje maloletnika od strane roditelja u našem pravu. *Annals of the Faculty of Law in Belgrade* 30: 1215–1232.

[33] Suzuki-Klasen, Anna Katharina. 2022. *A Comparative Study of the Formation of Contracts in Japanese, English, and German Law*. Nomos Verlagsgesellschaft mbH & Co. KG: Baden Baden.

[34] Vicente, Dário Moura. 2021. *Comparative Law of Obligations*. Cheltenham: Edwar Elgar Publishing.

[35] Von Bar, Christian, Eric Clive, Hans Schulte-Nölke, Hans (Eds.), Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano, Fryderyk Zoll. 2009. *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Munich: Sellier European Law Publishers.

Article history:
Received: 23. 7. 2024.
Accepted: 5. 9. 2024.

UDC 341.218(497.5)"1941/1945"; 94(497.5)"1941/1945"

CERIF: H 300, S 115, S 140

DOI: 10.51204/Anali_PFBU_24305A

Miloš ZDRAVKOVIĆ, PhD[*]

ELEMENTS OF STATEHOOD OF THE INDEPENDENT STATE OF CROATIA (1941–1945)[**]

The historical phenomenon of the Independent State of Croatia (NDH) is subjected to a basic legal theory analysis, which showed that this Nazi creation, at least to a minimal extent, possessed all the elements of statehood. On a large part of its territory, the Ustasha regime had a monopoly of physical force and was able to implement its basic political purposes. In this regard, the organization of terror against a large number of its inhabitants, which implied a completely new legislation, the formation of new judicial, police and other authorities, the organization of the camp system and railway transport, etc., proves a sufficient measure of the efficiency and regularity of the actions of the NDH state government. Such action produced wartime chaos, which eventually resulted in the loss of elements of statehood, with the creation of a new Yugoslav state in its territory.

Key words: *Independent State of Croatia (NDH). – Elements of statehood. – International recognition. – Functions of the state. – Legitimacy.*

---

[*] Assistant Professor, University of Belgrade Faculty of Law, Serbia, *milos.zdravkovic@ius.bg.ac.rs*, ORCID iD: 0000–0002–8096–5149.

[**] This paper results from research conducted within The Horizon Twining project „Advancing Cooperation on The Foundations of Law – ALF“ (project no. 101079177). The project is financed by the European Union.

1. INTRODUCTION

Postwar Yugoslav constitutionalists and historiographers unanimously refused to consider the Independent State of Croatia (NDH) phenomenon as a state. The statehood of the NDH was explicitly denied also in its designation, with the official name of the state being preceded by „so-called", with the addition of the qualification „Ustasha", or the word „state" was written in lowercase, in contravention with the rules of capitalization. There is no doubt that such a unison opinion by different authors was dictated by the official position of the Yugoslav authorities. They denied the statehood of the NDH for various political, international, ideological and other reasons, which consequently led to a lack of academic freedom.

The arguments used to back the position that the NDH was not a state differ greatly and can roughly be classified into four theses: on crimes, on resistance, on protectorate, and on illegality. Many authors provided arguments supporting the thesis that the NDH cannot be considered a state because it continuously carried out crimes against its own population. The thesis about resistance is presented by authors who claim that the National Liberation Movement was a key internal factor that unambiguously indicated that the NDH never had its own support, but that it was solely the artificial creation of the occupying forces. The third thesis is presented by authors who point out the argument that the NDH was merely the protectorate of Germany and Italy, without elements of statehood, while the fourth thesis, on illegality, is defended by constitutionalists, claiming that the NDH was created through the occupation by foreign powers, in violation of current international and internal rules, and therefore its statehood cannot be recognized (Marinkovic 2017, 78–81).

Even without the burden of ideology, the conceptual defining the state is rather problematic. The complexity of the state, as the highest level of political organization of human communities, as well as their diversity, has led to the absence of a common definition. For this reason, state theorists have sought its definition in its various aspects: form, organization, functions, enforcement ability, the sovereign position it assumes in the international system, the power to orient political action, instrument of the ruling classes, etc. (Jessop 2008, 112). However, despite this diversity, there is an undivided opinion in general legal theory that every state consists of three basic elements: territory, population, and state authority, because without the existence of all three elements one cannot discuss the existence of the

state.[1] Therefore, the state is created when all three elements are achieved, and it dissolves when it loses one of them. The necessary and minimum condition for the existence of the state is the existence of a state authority that has monopoly on use of physical force in its territory, which allows it to efficiency its effective enforcement over the population that inhabits the territory.

Primitive forms of state authority, present in pre-modern state forms such as during Antiquity (e.g., ancient Greece and Rome) or the Middle Ages (various dutchies, counties, marches, etc.) are reflected precisely in power based on the threat or actual application of enforcement. More developed forms of state authority, characteristic of the modern state, imply its application based on the predefined general legal rules implemented through its extensive bureaucratic apparatus, which makes the state a genuine defined political community. In addition to the legality, the state authority also features legitimacy, which is concisely defined as its acceptance by the majority of the population over which it is exercised. Finally, in order for an authority to be labelled as state, it must be sovereign. Sovereignty is a dual feature of state authority – in addition to the inner supremacy, expressed in its monopoly on use of force; it is also independent externally, in relations with other states.

In addition to the three basic elements of the state, authors studying the state from the position of theory of international law also include a fourth element of statehood – the ability of the state to enter into relations with other states (see Bobbitt 1996, 103–105; Jonjić 2011, 670–675; Krstić, Jovanović 2017, 197–203). Two fundamental theoretical principles on the emergence of the state have crystalized as part of the international law doctrine. According to the first one – the declaratory theory or the theory of effectiveness – the creation of the state was only a fact, which as such cannot be reduced to the legal framework. Its creation, therefore, depends solely on fact, i.e., whether there is an organized effective authority within a given territory, regardless of whether the act of its creation was illegal or not. The founding of the state therefore is not subject to legal assessment, i.e., it does not depend on international recognition, since internation law does not stipulate the rules on the creation of new states, nor do the acts of recognition by other state have a constitutive effect – but rather only a

[1] In addition to the usual reasons for the dissolution of a state, such as breakup or war conquest, it can also dissolve due to rising sea levels, such as the island state of Tuvalu, which is in danger of losing territory.

declaratory one. Unrecognized states certainly exist just as recognized ones do; the only difference is that recognized states can enter into international legal relations, while unrecognized states cannot.

In contrast to the classic theory of effectiveness, new constitutive theory does not reject the legal assessment of the creation of new states, i.e., it does not perceive the creation of a new state solely as a matter of fact, but requires that such a situation is created in accordance with the norms of international law. Since international law does not prescribe the conditions for the creation of a state, this additional condition is actually expressed negatively, meaning that the state cannot be created if the act of its creation „represents the flagrant violation of international law, and especially its cogent norms" (Krstić, Jovanović 2017, 200, all references in Serbian and Croatian were translated by the author). This implies that the acts of recognition by other states do not have only a declaratory, but also assume a constitutive effect, without which the newly-emerged creation could not qualify as a state. The best-known example of such an unrecognized state is the Turkish Republic of Northern Cyprus. Its creation through Turkey's military invasion of the part of the territory of Cyprus with a Turkish population in July 1974, as well as its proclamation of independence in 1983, were condemned in UN Security Council Resolutions 353 and 541. This state has not been recognized by any other state (with the exception of the Republic of Türkiye), since it was created through serious violations of norms of international law, i.e., aggression.

Unlike Northern Cyprus, which was denied international recognition on account of its illegal creation, there are many cases of internationally recognized states that were also created through flagrant violations of the norms of international law. This proves that to this day international law has not laid down indisputable criteria for the assessment of whether an entity is a state or not, furthermore – no clear and grounded rules on the creation and recognition of states can be identified with certainty. At the same time, this also provides arguments that international law can only be discussed conditionally as a legal order in the common meaning, because it sometimes levitates between the sphere of law and international relations of power and force (Bobbitt 1996, 103, 111).

2. INTERNATIONAL RECOGNITION OF THE NDH

When Slavko Kvaternik proclaimed the Independent State of Croatia on Radio Zagreb, on 10 April 1941, he very clearly and with full rights emphasized that it was the will of the Ustashas' allies, i.e., Germany and

Italy, rather than „the centuries-old struggle of the Croatian people and the great sacrifice of our *Poglavnik* Dr. Ante Pavelić, and the Ustasha movement", that was decisive for the establishment of Croatian statehood (according to Horvat 1942, 625). At the same time, the Ustashas' allies were the occupiers that had used military force to take over the Yugoslavian space, and it was their will that decided Croatia's statehood, the degree of its independence and its position within „the new European order", as was also the case with the borders of the new state, which at that moment had not yet been established.

The unprepared solutions regarding the new Yugoslav situation, which had been created by the state coup, required improvisation, which revealed certain collisions of the interests of Germany and Italy. The previously established division of spheres of interest between the Axis powers defined Italy's primacy in the Adriatic region. However, at that specific time Hitler was especially angry with his Italian partner. As had been the case previously in the Great War, the Italian military might had proven unreliable and he was no longer prepared to cede the entire Croatian area to the Italian side. He therefore made decisions on his own, and simply notified Mussolini about the more important ones. It was only after Hitler had told him about his decision to break up Yugoslavia that Mussolini summoned Pavelić, with the idea of using him to achieve his ambitions in connection with the Adriatic region.

At the same time, independently of the Italians, the Germans were counting on Vladko Maček, the leader of the Croatian Peasant Party (HSS), as the indisputable Croatian leader. However, Maček turned down the Germans' arrangements despite significant pressures, so they turned to far-right groups. The idea to take advantage of the Croatian independence aspirations in order to break up Yugoslavia more easily and go through former Austro-Hungarian officer Slavko Kvaternik and a relatively small group of Ustashas in the country, at the very inception meant less support among the Croatian population for the future state leadership.

The disagreement between the Germans and Italians regarding the status and borders of the NDH were greatly resolved on April 14, when Pavelić stopped in Karlovac enroute to Zagreb. Mussolini insisted that Pavelić once again – in official form – confirm the previously accepted obligation to cede Dalmatia to Italy. Following some friction between Germany and Italy, it was agreed that the issues of recognition and borders of the NDH would be separated, which was the condition for Italy to recognize the NDH as a state. In accordance with this agreement, Pavelić sent telegrams from Karlovac to

Hitler and Mussolini, requesting that they recognize the NDH (Colić 1973, 112). He received both answers already on the following day, April 15. Hitler wrote

„Dr. Ante Pavelić, Zagreb. I thank you for your telegram and dispatch from General Kvaternik, notifying me of the proclamation of the Independent State of Croatia, in accordance with the will of the Croatian people, requesting that the German Reich recognize the Independent State of Croatia.

„It is my special joy and pleasure to be able to inform you that the German Reich recognizes the Independent State of Croatia at an hour when the Croatian people have found their long-desired freedom through the victorious onslaught of the forces of the Axis powers. The German government will rejoice reaching an agreement with the Croatian people regarding the borders of the new state in the free exchange of ideas. I send you and the future of the Croatian people the best wishes" (according to Čulinović 1970, 230).

Mussolini's answer to Pavelić read

„Dr. Ante Pavelić, Zagreb. I have received the dispatch in which you inform me of the proclamation of the Croatian state, in accordance with the will of the Croatian people, asking me for the recognition of the Independent State of Croatia by Fascist Italy. It is with the greatest pleasure that I welcome the new Croatia, which has today won its long-desired freedom, when the Axis powers destroyed the artificially created Yugoslavia. I am glad to be able to inform you that the fascist state recognizes the independence of the Croatian state. Fascist Italy looks forward to reaching an agreement with the Croatian people on defining the borders of the state, which the Italian people wish all the best" (according to Čulinović 1970, 231).

Even before the NDH was recognized by its creators, Hungary hurried to be the first to do so, announcing already on April 10 that it was recognizing the new state. Its consul general in Zagreb travelled to Karlovac on April 14, where Pavelić was at the time, to personally convey his government's message regarding the recognition (Jelić-Butić 1977, 95; Colić 1973, 113). The reason for such haste was the bilateral treaty on „eternal friendship" between Hungary and Yugoslavia, which was concluded in December 1940. For the Hungarian side the proclamation of the NDH meant that Yugoslavia had ceased to exist, and consequently so did the obligations towards it. This was the justification for the occupation of part of the Yugoslavian territory, since Hungarian troops had crossed the border with Yugoslavia the day after the NDH was proclaimed. Further recognition of the NDH came from Slovakia and Bulgaria, which recognized it in April, and in the following months it was recognized by Romania, Japan, Spain, Denmark, Finland, Manchukuo and the

National Government of the Republic of China. All the states that recognized the NDH *de jure*, a total of twelve, were signatories to the Tripartite Pact or the Anti-Comintern Pact, which the NDH joined following its establishment.

In addition to the *de jure* recognition, the NDH entered into legal relations with several other states, and such relations can be understood as *de facto* recognition by these states. The NDH made special efforts aimed at gaining recognition by the Vatican. In May 1941 Pavelić personally visited Pope Pius XII, however, during the entire period of existence of the NDH, the Vatican officially recognized Yugoslavia and maintained diplomatic relations with its government in exile through its mission to the Vatican. On the other hand, it exchanged permanent representatives with the NDH, and sent Benedictine Abbot Giuseppe Ramiro Marcone as its apostolic delegate while the NDH government established the Office of the Extraordinary Plenipotentiary at the Vatican, who did not have any formal ties to the NDH mission in Rome (Krstić, Jovanović 2017, 215). The extent to which the NDH cared about relations with the Vatican being portrayed at the highest official level is illustrated by the fact that the Vatican delegate, Abbot Marcone, despite his formal status, was included in the list of accredited diplomats, and frequently attended public events in Zagreb with other diplomats (Matković 1994, 61; Colić 1973, 113).

In addition to the Holy See, the NDH government strived to gain *de jure* recognition from neutral Switzerland, which never transpired, primarily due to opposition from British and American diplomats. During the war, the Yugoslav mission was active in Bern, because Switzerland had continued to recognize its government in exile, however, it also maintained its consulate in Zagreb. As was the case with the Holy See, the NDH treated the Swiss consul as a diplomatic and not a consular representative. Switzerland also concluded two trade treaties with the NDH, and as the depository of certain international treaties, it responded affirmatively to the request of the NDH government to join the Universal Postal Union (Jonjić 1999, 271). Based on the concluded trade agreements, Switzerland allowed the establishment of the NDH Permanent Trade Representative. As the Embassy of the Kingdom of Yugoslavia continued to operate in Bern, the Swiss seated the Office of the NDH Permanent Trade Representative in Zurich, which conducted diplomatic and consular, as well as intelligence tasks, with tacit consent from the Swiss (Jelić-Butić 1977, 96; Jonjić 1999, 272–278). In addition to Switzerland, the NDH also concluded trade agreements with Vichy France in 1942 and the French consulate functioned in Zagreb. Furthermore, the NDH established Permanent Missions for Commercial Affairs in Paris and Lyon, and a Croatian cultural mission was established in Vichy (Jonjić 2011, 697; Krstić, Jovanović 215). All things considered, there were seven

missions (embassies) of Axis and satellite countries in Zagreb. On the other hand, during his address to the Croatian State Assembly in 1942, Foreign Minister Mladen Lorković „summarized the first months of the existence of the Ministry of Foreign Affairs: five departments with twenty sections and subsections were established, embassies were opened in Rome, Berlin, Bratislava, Budapest, Sofia, Bucharest, Madrid, and Helsinki, and consular missions of various levels in Zadar, Milan, Vienna, Prague, Munich, Graz, Rijeka, Ljubljana, Maribor, Belgrade, and Florence“ (Trifković 2016, 38).

3. DEFINING THE BORDERS OF THE NDH

The first more explicit plan regarding the dismemberment of the Yugoslavian state territory was determined by Hitler as part of the Interim Guidelines for Dividing Yugoslavia, i.e., Directive 27, dated 12 April 1941. Among other things, the document states that Croatia „will become an independent state within its national borders. Germany will not interfere in its internal political situation“ (Jelić-Butić 1977, 84). Based on the Interim Guidelines, it appears that Germany was not counting on Bosnia and Herzegovina being part of the Croatian national borders, because the political shaping of the BiH space had been ceded to Italy. With certain divergences, these guidelines would be confirmed in direct talks between the German and Italian ministers of foreign affairs, Joachim von Ribbentrop and Count Galleazzo Ciano, who discussed the division of interests in Yugoslavia in Vienna on April 20–21. The difference in the interests of the two Axis partners would define the future statuses of the dismembered parts of the Yugoslav kingdom. The greatest part, slightly more than two fifths of the Yugoslav territory, was to go to the NDH. Despite the fact that Germany had formally recognized the independent status of the new Croatian state, the Italian interests were given priority.

The border with the Third Reich was established based on the agreement signed on 13 May 1941, which actually demarcated the NDH from the part of Slovenia that was absorbed by Germany. Since the southern part of Slovenia was annexed by Italy, the remainder of the western border of the NDH was established through the exchange of notes in July 1941. The border that extended from „the tripoint of the NDH, German and Italy at Žumberačka Gora, along the river Krupa through Gorski Kotar, to the Bay of Bakar“ (Matković 1994, 64). Pavelić proclaimed the eastern border toward occupied Serbia in a unilateral act, the Legal Decree on the Eastern Border of

the Independent State of Croatia, which was adopted on 7 June 1941 – with Germany's previous consent, of course.[2] In the Legal Decree Pavelić drew the eastern border of the NDH as

„1. from the confluence of the Sava into the Danube, up the Sava to the confluence of the Drina into the Sava;

2. from the confluence of the Drina, up that river, to along its most eastern branches, with all the islands in the Drina belonging to the Independent State of Croatia, to the confluence of the Brusnica stream into the Drina, east of the village of Zemlica;

3. from the confluence of the Brusnica stream into the Drina the border of the Independent State of Croatia goes overland, east of the Drina, along the old border between Bosnia and Serbia, as it had existed prior to 1908."[3]

While the demarcation with Germany and with the territories occupied by it proceeded rather smoothly, significant problems appeared in the demarcation with Hungary and Italy. At the very beginning of the invasion of Yugoslavia, Hungary occupied the territories of Bačka, Baranja, Medjimurje and Prekomurje. The occupation of Medjimurje, which had a majority Croatian population, was carried out by the Hungarian armed forces under the pretext of military strategic reasons, while recognizing Croatia's sovereignty over that region. Despite the promises of the Hungarian consul general, who already on April 14 in Karlovac had told Pavelić that Hungary recognized Medjimurje as an integral part of the NDH, in spite of its military occupying the territory, the delegation that came to Zagreb in June 1941 resolve the demarcation of the two states, proposed the border that had existed prior to 1918. The old border separated Medjimurje from Croatia, and the Hungarian delegation cited its historical rights, regardless of the fact that the Croats constituted the majority of the population in the territory. Following a series of unsuccessful talks on the status of the disputed area, the Hungarian side proved unquestionably stronger, and in several moves it achieved its full sovereignty over Medjimurje (Jelić-Butić 1977, 94).

---

[2] German administration also extended to the territory of eastern Syrmia, which according to the internal division of Austria-Hungary belonged to the territory of Croatia, but in early October 1941 the German government decided that the eastern Syrmia and Zemun should be ceded to the NDH. That same month, Pavelić passed the Legal Provision on Extending the Legal Regulations to the Territory of the City and District of Zemun, as well as the Remaining Area of Eastern Syrmia.

[3] The NDH laws and legal provisions are cited according to the official publication Matаić, A. (ed.). 1944. *Nezavisna Država Hrvatska – Zakoni, zakonske odredbe i naredbe (knjiga I – L)*, Zagreb: Tisak i naklada knjižare St. Kugli.

The demarcation and relations with Italy proved to be the most problematic ones for the young NDH state. While acting in exiled, its Ustasha ideologists advocated the idea of an independent Croatia whose territory would extend to its entire ethnic and historic area.

The Ustashas were not the only ones who objected Croatia's crescent shape and they believed that for a better geostrategic shape and position, Croatia required the „belly", i.e., Bosnia and Herzegovina. Even though the 1939 internal division of the Kingdom of Yugoslavia, when the Banovina of Croatia was established, to some extent changed this crescent shape (by shortening the ends and widening the middle), the Ustashas considered such a solution to be a national betrayal, because their national conception considered Bosnia and Herzegovina a Croatian area. This territory had never been part of „historical Croatia", but the Ustashas considered it a Croatian ethnic area. Since Catholics represented the third largest confession in BiH, the Ustashas pointed out the rather senseless thesis that the Muslim population in Bosnia actually represented the ethnically purest Croats, the co-called „flowers of the Croatian people". Guided by this nonsense, the Ustashas also proclaimed the Sandžak area as their ethnic area, since Muslims represented the largest portion of the Sandžak population.

Due to their collaboration with the Italian fascist government, which had provided them sanctuary while in exile, the Ustasha ideologues consciously remained silent about notorious facts – because there was much more reason to claim that the Istria and Rijeka regions, which had a majority Slavic Catholic population, were Croatian ethnic space, rather than BiH and Sandžak. However, not only did the Ustashas not point this out – they were almost completely quiet about the very poor position of this population within the borders of the Kingdom of Italy, where they were denied the right to their national identity and language, and also underwent forced Italianization during the entire period of fascist rule. Pavelić was even prepared to cede indisputable parts of the Croatian state territory to the Italians, for the sake of his personal power and in contravention with Croatian national interests.

Since Germany had not counted on the Bosnian territory being part of the NDH state area at the time of its conception, the issues of the status and demarcation of the NDH primarily entailed an agreement with Italian, while the new Ustasha government was only a second-rate factor in this respect (Jelić-Butić 1977, 84). It was precisely during this period, following the ignominious campaigns in 1940–1941, that Mussolini endured significant pressure at home. Consequently, the absorption of Dalmatia into Italy represented an urgent matter that the entire Italian public expected, and which was supposed to improve his dictatorial reputation. This only placed the newly established Ustasha regime in a graver situation. It was necessary,

on the one hand, to fulfill the previously accepted obligations towards fascist Italy,[4] and on the other, to prevent the loss of Dalmatia from undermining the thin foundations of the Ustasha rule. Pavelić chose a waiting policy, hoping that the Italian occupation and its appetites would weaken over time. Mussolini did not feel like waiting and the issue of demarcation and arranging the relations with the NDH was an urgent one for him. For this reason, the Italian occupation forces did not allow for bodies of the new Croatian state to be established in the territory that it controlled, pending the resolution of the fundamental issues.

At the meeting in Vienna on April 20–21, Ribbentrop and Ciano finally agreed that the entire Yugoslav area would remain in a state of occupation, regardless of the proclamation of the NDH. Many differences between the Italian and German interests emerged during this meeting. Germany were primarily interested in the new Croatian state becoming independent as quickly as possible so that the German military would not have to remain in it, and so that the German government could exploit the Croatian area as much as possible, through economic and trade agreements. On the other hand, Italy did not want the NDH to become independent, because it fostered ambitions of gaining territory at Croatia's expense, and to tie the rest of the country to itself through personal, monetary, customs and other unions (Jelić-Butić 1977, 87). The conflicts between the German and Italian interests were ultimately resolved through agreement, although the friction between the Axis partners continued until Italy's capitulation in 1943. The Yugoslavian occupied space was divvied between German and Italy, and the demarcation line was finally established on 23 April, dividing the NDH territory into the northern part, which was occupied by the Germans, and the southern, which was under Italian occupation. The demarcation line extended from the tripoint of Germany, Italy and the NDH at Žumberačka Gora, to the northern border with Montenegro (continuing on to Kosovo and Metohija), approximately 200–250 kilometers parallel with the Adriatic coast. The large cities were predominantly in the German occupation zone,

[4] Pavelić had established contact with the Italian fascist as early as June 1927, when he was received in Rome by high-ranking officials of the National Fascist Party, to whom he complained about the horrific position of Croatia within the Kingdom of Serbs, Croats and Slovenes, and expressed his desire to create his own state within the Italian sphere of interest. At the time Pavelić submitted a memorandum in which he pointed out that „the Croats are prepared to adapt to the sphere of Italian interest, politically and economically, as well as militarily." By monopolizing the interpretation of Croatian national interests, Pavelić acted *longi manu* in his memorandum, pointing out that the Croats „are prepared to carry out the ultimate consequences even further than the limitations from the Treaty of Rapallo" (according to Matković 1994, 29).

and Germany exercised the right of the stronger and ensured its economic interests also within the Italian occupation zone, primarily ore mining, which its war machine was dependent on.

Pavelić's waiting strategy, which also had been supported by Germany, for its own interest, proved to be a failure (Krizman, 1978, 459). For Mussolini the issue of demarcation and regulation of relations with the NDH could not be delayed, so Pavelić was forced to immediately resolve it. Barely two weeks after the NDH had been proclaimed, Ciano invited Pavelić to a meeting – which was held already the following day, on 25 April, in Ljubljana. At the meeting the Italian side presented its maximal territorial demands, but Pavelić could not agree to the entire Adriatic coast, from Rijeka to the Bay of Kotor, go to Italy. In essence, he did not dispute the Italian imperialist ambitions, which had helped him rise to power, but he tried to preserve Croatian interests in this disputed region to some extent.

Since the meeting in Ljubljana had not yielded a concrete solution, further negotiations proceeded through regular diplomatic means. Being much more powerful in the negotiations, Italy continued to pressure Pavelić, who would not give in. He deviated from his position regarding the territorial demarcation, which he had defended at the meeting in Ljubljana, asking only for the city of Split with the immediate hinterland, but he softened even this view, demanding only join administration in Split. He agreed for the NDH to enter a personal union with the Kingdom of Italy, but he managed to avoid the creation of a customs and monetary union, and he also did not give in to the demand that the NDH military be placed under the direct control of its Italian counterpart (Jelić-Butić 1977, 88).

Since the views of the two inequal sides were brought very close, with the Croatian side agreeing to most of the Italian demands, a final meeting between Mussolini and Pavelić was held in Monfalcone, near Trieste, on May 7. Mussolini was correct in judging that the territorial loss of Dalmatia would represent a great blow to the new Ustasha government, which is why he prepared to cede most of the Bosnian territory to his proteges from their days in exile, as a form of compensation, so that they might be able to soften the loss of Dalmatia in the eyes of the Croatian public.[5] He also showed the willingness to make concessions to Pavelić regarding certain smaller territories in the Adriatic. Italy's backing down from demands for

[5] During the negotiations on arranging relations between Italy and the NDH, even Count Ciano was aware that excessive Italian territorial ambitions could lead to Pavelić's downfall, which would jeopardize Italy's interests (see Krizman 1980, 20–37). On the other hand, the NDH propaganda covered up the loss of the majority of Dalmatia with the fact that Croatia had never been larger territorially.

direct control of the NDH armed forces was resolved through the significant demilitarization of the Croatian-controlled Adriatic area, where the NDHwas allowed to maintain only symbolical forces.

At the meeting in Monfalcone it was agreed that the entire arrangement would be properly formalized, so the delegations of the two governments, headed by Mussolini and Pavelić, concluded three bilateral treaties on 18 May 1941 in Rome: the Treaty on Determining the Borders between the Kingdom of Croatia and the Kingdom of Italy, the Treaty on Matters of Military Importance Pertaining to the Adriatic-Litoral Area, and the Agreement on Guarantees and Cooperation between the Kingdom of Croatia and the Kingdom of Italy. This set of international treaties is known as the Treaties of Rome. The former was the most important in regard to defining the state territory of the NDH, defining its southern border, which annulled the Croatian national interests in Dalmatia that had previously been successfully defended within the Kingdom of Yugoslavia.

4. THE POPULATION OF THE NDH

In addition to territory, the second basic element that comprises a state is its population. The population are all the people located in the state territory, its citizens, foreigners and stateless persons. The legal order of the state applies to all of them – those permanently residing in its territory, as well as persons only temporarily residing there. This principle of the territorial, i.e., spatial application of law is characteristic of modern states, while during previous periods, in premodern states, the personal principle was also applied to a significant extent.

The greatest portion of the population of a state are its citizens, while foreigners and stateless persons are fewer in number.[6] Citizenship is defined as the personal, permanent and public legal connection between a person and a state, creating a system of mutual rights and obligations. On the one hand, citizens enjoy certain rights that other members of the population do not have, such as active or passive voting right, the right to political participation, certain social rights, the right to work at state institution, etc., while on the other hand, they have special obligations, primarily the obligation to defend the state. Furthermore, the state has the obligation to

[6] There are exceptions to this rule, such as Qatar and the United Arab Emirates, which, due to economic development policy, have accepted a large number of foreign citizens, and they presently constitute the majority of the population.

protect its citizens even when they are not located on its territory, i.e., when they have the status of foreigner, which it does through its diplomatic and consular missions.

In ancient slave and medieval feudal states, the difference between members of the population were much greater than they are today. Those who permanently resided in the territory of a state at the time were divided into free and unfree, and there were difference between free persons in their status. In the course of development of the state, from its premodern to its modern and contemporary forms, there has been a notable tendency for the citizens to have equal rights, which could be claimed to be achieved only in liberal democratic states, but also the reduction of the differences between citizens on the one hand, and foreigners and stateless persons, on the other. Contemporary liberal democratic states provided equal political rights to women only in the 20th century, while one of them, the United States of America, was implementing racial segregation policies at the same time. The most populous country in the world still has a caste system, while the legal position of women in many Islamic countries is not equal to that of men.

The development of the state as a political community can therefore be observed as a general history of human inequality. Perceived in this framework, especially taking into account the space and time of the creation of the first South Slav country, the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes was progressive in many respects. It abolished numerous legal inequalities that had previously existed in its territory. The state was defined as lay, democratic, liberal and social, annulling the previous privileged position of the clerical, aristocratic and large landowner minority. Therefore, following its adoption, the noble titles retained only a symbolic, but not status significance, and it abolished serfdom, which had still existed in some regions. The Kingdom of SCS abolished the property threshold in the parts of the territory previously included ion the Austria-Hungary, which significantly expanded the population that enjoyed political rights. This was a factor that led to the sudden development of the Croatian Peasant Party, which the rural population massively supported. The political emancipation of women did in fact occurred only in the postwar Yugoslavia, and it should also be pointed out that under pressure from Nazi Germany, in 1940 the Kingdom of Yugoslavia to a certain extent curbed the rights of its citizens of Jewish origin.

The dismemberment of the Yugoslavia led to the creation of the NDH. For the largest portion of the former Yugoslav citizens this meant a significant civilizational downfall. The Constitution and Principles, adopted by the Ustasha Croatian Revolutionary Organization (UHRO), in 1932 and 1933

envisioned the NDH as an exclusively Croatian state space. Since the Ustashas formed the NDH with the help of the Third Reich and Italy, they could carry out the basic principles of state organization that they had shaped previously. The type of national exclusivism promoted by the Ustashas directly led to the establishment of different types of inequalities unknown in the previous Yugoslav state. Furthermore, the complete discrepancy from the party program of the Croatian Party of Rights from late 1918, whose drafting Pavelić took part in as the Party's secretary and later president, is evidence of Pavelić's hypocrisy. According to this program, the Croatian citizens were guaranteed „state security, completed personal freedom, private property, freedom of thought in speaking and writing, freedom of assembly, agitation and organization, protection of domestic peace and confidentiality of correspondence, freedom of conscience and absolute equality of all citizens before the law, as well as all other human rights and liberties" (according to Horvat 1942, 27). The establishment of the NDH therefore did not mark only the return to *l'ancient régime*, characteristic of absolute monarchies where political rights were nonexistent (see Marinković 2017, 100–104); this was the establishment of a state that was incomparable to any previous state form. The creation and functioning of the NDH, as an epigonic variant of the totalitarian state, was a phenomenon of the 20th century, an innovation in the general history of human inequality.

The territory of the NDH covered an area of more 100,000 square kilometers,[7] with a population of 6 million. The last census of the population in the Kingdom of Yugoslavia was conducted in 1931, therefore the precise population in the territory of the NDH at the time of its creation cannot be determined. According to official data from the 1931 census, the territory that ten years later comprised the NDH had a population of 5,657,085. Based on natural increase, on 31 December 1941 this number should have been 6,663,157, which was still slightly higher than the official statistics of the NDH, which were carried out for the purpose of military and economic needs of the new state (Jelić-Butić 1977, 106). According to these statistics, published in *Brojitbeni izvještaji*, at the end of 1941 the NDH had a total

[7] According to official records, the territory of the NDH was 115,133 square kilometers, but this included territories where the NDH did not have sovereignty. German sources claim that the territory of the NDH was around 100,000 square kilometers (Marjanović 1963, 22–23), and similar facts are presented by the majority of historians.

population of 6,547,400, of which 3,286,800 were women and 3,266,600 were men, with the total area of the 22 great parishes and the City of Zagreb covered by the statistics being 101,889 square kilometers (Colić 1973, 184).[8]

In addition to the problem of determining the exact population of NDH, because many residents had been taken prisoner, a significant number went to work in the Third Reich in 1941 (officially 80,000, but the figure was likely higher), the constant migrations (immigration of the Slovenian population into the NDH, emigration of the Croatian population to Serbia), the large number of casualties in the regions affected by war, etc., determining the structure of the population represented an additional problem. Since a large number of ethnic Croat Catholics represented a thin majority in the NDH, the official statistics included the Muslim population in BiH as Croats, while the number of Serbs was intentionally reduced.

The calculation of the approximate number and ethnic structure of the population of the NDH, which was carried out by the Ministry of Foreign Affairs of the Third Reich in May 1941, indicated that there were 3,300,000 Croats, 1,925,000 Serbs, 700,000 Muslims, 150,000 Germans, 75,000 Hungarians, 65,000 Czechs and Slovaks, 40,000 Jews, and 30,000 Slovenes (Marjanović 1963, 22–23). Significantly different data was presented by Ustasha publications, and according to one from 1942, there were a total of 4,868,831 Croats, 1,250,000 Serbs, 170,000 Germans, 69,000 Hungarians, 44,000 Czechs and Slovaks, and 37,000 Slovenes. Due to the Ustasha ideology, Muslims were not mentioned as a separate group, while no information was given for Jews (Pekić, 1942, 97). Historians also do not fully agree on the number and makeup of the population of the NDH, but the discrepancies are far smaller than between the Nazi statisticians and Ustasha ideologues. There were roughly more than 3 million Croats, slightly less than 2 million Serbs, around 700,000 Muslims, 150,000–170,000 Germans, 35,000–40,000 Jews, and around 30,000 Romas.

Citizenship, as the public-private relationship between the individual and the state that creates a system of mutual rights and obligations, was defined by the Legal Decree on Citizenship, adopted on 30 April 1941. Unlike the legislation of the Kingdom of Yugoslavia, which stipulated in Article 4 of the 1931 Constitution that „citizenship in the entire Kingdom is one and the same. All citizens are equal before the law. All enjoy equal protection by the government. Neither aristocracy nor titles are recognized, nor any privilege

[8] By province: Croatia and Slavonia (including Syrmia) – 3,360,000, Bosnia and Herzegovina – 2,850,000, and Dalmatia without the annexed parts – 360,000. Most historians agree that around 6 million people lived in the NDH.

by birth", the NDH legislation represented a civilizational step backwards. The NDH Legal Decree on Citizenship divided the population that had enjoyed citizenship of Yugoslavia prior to the creation of the NDH into two categories: citizens and state nationals. The Legal Decree itself was very scant, as was the great majority of Ustasha general legal acts, intentionally leaving space for extreme arbitrariness in their application. It defined a state national as a person that is protected by the NDH, while Article 2 stipulated that „the citizen is a state national of Aryan origin who by his actions has shown that he did not work against the liberation aspirations of the Croatian people and who is willing to readily and faithfully serve the Croatian people and the Independent State of Croatia". Based on this legal decree, only citizens, but not state nationals, could be bearers of political rights.

Article 1 of this Legal Decree stipulated that state nationality was gained according to the regulations of the legal provision on state nationality, which was neither adopted together with the Legal Decree on Citizenship, as required by the usual rules of nomotechnics, nor was this legal decree adopted at any later date. Consequently, it is legally not possible to determine who was a state national, and it is equally impossible to determine who was a citizen, since Article 2 of the Legal Decree on Citizenship was prescribed so vaguely that it could be interpreted in any way. However, Article 3 of the Legal Decree stipulated that only citizens could be bearers of political rights. As political rights (active and passive voting rights, right to political association and action, freedom of speech and public assembly, freedom of the press, etc.) did not exist in the NDH, there were no status differences between state nationals and citizens in this respect, i.e., both categories were actually subjects.

The Legal Decree on Citizenship guaranteed the protection by the NDH to both categories, however, since it did not define any specific criteria for citizenship and state nationality, only the will of the Ustasha officials would decide who was under the protection of the NDH. The NDH legislation, which was full of platitudes, left much free space to all forms of arbitrariness and abuse, because just as the citizenship criteria was unclear – so clear was the Ustasha intention to make it thus.

The basic direction of developing the Ustasha ideology during the 1930s was aimed at fighting against the Serbs in Croatia and the Greater Serbian policies of the Belgrade regime, and not against the Jewdom, which was only later added in order to attract German sympathies. In any case, Pavelić was the secretary and later the president of the Croatian Party of Rights, while Josip (Joshua) Frank, after whom the party's members and supporters were called *Frankovci* and who laid down the direction of anti-Serbian policy –

was a Jew who had converted to Christianity.[9] It was not possible to establish racial criteria for Serbs, since only religion set them apart from the Croats, while their origin and language were the same (or at least very similar), therefore the criteria for citizenship was intentionally very vague.[10]

What Ante Pavelić, as the exclusive Ustasha legislator, „failed" to regulate on 30 April 1931, by adopting a legal degree that would define the criteria for gaining state nationality, was made up for in establishing the criteria defining who could not be a citizen. Borrowing from the Nazi legislator, Pavelić passed two more legal decrees on the same day: the Legal Decree on Racial Origins, and the Legal Decree on the Protection of Aryan Blood and the Honor of the Croatian People. Both the legal decrees were modeled after the 1935 Nuremberg Laws in the Third Reich (see Blašković, Alijagić 2010; Whitman 2017). Since Article 2 of the Legal Decree on Citizenship stated that only a state national of Aryan origin could be a citizen, the Legal Decree on Racial Origin excluded Jews and Romas from the circle of citizens.

According to Article 1 of this legal decree, a person of Aryan origin is one who „comes from ancestors who are members of the European racial community or who come from descendants of this community outside of Europe". Aryan origin was proven by „the baptismal (birth) and marriage certificates of the first and second generation (parents and grandparents)". Considering the state of the official records in the territory of BiH, in order to prove Aryan origin Muslims who could not provide the necessary documents needed „written testimony of two credible witnesses, who knew their ancestors, that there were no persons of non-Aryan origin among them". Article 2 of the legal decree equates Aryans and persons who „in addition to Aryan ancestors have one ancestor twice removed who is Jewish or of other European non-Aryan race are equated to persons of Aryan origin

[9] Jews contributed significantly to the triumph of the Ustasha movement „they were not quite rate among Pavelić's intellectual supporters" (Hori, Broscat 1994, 136).

[10] „What were the liberation aspirations of the Croatian people? Was it liberation from the Habsburg Monarchy (from Germanization and Magyarization) or only from Yugoslavia (i.e., from Serbia and the Serbs) or both? Next, what would be the actions directed against those liberating aspirations? For example, was a person of Aryan origin working against the liberating aspirations of the Croatian people because of their possible affection for the common state of the South Slavs? One would expect that persons of Serbian nationality – who were to a great extent majority members and voters of the Independent Democratic Party, which since 1927 had been in coalition with the Croatian Peasant Party, the main representative of Croatian interests in the state – were certainly candidates for citizenship. However, subsequent events completely repudiated this entirely reasonable expectation." (Mirković 2017, 48).

in regard to gaining citizenship". Persons who also had two ancestors twice removed who were Jews „can also be equated to persons of Aryan origin with regarding to citizenship, provided Article 3 does not stipulate otherwise".

Unlike the Legal Decree on Citizenship, which established quite vague conditions for gaining citizenship and none regarding state nationality, Article 3 of the Legal Decree on Racial Origin defined rather precise rules on who is considered a Jew. [11] Article 4 stipulated the restrictive criterium for Romas regarding the determination of Aryan origin, and the law defined a Roma as a person who „comes from two or more ancestors twice removed who are Gypsies by race".

Based on Article 5 of the Legal Decree on Racial Origin, on 4 June 1941 Minister of Interior Andrija Artuković passed the Order on the Establishment and Scope of Work of the Racial Political Commission, which was to implement the ideology of racial intolerance. Pavelić, as the Poglavnik of the NDH, kept for himself the exclusive of right of life or death, and in Article 6

[11] In the sense of this legal provision, the following persons shall be considered as Jews:

1. persons who come from at least three ancestors twice removed (grandparents) who are Jews by race. Grandparents are considered Jews if they are of the Mosaic faith or were born into that faith;
2. Persons who have two ancestors twice removed who are Jews by race, in the following cases:
   a. if they were members of the Mosaic faith on 10 April 1941 or if they later converted to that religion;
   b. if they have a spouse who is considered a Jew in the sense of item 1;
   c. if, after the entry into force of this legal provision, they entered into a marriage with a person who has two or more ancestors of the second generation of Jews by race, and the descendants from such a marriage;
   d. if they are illegitimate children with a Jew in the sense of item 1, and were born after 31 January 1942;
   e. if the ministry of internal affairs, on the basis of the submitted proposal of the racial political commission, decides that they are considered as Jews;
3. persons born outside the territory of the Independent State of Croatia, to parents who do not originate from the Independent State of Croatia, if they were of the Mosaic religion on 10 April 1941, or have at least two ancestors twice removed who are Jews by race, or are considered Jews according to the laws of the country from which they originate;
4. persons who, after the entry into force of this legal provision, entered into a prohibited marriage bypassing the legal provision on the protection of Aryan blood, and their descendants.
5. persons who are illegitimate children of Jewish women in the sense of item 1.

of the Legal Decree he stipulated that „[p]ersons who prior to 10 April 1941 proved themselves worthy of the Croatian people, primarily for its liberation, as well as their spouses, whom they entered into marriage prior to this legal stipulation coming into effect, and the descendants from such marriages, in the case that this order could apply to them, may be recognized all the rights that belong to persons of Aryan origin by the state poglavar".[12]

The position of the Ustasha regime regarding the Muslim population the region of Bosnia and Herzegovina was defined approximately at the same time as the Ustasha organization. Relying on Ante Starčević's notion regarding the Greater Croatian space, which also included BiH, they also adopted his idea on Muslims being ethnic Croats. Starčević's notion did not significantly differ from other greater national ideas that thrived in the 19th century. As the rounding out the living space that would include BiH could not be justified by the concept of Croatian state rights, since Bosnia had never been part of it, the Ustasha ideologues presented the thesis of the Muslim population as the ethnically purest part of the Croatian ethnic body. The „flowers of the Croatian people" platitude was also supposed to strengthen the thin majority that actual Croats had within the population.

When the Ustasha took over power in Croatia, they carried out a widespread campaign in order to win over the Muslim population. As Poglavnik of the NDH, Pavelić had no qualms about having his picture taken while wearing a fez, so that photos could be handed out in the form of postcards to the Muslim members of the Home Guard and Ustasha militias. He included in his first government Bosnian politician Osman Kulenović, and later also Džafer Kulenović, a prominent Bosnian politician and president of the Yugoslav Muslim Organization (JMO). The significance of the Bosnian region for the Ustashas is also reflected in the proclamation of Banja Luka as the capital of the NDH, although it was in essence always Zagreb. Also, the promise made at the beginning of the existence of the NDH regarding the construction of a mosque in Zagreb was fulfilled in 1944, when the Meštrović Pavilion was refurbished for religious service, with three minarets erected around the round building, with the interior undergoing minor changes.

Ustasha officials emphasized the significance of the members of the Muslim community for Croatdom in their public speeches, as did the Ustasha press. For example, in a speech in Banja Luka on 25 May 1941, Minister Jozo

[12] According to historical records, official recognition of Aryan rights was granted to around a hundred Jews, and since this also extended to their families, this applied to nearly 500 Jews in the NDH (Bartulin 2014, 154–155).

Dumandžić said that „with the same love as Starčević, our Poglavar also kisses Muslim brothers," and other slogans were promoted „The national harmony of the Croats is not and must not be upset by religious difference," „Bosniakdom is none other than preserved Croatdom," etc. In a speech in the Assembly in February 1942, Pavelić said „The Muslim blood of our Muslims is Croatian blood. It is Croatian faith, because on our lands its members are Croatian sons" (according to Jelić-Butić 1977, 197–198). Despite the strong words, the Ustasha policies were aimed at winning over wealthier Bosnian landowners (*begs*) who were promised a revision of the agrarian reform that had been carried under the Kingdom of Serbs, Croats and Slovenes.

All these political measures yielded rather meager results. With the exception of a small circle of the Muslim population who directly benefited from active participation in the life of the NDH, the majority remained passive and with reservations towards the idea of Greater Croatia. Furthermore, on several occasions Muslim intellectual circles even publicly opposed the Ustasha policies, through several resolutions, and requested that the German government grant BiH an autonomous status within the NDH. The German official field reports indicate the same, and one of them, sent to the High Command of the German Armed Forces (*Oberkommando der Wehrmacht* – OKW) notes that „Muslims would have surely acted the same way towards the Croats as the latter are now do towards the Serbs, of course – if only they could gain power. The greatest misapprehension is that there is a feeling of common national affiliation between the Muslims and Croats" (according to Kazimirović 1997, 114).

The legislation regarding the status of different groups that comprised the population of the NDH indicates certain features that deviate from the common definitions of citizenship as a public law link between the individual and the state. Members of the German national community, who could not even be citizens of the NDH, enjoyed greater rights than ethnic Croats „who had proven themselves with their demeanor" and were recognized citizenship. The position of the Germans in the NDH, who could also be foreign citizens, deviated from the standard definition of citizenship, which entailed that citizens of a given state have the greatest rights and obligations. This was just one of many aberrations from the usual notions developed by legal theory. The position of the German national group was defined in June

1941, through the Legal Decree on the Interim Legal Position of the German National Assembly in the Independent State of Croatia, and the extent of the rights was only expanded further on. [13]

In addition to full cultural autonomy, the German national group was granted decisive influence in the local self-government of areas inhabited by Germans, regardless of whether they were the majority, and they were even allowed to establish their own military units. [14] Furthermore, the NDH legislation also enabled unimpeded relations with military and civilian institutions of another state, i.e., the Third Redich, while its leader Branimir Altgayer was made state secretary within the government, with the right to issue orders, and they were guaranteed two representative seats in the NDH Assembly. Later the NDH government also approved that the *Volksdeutsche* could do their military service in SS units, and such a privileged position of the national group „gave cause for the official government of the Reich, SS and Department for Filling the SS Military Detachments act independently and administer according to their will." (Hori, Broscat 1994, 106). Therefore, the NDH legislation proved to be extremely distinct also regarding the issue of the population of the NDH and prescribing the position of the people who are located in the territory of the state and constitute its population.

[13] Article 1 of this legal provision stipulated that:

„The German national group in Croatia shall include Germans who live in Croatia, are not German citizens, and are under the leadership of the leader of the German national group.

„The German national group shall form a special constituent part of the Independent State of Croatia. For its work, within the framework of general legal regulations, it shall enjoy the unrestricted right of activity in the political, cultural, economic and administrative-social fields.

„The final position of the German national group in the Independent State of Croatia shall be regulated by special regulations" (translated by author).

[14] The Legal Decree on Organizing the Militia of the 'German National Group' Within the Croatian Ustasha Militia in the Independent State of Croatia stipulated that „In recognition of the merits of the 'German National Group' for maintaining order and creating a new order, and for the disarmament of the former Yugoslav army during the establishment of the Independent State of Croatia, one battalion (Einsatzstaffel) with a strength of three companies and a headquarters guard (Stabswache) shall be formed from the 'German Team' ('Deutsche Mannschaft') of the 'German National Group' in the Independent State of Croatia".

5. THE NDH STATE AUTHORITY

In addition to the territory and population, the third element of statehood is the state authority. As previously mentioned, in order for an authority to be designated a state, in addition to monopoly on use of force, it also must be legitimized by the population over which it is exerted, as well as be sovereign, i.e., independent of other states.

Prior to the introduction of King Aleksandar's dictatorship in early 1929, extreme Croatian nationalists, known as Frankovci, were active within the Croatian Party of Rights.[15] Even though they did not recognize the new state, considering it the end of Croatian statehood, they took part in parliamentary elections in order to remain politically visible. In the elections for the Constitutional Assembly of the Kingdom of Serbs, Croats and Slovenes their ticket won 0.7% of the votes, i.e., 10,880 votes (3,321 in Zagreb) and two seats. As a comparison, Stjepan Radić's Croatian Peasant Party (HSS) won the votes of 230,590 voters. Already in the next parliamentary elections in 1923 they won significantly fewer votes, only 6,469 (4,709 in Zagreb) and lost their parliamentary status. Two years later they fared even worse, winning a total of 3,191 votes (912 in Zagreb). Radić's HSS won 367,846 votes in 1923, and 376,414 in 1925, confirming its dominant position among the Croatian voters, especially in rural areas. The results of the elections clearly indicated that at the time the Croatian people did not accept the extremist views of the Frankovci and supported Radić, with the exception of larger urban areas, where the policy orientation of the HSS towards the problems of the

[15] The Croatian Party of Rights (HSP) was created by the unification of the former Party of Rights with the Independent People's Party in 1903 and operated until 1918. Starting in 1905 it was part of the Croatian–Serbian coalition. Its representatives directly participated in the creation of the Yugoslav state. After the Great War, Croatian nationalists founded a party under the same name. To make the confusion complete, the two parties with different program orientations and the same name, also include two namesakes with different political views. As a right-wing deputy in the Croatian Parliament from 1906 to 1918, in the latter years of the Great War, Ante Pavelić advocated for the unification of the Yugoslav peoples. Later, he was also the president of the Senate of the Kingdom of Yugoslavia, while a large number of former members of the HSP joined the ranks of the Democratic Party. He personally read to regent Alexander the Address of the National Council (of which he was vice president) requesting unification with Serbia. In order to avoid confusion in the historiographical literature, he is referred to as Ante Pavelić (senior), because he was born 20 years before his better-known namesake, or as Ante Pavelić (dentist), because he practiced dentistry in Zagreb. In order to avoid confusion about the namesake parties, the abbreviation HSP-F (Croatian Party of Rights – Frankovci) is often used for the Croatian Party of Rights that was created after the Great War.

village and rural population did not attract many voters. With the aim of returning his party to the parliament of the state that he did not recognize, Pavelić ran in the 1927 elections together with Ante Trumbić's federalists. United into the Croatian Bloc, as a coalition they won enough votes to cross the threshold and gain two seats in parliament, one of which was held by Pavelić. Both seats were won in the City of Zagreb, where they won more votes than any other party (9,795).[16]

Following the introduction of the dictatorship, Pavelić went into exile, where he formed the Ustasha Croatian Revolutionary Movement (UHRO). In addition to leaving the country, he also abandoned the framework of legal political activity and continued the struggle for achieving Croatian independence using terrorist means. During the interwar period, especially following the assassination of Puniša Račić in parliament, this idea gained increasing support among the Croatian population, as opposed to the idea of the joint Yugoslav state. When war came to its borders in 1941, the idea of Croatian independence seemed plausible, even easily achievable, and it was precisely the great support for this idea by the Croatian leadership and people that represented the foundation from which the new Ustasha government derived its legitimacy. [17] The Ustasha government immediately took over the institutions of the Banovina of Croatia, continuing their work in the newly created circumstances. The relatively easy creation of the NDH can be explained by the wartime circumstances in 1941, when the Axis powers appeared invincible, as well as the desire of the Croatian political elite to achieve the idea of Croatian autonomy, i.e., independence.

The Ustasha government enjoyed two main lines of institutional support. The first line, the political one, came from Maček, as the most influential Croatian leader. At the time that the NDH was proclaimed, Maček was first deputy prime minister of the Yugoslav putschist government, which he had accepted at Simić's invitation but with some hesitation. He rejected the German plans that he – as the undisputed Croatian leader – should become the dominant figure in the new state, since at the core he was not a fascist. Under great pressure, as well as fearing destruction similar to what Belgrade had already suffered as a warning to others, Maček was swayed to, perhaps hastily, call on the Croatian people to accept the new Ustasha auhtority, which was done in a radio address (Goldstein 2013, 301). Consequently,

[16] In the elections for alderpersons in Zagreb, held on 4 August 1927 (parliamentary elections were held on 11 September), the Croatian Block won 9,749 votes out of the total of 19,563 (Radonić Vranjković 2008, 268–270).

[17] Around 100,000 new members joined the Ustasha movement already in May 1941 (Goldstein, 2013, 303).

regardless of the motives and circumstances that influenced his decision, Maček „ensured the legitimate transfer of power to the Ustashas" (Marinković 2017, 96).

The second direction of institutional support came from the Catholic Church, which readily supported the creation of the new state. Already on 12 April, Archbishop Aloysius Stepinac sent Slavko Kvaternik official congratulations on the creation of the NDH, *Te Deum* was performed in churches in honor of the new state, and several days later Stepinac also officially visited Pavelić, upon his return from twelve years in exile. Many significant representatives of the Catholic Church in Croatia, as well as „a large portion of the lower clergy and members of certain orders (Franciscans) embraced the Ustasha movement entirely, including the application of genocidal measures. Very few induvials (Bishop A. Mišić, Archbishop J. Ujčić) distanced themselves from the physical destruction of people" (Živojinović 1994, 12).

The initial legitimacy of the Ustasha authorities was in essence derivative, however it is necessary to examine the ways that this regime was further legitimized after taking over power in Croatia. For this purpose we will use Weber's approach (Weber 1964, 328). For explaining the forms of power and authority, Weber differentiates between three types of authority. The first is the legal authority with its bureaucratic and administrative system, the second is the traditional authority, and third is charismatic authority. It should be kept in mind that Weber's models are of an ideal type, i.e., their analysis is defined by in „ideal-typical terms that are more suited for heuristic purposes of conceptual modelling than for describing particular historical realities" (Kallis 2006, 25). In reality it is nearly impossible to find pure types as defined by Weber, rather it is usually a specific combination or overlapping. For example, in the Kingdom of Yugoslavia, the state government primarily featured traditional authority, embodied in King Aleksandar, but it also had elements of the other two, e.g., the royal family „it had allure, its charm, and for the Croats the king had a mystical charm – the only one among Serbian politicians" (Ramet 2009, 135).

The creation of the NDH saw the return of Ustasha exiles, to Yugoslavia, headed by Pavelić and alongside the military units of the Axis powers. On the road to Karlovac, the returning Ustashas were greeted in many towns, and the gathered people openly commented „There's no war, yet we have a state" (Goldštajn 2012, 12). In the wartime circumstances, the support to the new authorities cannot be expressed differently (e.g., in elections), but through certain acts of active and passive support. „The exhilaration that followed the proclamation of the independent Croatian state, on Holy Thursday, 10 April 1941, was so sincere and so comprehensive that one could rightly claim that the great majority of the population in the Croatian

region accepted the new state as the attainment of their political will. That April there was no formal referendum, but had it been possible to carry out, the results would have hardly differed from the referendum where in the present the Croatian people declared in favor of the independence of its current state" (Kusić 1996). Many of them would join the Ustasha ranks in the following months, often for opportunistic reasons.[18]

During the entire war, significant portions of the Catholic Church and numerous dignitaries, headed by Archbishop Aloysius Stepinac, continuously provided support to the NDH authorities and its leader, Ante Pavelić. The position of Archbishop Stepinac towards the Ustasha authorities was followed by other church dignitaries, such as Archbishop Ivan Šarić of Vrhbosna, Bishop Antun Akšamović of Djakovica, Bishop Petar Čule of Mostar, Bishop Josip Garić of Banja Luka, Coadjutor Bishop Janko Šimrak of Križnjevci, etc. They and many other Catholic priests „spoke and wrote in favor of it, supported its decisions, justified actions or stood up in its defense and preservation. [...] It appeared that the symbiosis between the Catholic Church and the regime had become the foundation of its survival, its support in the masses of believers" (Živojinović 1994, 14–15).[19] The right wing of the HSS, as well as the entire so-called peasant and civic defense, as the party's paramilitary formations, would be placed under the Ustasha authority. Also, intellectual circles that were active within the Matica Hrvatska, headed by Filip Lukas, accepted and supported the authorities of the new state, which in the sense of Weber, would represent traditional grounds of authority.

However, the organization of the NDH authority and the position that Pavelić enjoyed within it, indicate that in addition to traditional legitimacy (support of the church, political and intellectual circles, the population's customary obedience, etc.), it attempted to significantly base its legitimization on the personality of the leader of the Ustasha movement, i.e., his charismatic authority. Almost all relevant authors, including those who were active in the NDH, are unanimous in their assessment of the nature

[18] Historians estimate that during this period between 80,000 and 100,000 people joined the Ustasha organization (Hori, Broscat 1994, 126–127; Goldstein 2008, 226).

[19] The 11 May 1941 issue of the Sarajevo-based weekly *Katolički tjednik*, edited by Archbishop Šarić, stated that „[o]ver our new, young and free Croatia a sign has appeared in the sky, as an image of the Virgin Mother of God. The Virgin is coming to visit Croatia. She wants to wrap in her motherly clothes the young reborn Croatia, precisely on the thousandth jubilee of Catholicism in Croatia. She descends again on the banner of our freedom, to take her old place on it... The Lord and Mary's Croatia from ancient times has been resurrected" (according to Kazimirović 1987, 109–110).

of the state regime and organization of authority in the NDH. The fact that the Ustasha regime was a type of neoabsolutism is confirmed also by Eugen Sladović, who defined the NDH as „the leader's state" in which there was no separation of powers, since they were all in his hands. „The Poglavnik, as the leader and head of state, is the master of the state administrative authority, and at the same time also the highest-ranking legislator, head of government, and therefore the master of state institutions. He is also the leader of the Ustasha movement and supreme commander of the armed forces" (according to Hori, Broscat 1994, 121). However, the neoabsolutistic type of constitutionality did not imply only „returning to the old regime (*l'ancient régime*) of absolute monarchies. It was no longer the authoritarian authority of the ruler or the church, but a societal Caesarism" (Marinković 2017, 101). This thesis is supported by the conclusion of the Treaties of Rome, in which Pavelić gave up part of the territory to Italy, implying that he disposed of the land as an absolute monarch, as though it was his private property.

The NDH was modelled after the then current type of political orders characteristic of many countries in interwar Europe, primarily Germany and Italy. This form of political regimes was not based on a constitution in the way that constitutionality is commonly understood today. In the NDH, as was the case in Fascist Italy and Nazi Germany, the constitution consisted of uncodified organic laws of a constitutional nature (Marković 2018, 74). Such an authoritarian type of constitutionality is not based on the consent of the people, i.e., confirmation by the electorate; this type of legitimacy is substituted by collective depictions of the leader's exaltedness and his historic mission.

Weber defines charismatic authority as „a certain quality of an individual personality by virtue of which he is set apart from ordinary men and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities. These are such as are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader" (Weber 1964, 358–359). Weber notably arguments that charisma originates from the individual who is considered to have special gifts or powers, that he has been chosen, and as such he becomes worthy of admiration in every sense and deserves unquestionable trust, which represents the foundation authority. According to Weber, a special personality and their power is not enough to create charismatic authority, but rather the crucial factor is precisely the recognition of its existence by those who are susceptible to the person's authority.

The development of the charismatic authority was greatly aided by Catholic circles, citing divine providence, e.g., in late 1941 Archbishop Ivan Šarić published the *Ode to the Poglavnik*. The right-wing intellectual circles acted in the same direction, as did the Ustasha ideologues. In a text titled What the Poglavnik Was to Us Before the Liberation and Now, which was published in the *Hrvatski Narod* magazine on 12 December 1941, Danijel Crljen wrote „The previously invisible, mystic leader, the source of our strength, the eagerly awaited avenger, the good knight from stories, the pride of the Ustasha fighters, the only hope of the oppressed Croatia, the spirit that floated above our fields and meadows, forests and barren lands... Today: ruler, the true leader of the people, the pillar of the state, protector and bastion of freedom and independence, the spirit and strength of the Ustasha movement, father to the small, protector of the oppressed, restorer of the glorious past, builder of the bright future, foreman and vanguard [...] Calling him the restorer of the Croatian state is an understatement. He is the savior and restorer of the Croatian people, which is much more – because the Croatian state could not exist without the Croatian people“ (according to Miljan 2013, 141).

Pavelić himself expressed the affinity towards irrational representations of his own historical mission. His speech to the members of the Croatian State Assembly (HDS) was especially impressive. The only item on the agenda for the last, twelfth session of the HDS, held on 28 December 1942, was the Poglavnik's address. In the speech Pavelić said „I cannot resign, I cannot refuse, I cannot also impart on anyone responsibility – as Mr. Kovačević said in the committee – that it seemed to him, that it happened on several occasions, that the government wanted to impart responsibility on the members of this Assembly – no, I protest against that! I bear responsibility for everything. I do not demand responsibility of any of the ministers before the people. The minister is here to serve the cause and no one shall demand responsibility of them later. I gladly accept it. I also take all responsibility for the military; I take responsibility also for food and for politics and for lives! That is why I don't demand and don't want to share responsibility with anyone, but I demand to share with all of you the work and tasks and successes“ (Brzopisni zapisnici Hrvatskog državnog sabora 1942. – Shorthand records of the HDS, 187)

Despite the elements of traditional authority, it would be incorrect to conclude that Pavelić's authority, around which the system of NDH authority was developed, had in essence been charismatic. Had he truly been a charismatic personality, it would not have been necessary to point out that charism and impose it through great addresses and propaganda, especially not through the creation of special security bodies whose basic purpose

was to intimidate people based on organized violence. In this respect, the Ustasha regime resembles totalitarian orders, whose epigonic variant it was, where authority is legitimized through „metarational and emotional appeals that are cast in strongly rational terms" (Friedrich, Bzezinski 1956, 42), and could rather be labelled as pseudo-charismatic (Marinković 2017, 99).

Finally, as the third element of state authority, in addition to monopoly on use of force and legitimization, is the sovereignty as a specific feature. Sovereignty is based on two expressions, internal and external. The former indicates that the state authority is the highest of all authorities or institutions (church, school, sports, etc.) and that as such it enjoys supremacy, i.e., it is not subordinate to any other authority and all others are subordinate to it. The latter, external element implies that the state authority is independent, i.e., free of all foreign interference when passing decisions, i.e., „it is not required to comply with orders of any foreign authority that is outside of the state territory" (Marković 2018, 154).

In the radio address proclaiming the NDH on 10 April 1941, Slavko Kvaternik pointed out that divine providence, the will of the allies (Germany and Italy), as well as the dedication of leader Ante Pavelić and the Ustasha movement determined the creation of the new Croatian state. Clearly, without the breakup of the Kingdom of Yugoslavia, the NDH could not have been created; its statehood came armored in the steel of the tanks of other states. However, when the structures of the old authority fell apart, the Croatian people recognized the Ustasha movement as the organized group of people that, with assistance from the German and Italian militaries, as well as the peasants' protection of the HSS, which placed itself under their authority, was capable of carrying out the idea of creating the new Croatian state. This idea, already rooted in the prewar period, and supported by church, political and intellectual circles, led the Croatian population to actively or silently accept the Ustashas as the bearers of new authority. The cost of this acceptance meant joining the fascist camp, with all the consequences that came with such a choice.

Nazi Germany and Fascist Italy formally recognized the independence of the new Croatian state. All the arrangements that essentially limited and even annulled Croatian independence were concluded with the consent of the Ustasha authority, embodied in Ante Pavelić as its bearer. Through a series of extremely unfavorable international treaties, this authority demonstrated the readiness to willingly forfeit the national interests that the state authority should primarily protect, which even entailed giving up part of its territory. In return, the Ustashas could implement the main goals of their policies – one of the main ones being the creation of an ethnically pure space, in which they had support, especially from the Germans. Also,

the NDH was capable of entering into legal relations with other states, which indicates that in some respect it was internationally recognized. However, under conditions of a world war, when chaos existed in many countries and the consequences and impacts of the conflict could be felt in every corner of the planet, the issue of international recognition becomes irrelevant, due to the uncertain outcome of the war. None of the Allies recognized the NDH; moreover, the NDH even declared war on Britain and the USA and sent its legions to the USSR – yet it was these countries that would develop the postwar international community on new principles and establish the United Nations.

6. CONCLUDING REMARKS

The ideological similarity with the fascist and nazi regimes, their military support, the institutional support of the Croatian political and Church circles, as well as the support of a great portion of the Croatian people for the idea to establish their own state, represented the pillars of the NDH authority. The Ustasha regime was reminiscent of the Nazi regime in many respects: all the state power was concentrated in executive, headed by Pavelić and his closest associates. Pavelić controlled the entire legislative authority,[20] as well as other dictatorial authorities. Borrowing from the Nazis, the Ustashas initiated a legislatorial endeavor already in the first days of their government, in order to provide a legal framework for the planned terror actions. The most important among the newly-adopted legal solutions was the very brief Legal Decree on the Defense of the People and State, dated 17 April 1941, after which Pavelić passed a series of legal decrees that situating a great portion of the NDH population outside any legal framework and protection. The new legislation also consolidated the Ustasha authority and established its foundations consisting of the „militia, army, secret police, special courts and more than twenty concentration camps“ (Čalić 2013, 172).

The way that the Ustashas exercised power in the NDH led to the initial support for their regime to quickly subside. From the viewpoint of the Croatian political elite and people, the signing of the Treaties of Rome in May

[20] Article 1 of the Legal Decree on the Names of Legal and Other Regulations and Regional Solutions, dated 20 October 1941, stated „Decrees shall be issued only by the Poglavnik of the Independent State of Croatia. The decrees shall be: 1) legal, which have the nature of law; 2) general, which regulate issues of a general nature and do not have the nature of law, and 3) special, which regulate specific (individual) issues, which by law shall be resolved only by the Poglavnik“ (translated by author).

1941 represented the first significant step towards their delegitimization. High inflation, corruption and embezzlement by state and party officials, irregular supply of basic provisions, malnutrition of the population, lack of healthcare and social protection, general legal insecurity, in addition to numerous other associated phenomena only accelerated this process. On the other hand, among the large population that was not ethnically Croat, the delegitimization of the Ustasha authority occurred primarily as the consequence of its brutal governance. Prior to the first larger actions aimed at deporting and eradicating the Serbs, Jews and Romas, there was no armed resistance to the new authorities. Resistance appeared only as the direct consequence of the existential threat to the Serbian population. Its trust in the NDH authorities was permanently shattered after the first organized crimes.

The number of victims of the Ustasha regime proves the exceptional scope of the organized crimes. The scope of the terror that the Ustashas were able to carry out, especially during 1941 and 1942, implied the adoption of an entirely new legislation, where numerous categories of population were completely disenfranchised, creation of a network of permanent and mobile military tribunals, establishment of special security services, organizing a system of camps and rail transport, engaging the state apparatus beyond its regular purview, creating Ustasha militias, etc. This mechanism was used to achieve an ethnically pure state, which was the main objective of the Ustasha movement, going back to its founding in Italy in 1932. The performance – which was measured in the number of converted, imprisoned, exiled or slain members of the population who were Serbs, Jews, Romas, as well as disloyal Croats – proves that the Ustasha regime, at least during the first half of its existence, enjoyed the monopoly on use of force. Therefore, it could be said that the NDH possessed all the attributes of statehood, i.e., that in addition to territory and population it also had an internationally recognized state authority, which possessed the power to carry out the main objectives of its policy.

Viewed from the opposite angle, the threatened population had no reason to accept such a state. Its functioning threatened the survival of many people, and survival represents the minimum purpose that people have in associating with each other within states, as political communities (Hart 2013, 251). In those parts of the NDH territory where the existentially threatened population was large enough (which were predominantly areas inhabited by Serbs), the motivation for survival led to disobedience of the NDH authorities, as well as the creation of a new order that would ensure that survival. Since the NDH authorities acted with the aim of threatening the existence of many of residents, the People's Liberation Movement (NOP)

emerged as the main competitor. Due to its supernational nature and high degree of organization, people of all different ethnicities and denominations came together in it; originally it was primarily Serbs, who were at the highest risk, but as the war progressed (especially following the capitulation of Italy) the movement was also joined by large numbers of ethnic Croats. [21]

Over time, the loss of legitimacy indirectly affected the effectiveness of the functioning of the NDH bodies, which led to the SS authorities taking over execution of police authority. German Reichsführer-SS Heinrich Himmler personally came to Zagreb on 5 May 1943, in order to arrange for the German police trustee to be given nearly unlimited police authority in the NDH, while the creation of mixed German–Croatian units and armed (gendarmerie) services placed a large portion of the state executive under control of the SS (see Kovačić 2014, 201–228). In early 1943, Pavelić's regime was worth to Hitler only as much as it was able help in the struggle against Germany's enemies. Consequently, „the history of the Ustasha state nearly completely lost its actual subject in 1943. What determined events on the Croatian stage from then until the end of the war could only insignificantly be linked to the effectiveness of the NDH. [...] The surging partisan strength and growing arbitrariness of the German military, police and political bodies and different special trustees shattered Croatian sovereignty into increasingly small pieces" (Hori, Broscat 1994, 238).

Following the unsuccessful military campaigns in the winter of 1942/43, undertaken with the aim of breaking the partisan resistance, elements of a new state-legal order started appearing in significant parts of the NDH territory, created on the ruins of the previous one. The new order was formally constituted at the Second Session of the Anti-Fascist Council for the National Liberation of Yugoslavia (AVNOJ), held in Jajce on 29 November 1943, which de facto already had a clear structure of authority, effective control of all the territories that it had gained by means of arms, and a population of around 2 million. Adding to this the fact that the Allies recognized the partisan movement at the Teheran Conference, which was held at the same time as the Second Session of the AVNOJ, it is easy to notice the seed of the new Yugoslav state, created in the midst of the NDH, and which over the next year-and-a-half would achieve all the elements of statehood, while at the same time the NDH would lose them.

[21] In the spring of 1944, the partisan military consisted of 44% Serbs, 30% Croats, 10% Slovenes, 4% Montenegrins, 2.5% Bosnian Muslims, etc. (Čalić 2013, 207).

In the postwar scientific literature, the unanimous rejection of the idea of the NDH statehood was also supported by the thesis of crimes that the Ustasha authorities carried out in an organized manner against their own population. This thesis is in many ways close to legal reasoning, which is accustomed to defining the state as the highest political organization whose basic function is to protect the people and territory. However, if this thesis about crime were to be accepted, one would have to challenge the statehood of the Third Reich, the ideological beacon of the Ustasha movement, which no one serious has done. Other theses and arguments supporting this same position on disputing NDH statehood have been dismissed in more recent literature (see Jonjić 2011; Krstić, Jovanović 2017; Marinković 2017, Zdravković 2019).

In this brief analysis, the thesis on crime is used oppositely – precisely to prove that the NDH possessed all elements of statehood, because then the scope of their undertaking aimed at carrying out the main political goals would not have been possible had the Ustasha authorities not had monopoly on use of force (stemming from its initial legitimacy) in the given territory. However, in the functional respect, this same thesis can easily dispute the statehood of the NDH, since it did not fulfill its basic functions – it did not protect its territory or population.[22] By producing the a chaos of war (resembling Thomas Hobbes's description of a pre-state condition) in the territory where it exercised authority, hundreds and thousands of kilometers away from the main front lines, and by voluntarily forfeiting historical Croatian regions and binding itself in perpetuity to the fate of the Third Reich, the Ustashas directly proved that the state exists in order to fulfill its functions. The state creation where they assumed the helm failed in two main respects: instead of internal integration it created grave divisions, widespread resistance and war, while in external policy it aligned itself with the losing side. The chaos that existed in its space was overcome by the NOP, which delegitimized the Ustasha regime, because, in addition to its greater military might and international recognition, it fulfilled the basic functions that otherwise encourage people to collaborate and which is the foundation for any political organization.

[22] „The Treaties of Rome, which were published yesterday evening, were like a slap in the face of all of Croatia [...] The Government, which already was not firmly established in the public, lost even more footing." (according to Hori, Broscat 1994, 102).

REFERENCES

[1] Balen, Šime. 1952. *Pavelić*. Zagreb: Biblioteka Društva novinara Hrvatske.

[2] Bartulin, Nevenko. 2014. *The Racial Idea in the Independent State of Croatia – Origins and Theory*. Leiden Boston: Brill.

[3] Blažević, Robert, Amina Alijagić. 2/2010. Antižidovsko i rasno zakonodavstvo u fašističkoj Italiji, nacističkoj Njemačkoj i ustaškoj NDH. *Zbornik Pravnog fakulteta u Rijeci* 31: 879–916.

[4] Bobbitt, Philip. 1996. Public International Law. 96–112 in *A Companion to Philosophy of Law and Legal Theory*, edited by Dennis Patterson. Oxford: Blackwell Publishing.

[5] Brzopisni zapisnici Hrvatskog državnog sabora. 1942. Zagreb: Hrvatska državna tiskara.

[6] Colić, Mladen. 1973. *Takozvana Nezavisna Država Hrvatska 1941*. Belgrade: Delta Press.

[7] Čalić, Mari-Žanin. 2013. *Istorija Jugoslavije u 20. veku*. Belgrade: Klio.

[8] Čulinović, Fedro. 1970. *Okupatorska podjela Jugoslavije*. Belgrade: Vojnoizdavački zavod.

[9] Friedrich, Carl J, Zbigniew K. Brzezinski. 1956. *Totalitarian Dictatorship and Autocracy*. Cambridge: Harvard University Press.

[10] Goldstein, Ivo. 2008. *Hrvatska 1918 – 2008*. Zagreb: EPH Liber.

[11] Goldstein, Ivo. 2013. *Hrvatska povijest*. Zagreb: Novi Liber.

[12] Goldštajn, Slavko. 2012. *1941. Godina koja se vraća*. Belgrade: JP Službeni Glasnik; Sarajevo: Synopsis.

[13] Hart, Herbert. 2013. *Pojam prava*. Belgrade: Pravni fakultet Univerziteta u Beogradu; Belgrade: Službeni glasnik.

[14] Hori, Ladislaus, Martin Broscat. 1994. *Ustaška država Hrvatska 1941–1945*. Belgrade: DBR International Publishing.

[15] Horvat, Rudolf. 1942. *Hrvatska na mučilištu*. Zagreb: Kulturno-historijsko društvo „Hrvatski rodoljub".

[16] Jelić-Butić, Fikreta. 1977. *Ustaše i Nezavisna Država Hrvatska 1941–1945*. Zagreb: Liber – Školska knjiga.

[17] Jessop, Bob. 2008. The State and State-Building. 111–130. *The Oxford Handbook of Political Institutions*, edited by R. A. W. Rhodes, Sarah A. Binder and Bert A. Rockman. Oxford New York: Oxford University Press.

[18] Jonjić, Tomislav. 2/1999. Pitanje priznanja Nezavisne Države Hrvatske od Švicarske Konfederacije. *Časopis za suvremenu povijest* 31: 261–278.

[19] Jonjić, Tomislav. 3/2011. Pitanje državnosti Nezavisne Države Hrvatske. *Časopis za suvremenu povijest* 43: 667–698.

[20] Kallis, Aristotle A. 1/2006. Fascism, Charisma and Charismatisation: Weber's Model of Charismatic Domination and Interwar European Fascism, *Totalitarian Movements and Political Religion* 7: 25–43.

[21] Kazimirović, Vasa. 1987. *NDH u svetlu nemačkih dokumenata i dnevnika Gleza fon Horstenau 1941–1944*. Belgrade: Nova knjiga; Belgrade: Narodna knjiga.

[22] Kovačić, Davor. 2014. *Oružništvo Nezavisne Države Hrvatske: Redarstveno tijelo i vojna postrojba 1941–1945*. Zagreb: Zvonimir Despot; Zagreb: Hrvatski institut za povijest.

[23] Krizman, Bogdan. 1978. *Ante Pavelić i ustaše*. Zagreb: Globus.

[24] Krizman, Bogdan. 1980. *Pavelić između Hitlera i Musolinija*. Zagreb: Globus.

[25] Krstić, Ivana, Miloš Jovanović. 2017. Međunarodnopravni status Nezavisne Države Hrvatske. 195–232. *Pravni poredak Nezavisne Države Hrvatske*, edited by Boris Begović and Zoran Mirković. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[26] Kustić, Živko. 1996. *Iskreno oduševljenje na veliki četrvtak 10. travnja 1941*. Panorama 102. Zagreb.

[27] Marinković, Tanasije. 2017. „Takozvana" Nezavisna Država Hrvatska. 75–109. *Pravni poredak Nezavisne Države Hrvatske*, edited by Boris Begović and Zoran Mirković. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[28] Marjanović, Jovan. 1963. *Ustanak i narodnooslobodilački pokret u Srbiji 1941*. Belgrade: Institut društvenih nauka – Odeljenje za istorijske nauke.

[29] Marković, Ratko. 2018. *Ustavno pravo*. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[30] Matković, Hrvoje. 1994. *Povijest Nezavisne Države Hrvatske*. Zagreb: Naklada P.I.P. Pavičić.

[31] Miljan, Goran. 1/2013. „Karizmatični" Poglavnik? Poglavnik i formiranje karizmatske zajednice – primjena i korisnost Weberova koncepta karizme. *Historijski zbornik* 46: 121–147.

[32] Mirković, Zoran. 2017. Rasno zakonodavstvo u Nezavisnoj Državi Hrvatskoj. 45–74. *Pravni poredak Nezavisne Države Hrvatske*, edited by Boris Begović and Zoran Mirković. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[33] Pekić, Petar. 1942. *Postanak Nezavisne Države Hrvatske: Borba za njeno oslobođenje i rad na unutrašnjem ustrojstvu*. Zagreb: Hrvatska knjiga.

[34] Radonić Vranjković, Paulina. 2008. Gradski i parlamentarni izbori u Zagrebu 1927. *Zavod za hrvatsku povijest* 40: 249–274.

[35] Ramet, Sabrina. 2009. *Tri Jugoslavije: Izgradnja države i izazov legitimacije: 1918–2005*. Zagreb: Golden marketing; Zagreb: Tehnička knjiga.

[36] Trifković, Srđa. 2016. Diplomatija NDH. *Politeia* 11: 27–54.

[37] Weber, Max. 1964. *The Theory of Social and Economic Order*. New York: The Free Press.

[38] Whitman, James. 2017. *Hitler's American model: The United States and the Making of Nazi Race Law*. Princeton: Princeton University Press.

[39] Zdravković, Miloš. 1/2019. Ustavnopravni temelji NDH. *Annals of the Faculty of Law in Belgrade* 67: 113–139.

[40] Živojinović, Dragoljub R. 1994. *Vatikan, Katolička crkva i Jugoslovenska vlast 1941–1958*. Belgrade: Prosveta; Belgrade: Tersit.

Article history:
Received: 27. 2. 2024.
Accepted: 5. 9. 2024.

/ANALIZA SUDSKE PRAKSE

UDK 342.56(497.11); 347.962.2(497.11)
CERIF: S 110, S 140, S 142
DOI: 10.51204/Anali_PFBU_24306A

Dr Nikola BODIROGA*

KONTROLA ODLUKE O IZBORU NA SUDIJSKU FUNKCIJU U POSTUPKU PRED USTAVNIM SUDOM

Promene Ustava iz 2022. godine i pravosudni zakoni koji su doneti godinu dana kasnije značajno su izmenili postupak za izbor sudija. Ukinut je prvi (probni) izbor na period od tri godine, izbor sudija svih sudova stavljen je u nadležnost Visokog saveta sudstva i predviđena je mogućnost podnošenja pravnog sredstva protiv odluke o izboru na sudijsku funkciju. Protiv te odluke kandidat ima pravo da Ustavnom sudu podnese žalbu, koja isključuje pravo na podnošenje ustavne žalbe. Tako je Ustavni sud došao u poziciju da kontroliše odluke o izboru na sudijsku funkciju koje donosi Visoki savet sudstva. U tekstu ćemo analizirati prvu odluku koju je Ustavni sud doneo povodom žalbe protiv odluke o izboru na sudijsku funkciju, a stavovi koji su u toj odluci sadržani biće dosledno primenjivani i u kasnijim odlukama Ustavnog suda.

Ključne reči: *Izbor sudije. – Pravno sredstvo. – Ustavni sud. – Evropski sud za ljudska prava.*

* Redovni profesor, Univerzitet u Beogradu – Pravni fakultet, Srbija, član Visokog saveta sudstva, Srbija, *bodiroga@ius.bg.ac.rs*, ORCID iD: 0009–0006–0615–3616.

1. ŽALBA USTAVNOM SUDU PROTIV ODLUKE O IZBORU NA SUDIJSKU FUNKCIJU I ODLUKA USTAVNOG SUDA

Zakon o sudijama[1] donet je u Skupštini Srbije 9. februara 2023. godine, a počeo je da se primenjuje od dana konstituisanja Visokog saveta sudstva, 10. maja 2023. godine. Brojni postupci o izboru sudija započeti su po ranijem Zakonu o sudijama,[2] ali nisu bili okončani u trenutku kada je novi zakon počeo da se primenjuje. Time je otvoreno pitanje koji zakon će se primeniti na započete a neokončane postupke. U skladu sa ranijim ustavnim i zakonskim rešenjima, prvi izbor na sudijsku funkciju vršila je Narodna skupština, dok je po novom zakonu za sve izbore na sudijsku funkciju nadležan Visoki savet sudstva. Bilo je promena i u samoj proceduri izbora jer je odredbama ZS 2023 propisano da se pre donošenja odluke o izboru mora sprovesti i vrednovati razgovor sa kandidatima, nezavisno od toga da li se prvi put biraju na sudijsku funkciju ili je reč o sudijama koje se već nalaze na sudijskoj funkciji a biraju se u drugi sud ili i u sud višeg stepena. Konačno, odredbama ZS 2023 predviđeno je da kandidat koji nije izabran ima pravo da podnese žalbu Ustavnom sudu, koja isključuje pravo na podnošenje ustavne žalbe. Odredbom čl. 111 ZS 2023 propisano je da postupak započet po odredbama ZS 2008 koji nije okončan do dana konstituisanja Visokog saveta sudstva treba da bude završen u skladu sa odredbama ZS 2023, što znači da se taj zakon primenjuje na neokončane postupke. To je imalo za posledicu da se neokončani postupci samo nastavljaju od faze u kojoj su se nalazili u trenutku konstituisanja Visokog saveta sudstva, a sve preostale faze postupka treba da se sprovedu u skladu sa novim zakonom. Odredba čl. 111 ZS 2023 odnosi se na samo na postupak za izbor sudija i predsednika sudova nego i na druge postupke koji se vode po tom zakonu. Očigledno je cilj zakonodavca bio da se nova zakonska rešenja primenjuju na sve neokončane postupke, i to od dana kada je Visoki savet sudstva konstituisan u sastavu koji je bitno promenjen u odnosu na sastav određen Ustavom iz 2006. godine.

U konkretnom slučaju sprovođen je postupak za izbor sudija jednog prvostepenog suda opšte nadležnosti, sve faze postupka sprovedene su po odredbama ZS 2008, a raniji saziv Visokog saveta sudstva uputio je Narodnoj skupštini predlog da se izaberu određeni kandidati, ali o tom predlogu nije doneta odluka nego je vraćen Visokom savetu sudstva. Postupajući u skladu

[1] Zakon o sudijama – ZS 2023, *Službeni glasnik RS* 10/2023.

[2] Zakon o sudijama – ZS 2008, *Službeni glasnik RS* 116 /2008, 58/ 2009 – US, 104 /2009, 101/ 2010, 8 /2012 –US, 121 /2012, 124 /2012 – US, 101/ 2013, 111/ 2014 – US, 117 /2014, 40 /2015, 63 /2015 – US, 106 /2015, 63/2016 – US, 47/2017, 76/2021.

sa prelaznim i završnim odredbama ZS 2023, Visoki savet sudstva je 15. juna 2023. doneo odluke o izboru na sudijsku funkciju, a 6. jula 2023. godine protiv tih odluka podneta je žalba Ustavnom sudu.

Žalbom se ukazuje na nepravilnosti u pojedinim fazama postupka izbora i na to da je Visoki savet sudstva prekoračio granice odlučivanja po slobodnoj oceni. Izabrani kandidati i neizabran kandidat se porede polazeći pre svega od dužine i vrste radnog iskustva koje je stečeno pre raspisivanja javnog konkursa. Navodi se i da svi kriterijumi za izbor sudija nisu pravilno i dosledno primenjeni. Na kraju, od Ustavnog suda se traži da ukine pobijane odluke Visokog saveta sudstva i vrati predmet na ponovno odlučivanje.

Ustavni sud je izjavljenu žalbu dostavio Visokom savetu sudstva na odgovor, Savet se u roku izjasnio o žalbenim navodima, nakon čega je Ustavni sud doneo rešenje kojim je žalbu odbacio. Odluku o odbacivanju žalbe donelo je Malo veće Ustavnog suda.[3]

U obrazloženju rešenja Ustavni sud je sumarno prikazao sadržinu žalbe i žalbenih navoda, odgovor na žalbu koji je podneo Visoki savet sudstva, a potom naveo koji zakoni i podzakonski akti su bili značajni za odlučivanje u tom postupku. Analizirajući ranija i važeća zakonska rešenja, Ustavni sud je zaključio da su u oba zakona propisani gotovo identični uslovi za izbor. Povodom žalbenih navoda koji se odnose na nepoštovanje zakonom propisanog postupka, Ustavni sud je ocenio da ti navodi nisu tačni jer je postupak za izbor sudije sproveden u skladu sa relevantnim odredbama zakona i podzakonskih akata i da je za izabranog kandidata pribavljeno mišljenje organizacije u kojoj je radio. Ustavni sud se nije detaljno bavio tvrdnjama iznetim u žalbi da podnosilac žalbe ima više radnog iskustva i da je to radno iskustvo raznovrsnije jer obuhvata postupanje u različitim materijama. U tom delu prihvatio je navode iz odgovora Visokog saveta sudstva u kojem se navodi da je radno iskustvo samo jedan od zakonom propisanih kriterijuma za izbor.

Ustavni sud je zaključio da se Visoki savet sudstva kretao u granicama zakonskih ovlašćenja, da je postupak sproveden u potpunosti u skladu sa zakonom i da su donete odluke koje su obrazložene, u smislu odredaba ZS 2023 i Zakona o Visokom savetu sudstva.[4] Sledom iznetog, žalbeni navodi su očigledno neosnovani pa je Ustavni sud u skladu sa čl. 36 st. 1 t. 5 Zakona o Ustavnom sudu[5] doneo rešenje kojim žalbu odbacuje kao očigledno

[3] Rešenje Ustavnog suda VIII–U 72/2023 od 3. oktobra 2023. godine.

[4] Zakon o Visokom savetu sudstva, *Službeni glasnik RS* 10/2023.

[5] Zakon o Ustavnom sudu, *Službeni glasnik RS* 109/2007, 99/2011, 18/2013 – odluka US, 40/2015 – dr. zakon, 103/2015, 10/23 i 92/2023.

neosnovanu. To je prva odluka koju je Ustavni sud doneo nakon početka primene novih pravosudnih zakona, ali su način postupanja Ustavnog suda i sam ishod postupka bili isti i povodom kasnije izjavljenih žalbi protiv odluka o izboru na sudijsku funkciju koje je doneo Visoki savet sudstva. Zbog toga ta odluka zaslužuje poseban komentar.

2. PRAVILA KOJA SE PRIMENJUJU NA POSTUPAK I ODLUČIVANJE O ŽALBI

Odredbom čl. 59 st. 1 ZS 2023 propisano je da se protiv odluke o izboru na sudijsku funkciju može izjaviti žalba Ustavnom sudu i da ta žalba isključuje pravo na podnošenje ustavne žalbe. Žalbu Ustavnom sudu može podneti samo kandidat na javnom konkursu povodom kojeg je doneta odluka o izboru na sudijsku funkciju. Rok za izjavljivanje žalbe iznosi 15 dana i računa se od dana objavljivanja odluke u *Službenom glasniku Republike Srbije*. Zakonom nije propisano da se žalba podnosi preko Visokog saveta sudstva, kao organa koji je doneo pobijanu odluku, što je inače pravilo u procesnim zakonima. Rok za donošenje odluke o žalbi određen je u čl. 59 st. 2 ZS 2023. Naime, Ustavni sud je dužan da odluči u roku od 30 dana od dana isteka roka za izjavljivanje žalbe. U skladu sa čl. 59 st. 3 ZS 2023, Ustavni sud može odbiti žalbu kao neosnovanu i potvrditi odluku o izboru na sudijsku funkciju ili usvojiti žalbu i poništiti odluku o izboru na sudijsku funkciju. Odluka Ustavnog suda mora biti obrazložena i objavljuje se u *Službenom glasniku Republike Srbije* (čl. 59 st. 4 ZS 2023).

Navedene odredbe ZS 2023 ne predstavljaju dovoljno precizan okvir za postupanje i odlučivanje o žalbama protiv odluka o izboru na sudijsku funkciju, zbog čega se moraju primenjivati i odredbe Zakona o Ustavnom sudu. Odredbama čl. 99–102 Zakona o Ustavnom sudu uređen je postupak po žalbi sudije, predsednika suda ili nosioca javnotužilačke funkcije protiv odluke o prestanku funkcije. Odredbom čl. 102a Zakona o Ustavnom sudu propisano je da se u tom postupku shodno primenjuju odredbe zakona kojima se uređuje postupak po ustavnoj žalbi (čl. 82–89), a odredbom čl. 103. propisano je da se odredbe čl. 99–102a shodno primenjuju i u postupku po žalbi odluke Visokog saveta sudstva, koja isključuje pravo na podnošenje ustavne žalbe, u slučajevima propisanim Ustavom i zakonom. Odredbom čl. 8 st. 1 Zakona o Ustavnom sudu propisano je da se na pitanja postupka koja nisu uređena ovim zakonom shodno primenjuju odredbe odgovarajućih procesnih zakona, a u st. 2 istog člana propisano je da ako neko pitanje nije uređeno ni ovim ni procesnim zakonom, Ustavni sud će odlučiti u svakom konkretnom slučaju. Uzimajući u obzir da su pojedina pravila o postupku po

žalbi protiv odluke o izboru na sudijsku funkciju sadržana u odredbama ZS 2023, treba odrediti u kojoj meri se primenjuju prikazane odredbe Zakona o Ustavnom sudu.

Nesporno je da se odredbe ZS 2023 primenjuju u pogledu ovlašćenja za podnošenje žalbe Ustavnom sudu i u pogledu roka za njeno podnošenje. Iz odredaba ZS takođe proizlazi da podnošenje žalbe Ustavnom sudu ima suspenzivno dejstvo, odnosno da odlaže izvršenje odluke o izboru na sudijsku funkciju. Ukoliko je podneta žalba Ustavnom sudu, ne može se zakazati polaganje zakletve za sudiju koji se prvi put bira (čl. 60 ZS 2023), pre nego što se o žalbi odluči. Kada je u pitanju sudija koji se već nalazi na sudijskoj funkciji i izabran je u drugi sud ili sud višeg stepena, on ne može da stupi na funkciju, odnosno ne može se zakazati svečana sednica svih sudija u sudu za koji je izabran dok Ustavni sud ne donese odluku o žalbi. Takav zaključak proizlazi iz čl. 63 st. 1 ZS 2023 kojim je propisano da se smatra da sudija nije izabran ako bez opravdanog razloga ne stupi na funkciju u roku od 30 dana od isteka roka za podnošenje žalbe Ustavnom sudu ako ta žalba nije podneta, odnosno u roku od 30 dana od dana objavljivanja odluke Ustavnog suda kojom se odbija žalba na odluku o izboru na sudijsku funkciju ukoliko je podneta žalba Ustavnom sudu.

Ustavni sud dostavlja izjavljenu žalbu na odgovor Visokom savetu sudstva. U nalogu za izjašnjenje Ustavni sud se poziva na čl. 99 st. 2 Zakona o Ustavnom sudu, kojim je predviđeno da organ koji je doneo odluku o prestanku funkcije ima pravo da odgovori na žalbu u roku od 15 dana od dana dostavljanja žalbe. Iz čl. 103 Zakona o Ustavnom sudu izvodi se zaključak da se obaveza dostavljanja žalbe na odgovor primenjuje i u postupku po žalbama protiv drugih odluka Visokog saveta sudstva. Primenjujući čl. 103 Zakona o Ustavnom sudu, žalba protiv odluke o izboru na sudijsku funkciju uvek je dostavljana na odgovor Visokom savetu sudstva.

U skladu sa čl. 100 st. 1 Zakona o Ustavnom sudu, o podnetoj žalbi održava se rasprava na koju se pozivaju podnosilac žalbe i predstavnik Visokog saveta sudstva. Na toj raspravi može se isključiti javnost (čl. 100 st. 2 Zakona o Ustavnom sudu). Nakon održavanja rasprave Ustavni sud donosi odluku kojom može usvojiti žalbu i poništiti pobijanu odluku Visokog saveta sudstva ili odbiti žalbu kao neosnovanu i potvrditi pobijanu odluku Visokog saveta sudstva (čl. 101 st. 2 Zakona o Ustavnom sudu). Iako je čl. 101 st. 2 Zakona o Ustavnom sudu određeno da se navedene vrste odluka donose u postupku po žalbi na odluku o prestanku sudijske funkcije, to pravilo se na osnovu čl. 103 primenjuje i u postupku po žalbama izjavljenim protiv drugih odluka Visokog saveta sudstva, a to znači i protiv odluka o izboru na sudijsku funkciju. Isto tako, u čl. 59 st. 3 ZS pominju

se samo usvajanje žalbe (poništaj odluke o izboru na sudijsku funkciju) i odbijanje žalbe kao neosnovane (potvrđivanje odluke o izboru na sudijsku funkciju).

Od prve odluke Ustavnog suda donete 3. oktobra 2023. godine pa do poslednje dostupne odluke koja je doneta 11. jula 2024. godine,[6] sve žalbe izjavljene protiv odluka o izboru na sudijsku funkciju odbačene su kao očigledno neosnovane. Postupak koji je prethodio donošenju rešenja o odbacivanju žalbi svodio se na dostavljanje tih žalbi na odgovor Visokom savetu sudstva, a nakon podnošenja odgovora žalbe su bile odbacivane kao očigledno neosnovane. To znači da čl. 100 Zakona o Ustavnom sudu nikada nije primenjen jer Ustavni sud nije zakazao nijednu raspravu pre donošenja odluke, a osim toga nisu primenjeni ni čl. 101 Zakona o Ustavnom sudu niti čl. 59 ZS 2023, odnosno Ustavni sud nikada nije doneo meritornu odluku. Sve odluke koje je Ustavni sud doneo bile su procesne prirode, odnosno sve žalbe su rešenjem odbačene kao očigledno neosnovane. U čl. 36 Zakona o Ustavnom sudu normirane su situacije u kojima se inicijalni podnesak može odbaciti, a u t. 5 tog člana navodi se da je to moguće učiniti i ako je reč o očigledno neosnovanom podnesku. Ustavni sud o pitanjima iz svoje nadležnosti odlučuje na sednici Ustavnog suda, sednici Velikog veća ili sednici Malog veća. Ustavni sud je sva rešenja kojima su žalbe protiv odluka o izboru na sudijsku funkciju odbačene kao očigledno neosnovane doneo na sednici Malog veća. Jedna od situacija u kojoj Ustavni sud odlučuje rešenjem jeste i kada odbacuje ustavnu žalbu ako nisu ispunjene procesne pretpostavke (čl. 46 t. 9 Zakona o Ustavnom sudu). Odredbom čl. 42v st. 1 t. 1 stavljeno je u nadležnost Malog veća (troje sudija Ustavnog suda) da donosi rešenja iz čl. 46 t. 9 Zakona o Ustavnom sudu. Tako su sve do sada izjavljene žalbe protiv odluka o izboru na sudijsku funkciju rešenjem odbačene kao očigledno neosnovane, bez održane rasprave, na sednici Malog veća sastavljenog od troje sudija Ustavnog suda.

Donošenje rešenja kojim se žalba izjavljena na odluku o izboru na sudijsku funkciju odbacuje kao očigledno neosnovana otežava primenu odredaba ZS 2023 u delu koji se odnosi na računanje rokova za stupanje sudije na sudijsku funkciju. Odredbom čl. 63 st. 1 ZS 2023 propisano je da će se smatrati da sudija nije izabran ako bez opravdanog razloga ne stupi na sudijsku funkciju u roku od 30 dana od dana objavljivanja odluke kojom je odbijena žalba izjavljena na odluku o izboru. U skladu sa citiranom zakonskom odredbom, rok se računa od dana objavljivanja odluke Ustavnog suda kojom je žalba odbijena. Odredbama ZS 2023 o stupanju na sudijsku funkciju zakonodavac je opet imao u vidu samo mogućnost donošenja usvajajuće ili odbijajuće

[6] Rešenje Ustavnog suda VIIIU–94/2024 od 11. jula 2024. godine.

odluke Ustavnog suda. Videli smo da su sve do sada izjavljene žalbe odbačene kao očigledno neosnovane. U odredbama čl. 99 do 102a Zakona o Ustavnom sudu nije izričito propisano da se odluka Ustavnog suda doneta o žalbi na odluku o izboru na sudijsku funkciju objavljuje. Na osnovu čl. 103 Zakona o Ustavnom sudu, na to pitanje treba da se shodno primene odredbe kojima se uređuje postupak po ustavnoj žalbi. Odredbom čl. 49 st. 1 Zakona o Ustavnom sudu propisano je da se odluke Ustavnog suda, izuzev odluke donete po ustavnoj žalbi, objavljuju u *Službenom glasniku Republiku Srbije* i u službenom glasilu u kojem je objavljen statut autonomne pokrajine, drugi opšti akt i kolektivni ugovor, odnosno na način na koji je objavljen opšti akt o kome je Ustavni sud odlučivao. Odluka koju je Ustavni sud doneo u postupku po ustavnoj žalbi može se objaviti u *Službenom glasniku Republike Srbije*, kao i rešenja koja su od šireg značaja za zaštitu ustavnosti i zakonitosti (čl. 49 st. 2 Zakona o Ustavnom sudu). Iz citiranih zakonskih odredaba može se utvrditi da ne postoji obaveza objavljivanja odluke donete po ustavnoj žalbi, već je to samo mogućnost, a isto važi i za rešenje. Odredbom čl. 93 Poslovnika o radu Ustavnog suda[7] propisano je da se odluka i rešenje za koje je Ustavni sud odredio da se objavljuju dostavljaju radi objavljivanja *Službenom glasniku Republike Srbije*, odnosno drugom službenom glasilu, zavisno od toga gde je objavljen akt o kom je Ustavni sud odlučivao, po pravilu, u roku od 30 dana od dana odlučivanja. Analizom tih zakonskih i poslovničkih odredaba dolazi se do problema računanja roka, odnosno postavlja se pitanje kada počinje da teče rok za stupanje na sudijsku funkciju. Taj rok se ne može računati od dana objavljivanja odluke kojom je žalba protiv odluke o izboru na sudijsku funkciju odbijena, ako Ustavni sud rešenjem žalbu odbaci kao očigledno neosnovanu, a to rešenje se ne objavljuje. U tom slučaju rok se može računati samo od dana kada je Visoki savet sudstva primio rešenje Ustavnog suda.

Na kraju da napomenemo da je čl. 101 st. 1 u vezi sa čl. 103 Zakona o Ustavnom sudu predviđeno da se zakonom može propisati rok u kojem je Ustavni sud dužan da odluči o podnetoj žalbi, a u skladu sa čl. 59 st. 2 ZS 2023 taj rok iznosi 30 dana i računa se od isteka roka za izjavljivanje žalbe. Odluka koju smo prikazali doneta je nakon skoro tri meseca od dana podnošenja žalbe Ustavnom sudu. U postupcima pokrenutim povodom kasnije izjavljenih žalbi, Ustavni sud je pokazao veći stepen efikasnosti.[8] Nadležnosti Ustavnog suda određene su Ustavom i zakonom, sa tendencijom konstantnog proširivanja. Odluka o izboru na sudijsku funkciju

[7] Poslovnik o radu Ustavnog suda, *Službeni glasnik RS* 103/2013.

[8] Već smo napomenuli da je poslednje nama dostupno rešenje u predmetu VIIIU–94/2024 doneto na sednici Malog veća Ustavnog suda 11. jula 2024, a tim rešenjem odbačena je žalba podneta 15. juna 2024. godine.

nije jedina odluka koja se u skladu sa Zakonom o sudijama može pobijati podnošenjem žalbe Ustavnom sudu, koja isključuje pravo na podnošenje ustavne žalbe. To su i odluka o prestanku sudijske funkcije, odluka o izboru na funkciju predsednika suda, odluka o trajnom premeštaju i privremenom upućivanju sudije i druge odluke navedene u Zakonu o sudijama. Zakonom o izmenama i dopunama Zakona o zaštiti prava na suđenje u razumnom roku[9] i Zakonom o izmeni i dopuni Zakona o Ustavnom sudu[10] vraćena je nadležnost Ustavnog suda da odlučuje o ustavnim žalbama izjavljenim zbog povrede prava na suđenje u razumnom roku u izvršnim i stečajnim postupcima koji se vode radi namirenja priznatih i utvrđenih potraživanja, u kojima je stečajni, odnosno izvršni dužnik preduzeće sa većinskim društvenim ili državnim kapitalom. To su samo neki primeri proširivanja nadležnosti Ustavnog suda, zbog čega je teško očekivati da se postupanje i odlučivanje povodom žalbi izjavljenih protiv odluka o izboru na sudijsku funkciju odvija u zakonom definisanim kratkim rokovima.

3. PRAVO NA PRAVNO SREDSTVO – STAVOVI PRAVNE TEORIJE I RANIJA ZAKONSKA REŠENJA

Domaća pravna teorija nije se bavila potrebom za obezbeđivanjem delotvornog pravnog sredstva protiv odluke o izboru na sudijsku funkciju. Uglavnom se naglašava postojanje mogućnosti pobijanja odluke o prestanku sudijske funkcije (Rakić – Vodinelić 2012, 172; Ilić 2009, 46–47; Stanković, Mandić 2013, 63; Poznić, Rakić – Vodinelić 2015, 100), odnosno postojanje prava na pravno sredstvo i protiv drugih odluka kojima se utiče na položaj sudija (Bodiroga 2019, 235). Rešenja iz uporednog prava nisu od pomoći, imajući u vidu bitno različite modele izbora sudija (Ballon 2009, 46–51; Leunberger, Uffer–Tobler 2010, 21–22; Schilken 2010, 22–23). U komentarima Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda ukazuje se na praksu Evropskog suda za ljudska prava u pogledu proširenja primene prava na pravično suđenje iz čl. 6(1) na postupke u kojima se odlučuje o građanskim pravima i obavezama lica koja vrše državnu vlast, ali se ne razmatra specifičan položaj sudija (Popović 2012, 242–243). Sledstveno tome, ne razmatra se ni koje bi pravno sredstvo protiv odluke o izboru na sudijsku funkciju bilo adekvatno niti koji bi organ i po kojim procesnim pravilima odlučivao o tom pravnom sredstvu.

[9] Zakon o izmenama i dopunama Zakona o zaštiti prava na suđenje u razumnom roku, *Službeni glasnik RS* 92/2023.

[10] Zakon o izmeni i dopuni Zakona o Ustavnom sudu, *Službeni glasnik RS* 92/2023.

U skladu sa Zakonom o sudovima iz 1991. godine,[11] izbor i razrešenje sudija bili su u nadležnosti Narodne skupštine (čl. 3 ZS 1991). Predlog za izbor i razrešenje sudije podnosilo je nadležno telo Narodne skupštine (čl. 40 ZS 1991). Slobodna sudijska mesta oglašavao je ministar pravde, a u njegovoj nadležnosti bilo je i pribavljanje mišljenja o prijavljenim kandidatima (čl. 41 i 42 ZS 1991). Pokretanje postupka za razrešenje sudije bilo je u nadležnosti predsednika Vrhovnog suda. Odluku o postojanju razloga za prestanak sudijske funkcije i razloga za razrešenje donosio je Vrhovni sud (čl. 45 i 48 ZS 1991). Odluku o utvrđivanju prestanka sudijske funkcije i odluku o razrešenju sudije donosila je Narodna skupština, a protiv tih odluka nije bila dozvoljena sudska zaštita (čl. 49 st. 3 ZS 1991). Pravo na pravno sredstvo protiv odluke o izboru na sudijsku funkciju nije bilo regulisano zakonskim odredbama.

Odredbom čl. 9 Zakona o sudijama iz 2001. godine[12] bilo je propisano da sudije bira Narodna skupština. Oglašavanje slobodnih sudijskih mesta, pribavljanje mišljenja o kandidatima i predlaganje kandidata Narodnoj skupštini prešlo je u nadležnost Visokog saveta pravosuđa (čl. 42–45 ZS 2001). Odluku o izboru na sudijsku funkciju donosila je Narodna skupština ali je mogla da izabere samo kandidata kog predloži Visoki savet pravosuđa (čl. 46 ZS 2001). Odluku o prestanku sudijske funkcije donosila je Narodna skupština, a protiv te odluke mogla se podneti žalba Ustavnom sudu, u roku od 15 dana od dana njenog objavljivanja u *Službenom glasniku Republike Srbije* (čl. 63 ZS 2001). Nijednom zakonskom odredbom nije bila predviđena mogućnost pobijanja odluke o izboru na sudijsku funkciju.

Na početku smo ukazali na to da je prema odredbama ZS 2008 nadležnost za donošenje odluka o izboru na sudijsku funkciju bila podeljena između Narodne skupštine i Visokog saveta sudstva. Prvi (probni) izbor na sudijsku funkciju u trajanju od tri godine bio je u nadležnosti Narodne skupštine, dok je Visoki savet sudstva odlučivao o izboru sudije na stalnu sudijsku funkciju i o izboru sudije koji se nalazi na stalnoj sudijskoj funkciji u drugi sud ili sud višeg stepena.[13] U skladu sa čl. 67 ZS 2008, odluku o prestanku sudijske funkcije donosio je Visoki savet sudstva, a protiv pravnosnažne odluke Saveta mogla se podneti žalba Ustavnom sudu, u roku od 30 dana od dana dostavljanja odluke. Članom 52 st. 4 ZS 2008 bilo je propisano da svaka odluka o izboru mora biti obrazložena i objavljena u *Službenom glasniku Republike*

[11] Zakon o sudovima – ZS 1991, *Službeni glasnik RS* 46/1991, 60/1991 – ispr., 18/1992 – ispr., 71/1992.

[12] Zakon o sudijama – ZS 2001, *Službeni glasnik RS* 63/2001.

[13] Videti čl. 51 i 52 ZS 2008.

Srbije. O pravu na izjavljivanje pravnog sredstva protiv odluke o izboru na sudijsku funkciju nije bilo nikakvih zakonskih odredaba, što je ostavljalo prostor za različita tumačenja.

Protiv odluka o izboru na sudijsku funkciju, donetih na osnovu odredaba ZS 2008, podnošene su tužbe Upravnom sudu, u skladu sa odredbama Zakona o upravnim sporovima.[14] Odredbom čl. 1 st. 2 ZUS propisano je da se tim zakonom obezbeđuje sudska zaštita pojedinačnih prava i pravnih interesa i zakonitost rešavanja u upravnim i drugim Ustavom i zakonom određenim pojedinačnim stvarima. Predmet upravnog spora jeste zakonitost konačnih upravnih akata, ali se to ne odnosi na one upravne akte u pogledu kojih je obezbeđena druga sudska zaštita (čl. 3 st. 1 ZUS). U upravnom sporu sud odlučuje i o zakonitosti konačnih pojedinačnih akata kojima se rešava o pravu, obavezi ili na zakonom zasnovanom interesu, pod uslovom da nije propisana sudska zaštita u drugoj vrsti postupka (čl. 3 st. 2 ZUS). Tužilac u upravnom sporu može biti svako fizičko, pravno ili drugo lice ako smatra da mu je upravnim aktom povređeno neko pravo ili na zakonu zasnovan interes (čl. 10 st. 1 ZUS). Tuženi u upravnom sporu je organ čiji je upravni akt predmet osporavanja, odnosno organ koji je po zahtevu ili žalbi stranke propustio da donese upravni akt (čl. 12 ZUS). Osim stranaka upravnog spora (tužioca i tuženog), odredbama ZUS regulisan je i položaj zainteresovanog lica, a to je ono lice koje bi poništajem osporenog upravnog akta bilo neposredno oštećeno (čl. 13 ZUS). Tužba se podnosi u roku od 30 dana od dana dostavljanja upravnog akta stranci koja je podnosi ili u zakonom određenom kraćem roku (čl. 18 st. 1 ZUS). Samo podnošenje tužbe po pravilu nema suspenzivno dejstvo, odnosno ne odlaže izvršenje upravnog akta koji se tužbom pobija. Na zahtev tužioca sud može odložiti izvršenje pobijanog upravnog akta kojim je meritorno odlučeno u upravnoj stvari, i to do donošenja sudske odluke, ako su ispunjeni zakonom propisani uslovi. Neophodno je da bi tužilac izvršenjem pobijanog upravnog akta pretrpeo teško nadoknadivu štetu, da odlaganje nije u suprotnosti sa javnim interesom i da odlaganjem ne bi bila naneta veća ili nenadoknadiva šteta protivnoj stranci ili zainteresovanom licu. Ukoliko su ispunjeni svi ti uslovi, sud može ali ne mora odložiti izvršenje osporenog upravnog akta (čl. 23 ZUS).

Oslanjajući se na citirane zakonske odredbe i na činjenicu da se odluke Visokog saveta sudstva smatraju konačnim upravnim aktima, kandidati koji nisu izabrani na sudijsku funkciju po konkursima sprovođenim u vreme važenja ZS 2008 podnosili su tužbe Upravnom sudu. U tim slučajevima Upravni sud je donosio meritorne odluke. U jednom takvom predmetu tužilac je u tužbi prigovarao na nedostatak transparentnosti u radu Visokog

[14] Zakon o upravnim sporovima, *Službeni glasnik RS* 111/2009.

saveta sudstva, na nepostojanje jasnih i objektivnih kriterijuma na kojima je zasnovana odluka o izboru na sudijsku funkciju i na manjkavo obrazloženje. Pod ovim poslednjim podrazumeva se izostanak jasnih razloga zbog kojih se bira jedan, a ne drugi kandidat, iako oba kandidata ispunjavaju uslove za napredovanje. U odgovoru na tužbu Visoki savet sudstva je naveo da je cela procedura sprovedena u skladu sa tada važećim zakonima i podzakonskim aktima, da izabrani kandidat ispunjava sve uslove za napredovanje i da je odluka o izboru na sudijsku funkciju obrazložena u skladu sa zakonom. Posebno je naglašeno da odredbama ZS 2008 nije bilo predviđeno donošenje obrazloženih odluka o onim kandidatima koji nisu izabrani niti je postojala obaveza da se odluke o izboru na sudijsku funkciju dostavljaju svim učesnicima na konkursu. Pobijana odluka o izboru na sudijsku funkciju doneta je 4. novembra 2021, tužba je podneta 18. decembra 2021, odgovor na tužbu 18. aprila 2022, a Upravni sud je 10. juna 2024. godine doneo presudu kojom tužbu odbija, smatrajući da donošenjem odluke o izboru kandidata nije povređen zakon na štetu tužioca.[15] U obrazloženju presude navodi se koji propisi se primenjuju na postupak izbora i na uslove za izbor na sudijsku funkciju u sudu za koji je bilo oglašeno slobodno mesto. Upravni sud je konstatovao da izabrani kandidat ispunjava sve uslove za izbor na sudijsku funkciju u određenom sudu, da je Visoki savet sudstva sproveo ceo postupak u skladu sa odredbama relevantnih zakona i podzakonskih akata i da je odluka o izboru na sudijsku funkciju obrazložena u skladu sa zakonom. U povodu tužbenih navoda koji se odnose na to da nije jasno zašto je na sudijsku funkciju izabran određeni kandidat, a ne tužilac, Upravni sud ističe da obrazloženje odluke o izboru na sudijsku funkciju, u smislu čl. 52 st. 4 ZS 2008, treba da sadrži utvrđene činjenice o tome da izabrani kandidat ispunjava opšte i posebne uslove za izbor sudije određenog suda i razloge za ocenu da je izabrani kandidat te uslove ispunio. Prema nalaženju Upravnog suda, Visoki savet sudstva dužan je da obrazloži samo odluku o izboru na sudijsku funkciju, ali nije dužan da navede razloge zbog kojih ostali kandidati nisu izabrani.[16] U drugim postupcima pokrenutim po tužbama protiv odluka o izboru na sudijsku funkciju, Upravni sud je postupao na istovetan način. Tužba se odbija, a u obrazloženju presude prikazuje se tok postupka koji je prethodio donošenju odluke o izboru i zaključuje se da je Visoki savet

[15] Presuda Upravnog suda 3 U 3417/22 od 10. juna 2024. godine.

[16] Takav stav zauzima i Ustavni sud. U obrazloženju rešenja VIIIU–67/2024 od 3. jula 2024. godine, kojim je podneta žalba odbačena kao očigledno neosnovana, Ustavni sud ističe kako se u obrazloženju odluke o izboru na sudijsku funkciju moraju navesti razlozi zbog kojih se određeni kandidat bira, ali ne i razlozi neizbora ostalih kandidata. To znači da u obrazloženju odluke o izboru na sudijsku funkciju Visoki savet sudstva nije dužan da uporedi kandidata koji je izabran i neizabrane kandidate.

sudstva pravilno utvrdio činjenice o tome da izabrani kandidat ispunjava zakonom propisane uslove za izbor na sudijsku funkciju u određenom sudu i da Visoki savet sudstva nije dužan da obrazloži odluku o neizboru ostalih kandidata na sudijsku funkciju.[17]

Ukoliko se uporede postupci u kojima su se pred Upravnim sudom osporavale odluke o izboru na sudijsku funkciju i postupci u kojima se te odluke nakon početka primene novih zakonskih rešenja osporavaju pred Ustavnim sudom, mogu se uočiti određene sličnosti i razlike. Odredbama ZS 2008 nije izričito bila predviđena mogućnost osporavanja odluke o izboru na sudijsku funkciju. Pravo na pokretanje upravnog spora neizabrani kandidati izvodili su iz odredaba Zakona o upravnim sporovima. Podnošenje tužbe Upravnom sudu samo po sebi ne zadržava izvršenje odluke o izboru na sudijsku funkciju. Postoji mogućnost da Upravni sud u skladu sa čl. 23 ZUS odloži izvršenje pobijanog akta (odluke o izboru na sudijsku funkciju), ali ta mogućnost u prikazanim postupcima nije iskorišćena. Izabrani kandidati su stupili na sudijsku funkciju i vršili sudijsku funkciju dok je trajao postupak pred Upravnim sudom. Nasuprot tome, podnošenje žalbe Ustavnom sudu protiv odluke o izboru na sudijsku funkciju sprečava izvršenje te odluke jer ukoliko je žalba podneta, izabrani kandidat ne može stupiti na sudijsku funkciju dok se o žalbi ne odluči. Ustavni sud je o svim do sada podnetim žalbama odlučio donošenjem rešenja kojima su te žalbe odbačene kao očigledno neosnovane. Odluke je donosio na osnovu žalbe i odgovora na žalbu, nalazeći da je održavanje usmene rasprave nepotrebno jer su odlučujuće činjenice već utvrđene u postupku koji je prethodio donošenju osporene odluke.[18] Upravni sud je odluke donosio u meritumu, odnosno odbijao tužbene zahteve kao neosnovane, i to nakon dostavljanja tužbe na odgovor Visokom savetu sudstva i zainteresovanom licu (izabranom kandidatu) i nakon održane usmene javne rasprave. Ustavnom sudu je trebalo znatno manje vremena da donese odluku o žalbi nego Upravnom sudu da odluči o tužbi protiv odluke o izboru na sudijsku funkciju.

U pogledu samog opsega preispitivanja odluka Visokog saveta sudstva, Upravni sud i Ustavni sud se ograničavaju na to da li je sproveden postupak u skladu sa zakonom i podzakonskim aktima, da li izabrani kandidat ispunjava uslove za izbor na sudijsku funkciju u određenom sudu, da li su činjenice o tome pravilno utvrđene i da li je odluka o izboru na sudijsku funkciju

[17] Videti presude Upravnog suda donete donete u sledećim predmetima: 14 U 49136/22 od 6. juna 2024, 19 U 3414/22 od 5. jula 2024, 24 U 3416/22 od 5. jula 2024. i 2 U 3418/22 od 12. jula 2024. godine.

[18] Rešenje Ustavnog suda VIIIU–67/2024 od 3. jula 2024. godine.

obrazložena. Ukoliko je odgovor na sva ova pitanja potvrdan, rezultat je donošenje presude kojom Upravni sud odbija tužbu, odnosno donošenje rešenja kojim Ustavni sud odbacuje žalbu kao očigledno neosnovanu.

4. STAVOVI EVROPSKOG SUDA ZA LJUDSKA PRAVA

U svojoj bogatoj praksi Evropski sud za ljudska prava (dalje: ESLJP) bavio se i pitanjima koja se odnose na položaj sudija, izbor, napredovanje, kažnjavanje i razrešenje sa sudijske funkcije. U početku je bilo sporno da li postupci koji se odnose na sva ta pitanja ulaze u domen primene prava na pravično suđenje iz čl. 6(1) Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (dalje: EKLJP), odnosno da li se sporovi o svim tim pitanjima mogu smatrati sporovima o građanskim pravima i obavezama, od čega direktno zavisi primena jemstava koja proizlaze iz prava na pravično suđenje.

Jedna od prvih presuda koja se bavi tim problemom, odnosno primenom čl. 6(1) EKLJP u postupcima u kojima se odlučuje o položaju državnih službenika i imalaca javnih ovlašćenja doneta je u predmetu *Pelegran protiv Francuske* (*Pellegrin v. France*).[19] Prema stavovima zauzetim u toj presudi, ako se radi o nosiocima javnih ovlašćenja koja su povezana sa ostvarivanjem države vlasti i koja se vrše u državnom interesu, onda država ima legitiman interes da od tih subjekata zahteva poseban odnos lojalnosti i poverenja, što ima za posledicu da se čl. 6(1) EKLJP ne primenjuje na postupke u kojima se odlučuje o njihovim pravima i obavezama. Na druge službenike i imaoce javnih ovlašćenja koji nisu u toj meri povezani sa vršenjem državne vlasti, čl. 6(1) EKLJP primenjuje se u svom građanskopravnom aspektu (st. 64–67 presude).

Dalji razvoj u praksi ESLJP usledio je donošenjem presude u predmetu *Vilho Eskelinen i drugi protiv Finske* (*Vilho Eskelinen and others v. Finland*).[20] Predmet je formiran po predstavci zaposlenih u Ministarstvu unutrašnjih poslova Finske koji su se pritužívali na to što im je odlukama finskih organa uskraćeno pravo na dodatak zarade. Petoro podnosilaca predstavke radili su kao policijski službenici vršeći javna ovlašćenja direktno povezana sa

[19] *Pelegran protiv Francuske*, presuda ESLJP od 8. decembra 1999. godine, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 20. jula 2024.

[20] *Vilho Eskelinen i drugi protiv Finske*, presuda ESLJP od 19. aprila 2007. godine, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 20. jula 2024.

opštim interesom države, dok je jedan podnosilac predstavke imao isključivo administrativna ovlašćenja, bez prava na donošenje odluka i bez učešća u sprovođenju javne vlasti. Prikazujući dosadašnju praksu i stavove o primeni čl. 6(1) EKLJP na sporove o pravima i obavezama državnih službenika i imalaca javnih ovlašćenja, ESLJP je zauzeo stav da je za isključenje primene čl. 6(1) EKLJP neophodno da kumulativno budu ispunjena dva uslova. Prvi uslov je da u nacionalnom zakonodavstvu mora biti izričito isključeno pravo na pristup sudu za određenu kategoriju tih subjekata. Drugi uslov je ispunjen ako je isključenje prava na pristup sudu zasnovano na objektivnim razlozima i ako je u interesu države. Sama činjenica da je neko lice zaposleno u organu ili organizaciji koja vrši javna ovlašćenja nema odlučujuću važnost. Da bi isključenje prava na pristup sudu bilo opravdano, nije dovoljno da se država pozove na to da taj službenik vrši određena javna ovlašćenja ili da je njegov položaj vezan za odnos lojalnosti i poverenja između njega i države. Država mora da dokaže da je predmet konkretnog spora vezan za vršenje državne vlasti ili da je taj odnos lojalnosti i poverenja doveden u pitanje. Zbog svega navedenog nema opravdanja za isključivanje primene čl. 6(1) EKLJP iz sporova povodom radnog odnosa, kao što su sporovi o zaradama, dodacima i drugim primanjima po osnovu rada. Štaviše, postoji pretpostavka da se čl. 6(1) EKLJP primenjuje u svom građanskopravnom aspektu, a na državi ugovornici je da dokaže da je izričito isključeno pravo na pristup sudu i da je to isključenje zasnovano na opravdanim razlozima i u državnom interesu (st. 62 presude).

Kriterijumi koje je ESLJP definisao u predmetu *Vilho Eskelinen i drugi protiv Finske* počeli su da se primenjuju i na postupke u kojima se odlučivalo o položaju sudija, odnosno o njihovim pravima i obavezama. U predmetu *Olujić protiv Hrvatske*[21] ESLJP se bavio razrešenjem podnosioca predstavke sa funkcije predsednika i sudije Vrhovnog suda. Podnosilac predstavke je tvrdio kako je u postupku u kojem je razrešen došlo do povrede prava na pravično suđenje iz čl. 6(1) EKLJP, i to: zbog pristrasnosti troje članova Državnog sudbenog veća, zbog protivzakonitog isključenja javnosti iz disciplinskog postupka i zbog nerazumno dugog trajanja samog postupka. Postavilo se pitanje da li se uopšte čl. 6(1) EKLJP primenjuje na postupak razrešenja podnosioca predstavke sa funkcije predsednika i sudije Vrhovnog suda Hrvatske. Nakon donošenja presude u predmetu *Vilho Eskelinen i drugi protiv Finske* postoji pretpostavka o primeni čl. 6(1) EKLJP, osim ako je nacionalnim zakonodavstvom izričito isključeno pravo na pristup sudu i ako

[21] *Olujić protiv Hrvatske*, presuda ESLJP od 5. februara 2009. godine, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 21. jula 2024.

je to isključenje zasnovano na objektivnim razlozima i u državnom interesu. Sam sastav i način izbora članova Državnog sudbenog veća ukazuju na to da se ovo telo može smatrati tribunalom u smislu čl. 6(1) EKLJP, odnosno da je Državno sudbeno veće vršilo sudska ovlašćenja u disciplinskom postupku. Protiv odluke Državnog sudbenog veća o razrešenju sa sudijske funkcije postojala je mogućnost podnošenja ustavne žalbe, a Ustavni sud je imao ovlašćenje da ispita ceo slučaj u meritumu i da poništi odluku Državnog sudbenog veća ukoliko smatra da su za to ispunjeni uslovi. Imajući u vidu sve navedeno, podnosilac predstavke imao je pravo na pristup sudu u disciplinskom postupku koji je protiv njega vođen, pa se čl. 6(1) EKLJP primenjuje na taj postupak (st. 31–45 presude).

U predmetu *Juričić protiv Hrvatske*[22] ESLJP se bavio primenom čl. 6(1) EKLJP u postupku za izbor sudija Ustavnog suda Hrvatske. Podnositeljka predstavke je podnela prijavu na javni konkurs, ali nije dobila potrebnu većinu glasova u Saboru, nakon čega je osporila odluku o izboru druge kandidatkinje pozivajući se na to da ona nije ispunjavala propisan uslov u pogledu godina profesionalnog iskustva neophodnih za izbor sudije Ustavnog suda. Odlučujući o zahtevu za zaštitu prava podnositeljke predstavke, Upravni sud je ukinuo odluku Sabora o izboru druge kandidatkinje navodeći da se iz priložene dokumentacije ne može zaključiti da ona ima profesionalno iskustvo koje se traži za izbor sudije Ustavnog suda. Izabrana kandidatkinja je protiv presude Upravnog suda podnela tužbu Ustavnom sudu, zahtevajući istovremeno da Ustavni sud privremenom merom zabrani izvršenje odluke Upravnog suda, što je Ustavni sud i učinio. Nakon toga je i ukinuta presuda Upravnog suda, a izabrana kandidatkinja je ostala na funkciji sudije Ustavnog suda. Podnositeljka predstavke se obratila ESLJP navodeći da je odlukom Ustavnog suda povređeno njeno pravo na pravično suđenje iz čl. 6(1) EKLJP. Pozvala se na pristrasnost dvoje sudija koji su učestvovali u donošenju odluke, kao i na to da je povređeno pravo na kontradiktoran postupak zato što joj pre donošenja odluke nisu dostavljeni dokazi na kojima je Ustavni sud zasnovao svoju odluku. Prvo se postavilo pitanje da li podnositeljka predstavke uopšte uživa „pravo“ u smislu čl. 6(1) EKLJP, odnosno da li se odlučivanje o njenoj prijavi za izbor za sudiju Ustavnog suda može smatrati sporom građanskopravne prirode. Da bi odgovor na to pitanje bio potvrdan, neophodno je da nacionalno zakonodavstvo Hrvatske to pravo zaista i priznaje. Pozivajući se na praksu Upravnog suda prema kojoj svaki kandidat koji ispunjava zakonske uslove ima pravo

[22] *Juričić protiv Hrvatske*, presuda ESLJP od 26. jula 2011. godine, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 21. jula 2024.

da ravnopravno učestvuje na konkursu za izbor na javnu funkciju i na Ustavom Republike Hrvatske zagarantovano pravo na jednak pristup javnoj službi, ESLJP je zauzeo stav da se podnositeljka predstavke može smatrati titularem prava koje je zaštićeno na osnovu čl. 6(1) EKLJP. U pogledu građanskopravne prirode tog prava, ESLJP je podsetio na ranije zauzet stav da se čl. 6(1) EKLJP primenjuje na postupak odlučivanja o platama i drugim naknadama sudije, na postupak odlučivanja o premeštaju sudije i na postupak odlučivanja o razrešenju sudije. Na kraju, hrvatsko pravo dozvoljava da se odluke Sabora pobijaju pred nadležnim sudovima ukoliko su one suprotne ustavnom pravu na jednak pristup javnoj službi i pravu na jednak pristup zapošljavanju. Uzimajući u obzir sve te argumente, ESLJP je zaključio da je čl. 6(1) EKLJP primenljiv u svom građanskopravnom aspektu (st. 51–58 presude).

Jedna od najnovijih presuda ESLJP doneta je u predmetu *Oktan Alkaj protiv Turske* (*Oktan Alkay v. Turkey*).[23] Podnosilac predstavke se žalio na postupanje Saveta sudija i tužilaca koji je odbio da potvrdi njegov izbor na sudijsku funkciju iako je završio obuku u propisanom roku, kao i na nemogućnost osporavanja odluke Saveta u postupku pred sudom (uskraćivanje prava na pristup sudu). Podnosilac predstavke je završio pravni fakultet, položio potrebne ispite, prošao test psihofizičkih sposobnosti, započeo obuku, položio završni ispit sa visokim brojem bodova, ali je Savet nakon obavljenog usmenog intervjua objavio da kandidat nije završio potrebnu obuku za izbor na sudijsku funkciju, pri čemu nikakvi razlozi za takvu odluku nisu saopšteni. Nakon podnošenja prigovora, Ministarstvo pravde je promenilo prvobitnu odluku i saopštilo da je podnosilac predstavke položio završnu obuku. Savet je uprkos tome odbio da potvrdi njegovo imenovanje pozivajući se na različite isprave, od kojih su neke za kandidata bile nedostupne. Nakon razgovora sa predstavnicima Saveta saopšteno mu je da je izbor odbijen iz zdravstvenih razloga. Prigovor kandidata je odbijen, a Ustavni sud je odbacio njegovu žalbu navodeći da nije nadležan da preispituje odluke Saveta. Podnosilac predstavke je bio kandidat za sudiju, pa se postavilo pitanje da li se na njega mogu primeniti stavovi koje je ESLJP zauzimao u pogledu prava sudija zaštićenih po čl. 6(1) EKLJP. Uzimajući u obzir da je podnosilac predstavke ispunio sve zakonske uslove za izbor na sudijsku funkciju i da se čekala samo potvrda Saveta, ESLJP je primenio svoje stavove koji se odnose na zaštitu prava sudija. Zadatak ESLJP nije da preispituje različite sisteme izbora sudija koji postoje u državama Saveta Evrope, ali

[23] *Oktan Alkaj protiv Turske*, presuda ESLJP od 20. juna 2023. godine, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 21. jula 2024.

ako je isključeno pravo na pristup sudu, onda to isključenje mora zadovoljiti kriterijume postavljene u predmetu *Vilho Eskelinen i drugi protiv Finske*. Ključno pitanje na koje je trebalo odgovoriti jeste da li je isključenje prava na pristup sudu u pogledu mogućnosti osporavanja odluka Saveta bilo zasnovano na opravdanim razlozima i u državnom interesu. To isključenje je opravdano ukoliko je predmet spora takav da dovodi u pitanje odnos poverenja i lojalnosti koji postoji između nosioca javne funkcije i državne vlasti. Međutim, država ugovornica ne može isticati postojanje tog odnosa kao razlog za isključenje prava na pristup sudu ukoliko bi to proizvelo posledice koje su u suprotnosti sa principima sudske nezavisnosti. Upravo je sam integritet postupka izbora sudija jedan od pokazatelja na osnovu kojih se ocenjuje da li ta nezavisnost postoji. Zato izbor i napredovanje sudija treba da budu zasnovani na objektivnim kriterijumima, a time se jača i poverenje javnosti u pravosuđe. Zbog svega navedenog, uskraćivanje prava kandidatu koji je ispunio sve zakonom propisane uslove da učestvuje u završnoj fazi izbora i da u sudskom postupku osporava odluku kojom se ne potvrđuje njegov izbor nije zasnovano na objektivnim razlozima, što znači da se na taj postupak primenjuje čl. 6(1) EKLJP, i to u svom građanskopravnom aspektu (st. 49–58 presude).

5. UMESTO ZAKLJUČKA

Primena jemstava koje obuhvata pravo na pravično suđenje iz čl. 6(1) EKLJP postepeno se proširila i na postupke u kojima se odlučuje o položaju sudija, ali i na sam postupak izbora na sudijsku funkciju. Najveći doprinos tome dao je ESLJP koji je svojim presudama ustanovio jasne kriterijume u pogledu ovlašćenja države da uskrati pravo na pristup sudu u tim postupcima. U početku je čl. 6(1) EKLJP u svom građanskopravnom aspektu primenjivan samo na postupke u kojima se odlučivalo o pravima i obavezama lica koja se već nalaze na sudijskoj funkciji (razrešenje, udaljenje, disciplinska odgovornost, zarade i druge naknade), a u svojoj novijoj praksi ESLJP je zauzeo stav da se jemstva pravičnog suđenja primenjuju i na lica koja se nalaze u statusu kandidata za izbor na sudijsku funkciju.

U našem zakonodavstvu dugo je bilo sporno da li treba i u kojoj meri obezbediti pravo na pristup sudu u tim postupcima. U zakonima koje smo analizirali postojalo je malo odredaba koje su se bavile tim pitanjima. Zakonom koji je važio devedesetih godina bilo je izričito isključeno pravo na sudsku zaštitu protiv odluke o prestanku sudijske funckije (čl. 49 st. 3 ZS 1991). Usvajanjem ZS 2001 garantovano je pravo na žalbu Ustavnom sudu protiv odluke o prestanku sudijske funkcije koju je donela Narodna skupština,

a na sam postupak odlučivanja o toj žalbi shodno su se primenjivala pravila po kojima Ustavni sud odlučuje o izbornim sporovima (čl. 63 st. 3 ZS 2001). Odredbama ZS 2008 bilo je priznato pravo na podnošenje žalbe Ustavnom sudu protiv pravnosnažne odluke o prestanku sudijske funkcije koju je doneo Visoki savet sudstva. Nijednim od tih zakona nije bila predviđena mogućnost osporavanja odluke o izboru na sudijsku funkciju, a videli smo da su u praksi podnošene tužbe Upravnom sudu, o kojima se odlučivalo dve ili tri godine nakon donošenja odluke o izboru i nakon što je izabrani kandidat stupio na sudijsku funkciju.

Zakonima donetim nakon ustavnih promena iz 2022. godine znatno je proširena mogućnost kontrole odluka Visokog saveta sudstva propisivanjem da se protiv tih odluka može podneti žalba Ustavnom sudu koja isključuje pravo na podnošenje ustavne žalbe. To se odnosi na odluke kojima se odlučuje o pravima i obavezama sudijama (odluka o udaljenju sudije, odluka o trajnom premeštaju i privremenom upućivanju, odluka o prestanku sudijske funkcije i sl.), ali i na odluku o izboru na sudijsku funkciju (čl. 59 ZS 2023). Prvi put u našem zakonodavstvu izričito je priznato pravo kandidata da osporava odluku o izboru na sudijsku funkciju, podnošenjem žalbe Ustavnom sudu koja isključuje pravo na podnošenje ustavne žalbe. Zakonom je ustanovljeno i suspenzivno dejstvo žalbe, odnosno da izabrani kandidat ne može stupiti na sudijsku funkciju dok se o toj žalbi ne odluči. Ukazali smo na određene pravne praznine i nedoslednosti koje se odnose na sam postupak podnošenja žalbe Ustavnom sudu, na vrste odluka koje se donose u tom postupku i na računanje roka za stupanje na sudijsku funkciju. Ti nedostaci koji se otklanjaju postupanjem Visokog saveta sudstva i Ustavnog suda ne dovode u pitanje osnovnu ideju da odluka o izboru na sudijsku funkciju mora biti podložna preispitivanju.

Odlučujući o žalbama podnetim protiv odluka o izboru na sudijsku funkciju, Ustavni sud je tokom godinu dana primene novih zakonskih rešenja proveravao da li se Visoki savet sudstva kretao u granicama zakonom propisanih ovlašćenja, da li je donošenju odluke prethodilo sprovođenje zakonom propisanog postupka i da li doneta odluka o izboru na sudijsku funkciju sadrži obrazloženje u skladu sa odredbama ZS 2023 i odredbama Zakona o Visokom savetu sudstva. Prema shvatanju Ustavnog suda, Visoki savet sudstva ima obavezu da obrazloži zašto je izabrao određenog kandidata na sudijsku funkciju, ali nije dužan da obrazloži razloge zbog kojih ostali kandidati nisu izabrani niti da poredi izabranog kandidata i neizabrane kandidate.

LITERATURA

[1] Ballon, Oskar J. 2009. *Einführung in das österreichische Zivilprozessrecht*: *Streitiges Verfahren*. 12. Auflage. Graz: Leykam Buchverlag.

[2] Bodiroga, Nikola. 2019. *Ustavna jemstva u parničnom postupku*. Beograd: Pravni fakultet Univerziteta u Beogradu.

[3] Ilić, P. Goran. 2009. *Pravosudno organizaciono pravo*. Beograd: Službeni glasnik.

[4] Keča, Ranko, Marko Knežević. 2022. *Građansko procesno pravo*. 19. izmenjeno i dopunjeno izdanje. Beograd: Službeni glasnik.

[5] Leunberger Christoph, Beatrice Uffer-Tobler. 2010. *Schweizerisches Zivilprozessrecht*. Stämpfli Verlag AG Bern.

[6] Poznić, Borivoje, Vesna Rakić–Vodinelić. 2015. *Građansko procesno pravo*. 17. izmenjeno i dopunjeno izdanje. Beograd: Službeni glasnik – Pravni fakultet Univerziteta Union.

[7] Popović, Dragoljub. 2012. *Evropsko pravo ljudskih prava*. Beograd: Službeni glasnik.

[8] Rakić-Vodinelić, Vesna. 2012. *Pravosudno organizaciono pravo*. Beograd: Službeni glasnik – Pravni fakultet Univerziteta Union.

[9] Schilken, Eberhard. 2010. *Zivilprozessrecht*. München: Verlag Franz Vahlen GmbH.

[10] Stanković, Gordana, Ljubica Mandić. 2013. *Organizaciono građansko procesno pravo*. Niš: Sven.

Nikola BODIROGA, PhD

Profesor, University of Belgrade Faculty of Law, Serbia

DECISION ON THE ELECTION TO THE JUDICIAL FUNCTION AND ITS REVIEW BY CONSTITUTIONAL COURT

Summary

The paper explores the review of decisions on the election to judicial functions. The candidate may file an appeal on the decision on the election to the judicial function to the Constitutional Court within 15 days from the day of the publication of the decision in the Official Gazette of the Republic of Serbia, which excludes the right to submit a constitutional appeal.

Appeal to the Constitutional Court suspends the enforcement of the decision, which means that the elected candidate cannot take office before the appeal is decided. The scope of the Constitutional Court review has been limited to proper execution of powers by the High Judicial Council, following procedure provided for in the Law on Judges and the quality of reasoning in decisions on the election to the judicial function. So far, all appeals submitted to the Constitutional Court have been dismissed as manifestly ill-founded.

Key words: *Election of judges. – Legal remedy. – Constitutional Court. – European Court of Human Rights.*

Article history:
Received: 31. 7. 2024.
Accepted: 5. 9. 2024.

/PRIKAZI

Kenneth Einar HIMMA, PhD*

Hershovitz, Scott. 2023. *Law Is a Moral Practice*. Cambridge: Harvard University Press, 256.

Scott Hershovitz's *Law Is a Moral Practice* is concerned to defend two principal theses: the Moral Practice Thesis (MPT) and the Obligation Thesis (OT). According to MPT, the point of law *as such* is to rearrange our moral relationships by imposing *moral* obligations that people would not have if not for law.[1] According to OT, legal obligations are ontologically identical with moral obligations; as he puts the matter, „legal obligations *are* moral obligations" (23, emphasis added), adding, without defense, the peculiar claim that moral obligations are the only „genuine" obligations (23).[2]

* Associate Professor, University of Zagreb Faculty of Law, Croatia, *khimma@gmail.com*, ORCID iD: 0000–0003–2517–6937.

1 Hershovitz also frequently makes unsupported empirical claims about what we typically do. For example, he claims, without any evidence, that „legal practices are tools for adjusting our moral relationships, and *they are typically employed for the purpose of doing so*" (18, emphasis added). It should be clear that he needs a rigorous sociological study to justify this claim – like the ones being done in experimental jurisprudence, an important new area of legal philosophy that is not discussed in the book.

2 Tell someone who has spent their life in prison for murder that there wasn't any genuine legal obligation not to commit murder. As I have spent some time working with inmates in prison as a volunteer, I am pretty sure that will be enough for them to lose confidence in you.

It is important to understand that both of these theses are metaphysical in character, and, as such, purport to be necessary truths about law and morality. But only MPT is clearly conceptual in character. Claims about the point of law „as such" are claims about its conceptual function, which hence count as conceptual in character. In contrast, it is not clear whether OT is a conceptual claim about the relationship between legal and moral obligations. Claims of ontological identity can be conceptual but need not be; the claim that 1 + 1 = 2 asserts an ontological identity that is not true simply in virtue of the way we use the constituent words. Either way, both of these theses should be understood as metaphysical and hence as purporting to be necessarily true.

There are a number of interesting discussions in the book, but the analysis is, as we will see, marred by Hershovitz's failure to consider the existing literature. It bears noting in this connection that the book is intended to reach a more general audience than just academics and is written in a less formal and technical style than is traditional in conceptual jurisprudence. But, even so, the analysis suffers from the book's lack of engagement with the literature. The unfortunate result is that this omission limits the book's utility even for the more general audience that Hershovitz wants to reach.

A second problem has to do with its style. While it has become common for professional philosophers to attempt to reach a broader audience (following the model of Ronald Dworkin's classic *Law's Empire*), it is quite difficult to do this without making some compromises in terms of sophistication, detail, and hence rigor. It feels a little uncharitable to assess this book against the standards that apply to scholarly writing. But Hershovitz is not at all bashful about bashing the rest of us scholars. As will be seen below, he repeatedly dismisses our views as mere „clutter".[3] That he is dismissive of these views as „clutter" suggests that considering them will get in the way of seeing Hershovitz's truth; and that suggestion opens him up to having his views assessed against those academic standards of rigor. As the kids today say, „don't start none; won't be none."

Before proceeding to a brief discussion of each chapter, it would be helpful to make a general observation about MPT and OT. Both these theses are grounded in Hershovitz's view that law and morality are not separate systems, which I will call the One System Thesis (OST). This, as should be clear, is an ontological and hence metaphysical thesis that purports to be necessarily true. As he explains OST:

[3] To be fair, it beats „rubbish." Thank goodness for little blessings.

> [It is] easy to think that law is something other than morality – that it's a separate normative system. But that thought rests on a mistaken picture of morality. Morality is not insulated from the messy details of our lives. It cares about them. Indeed, it tells us what we owe each other in light of them (171).

These remarks are problematic in two conspicuous respects. First, it is silly to assume that *anyone* thinks morality is „insulated from the messy details of our lives": it is obvious that the requirements of criminal law mirror those of morality and hence that there is considerable overlap in their content. Indeed, it seems nearly pathologically uncharitable to attribute this foolishness to even the more general audience Hershovitz wants to reach. Second, and equally problematic, OST does not imply any conceptual claims about the point of law as such – though it clearly implies OT. Alternatively, one could argue, as Dworkin does in *Law's Empire*, that the point of law as such is to morally justify the state's use of its coercive power.[4] This is not to endorse Dworkin's view; it is merely to illustrate the claim that OST logically implies nothing about the point of law as such.

The book begins with an introduction, which is concerned, in essence, with the question of what makes a rule a rule. The analysis here is organized around a discussion of whether there is a rule in the Hershovitz household that requires his four-year-old son, Hank, to try every food on his plate. During the course of the discussion, Hershovitz rejects the altogether sensible claim that the rule exists because he and his partner made it to govern Hank's conduct at dinner:

> [Hank] knows that both Julie and I think – and act as if – there is such a rule. But he does not think that sufficient to make it the case that there is a rule that requires him to do so. When Hank and I argue over whether he is required to try things on his plate, we are not debating whether he is required according to the rules that I recognize. Rather, we are debating whether he is required to do so, sans qualification. In other words, *Hank and I are having a debate about his actual rights and responsibilities, not the rights and responsibilities that I take him to have* (9, emphasis added).

[4] As Dworkin expresses his view: „The law of a community [...] is the scheme of rights and responsibilities [that] license coercion because they flow from past decisions of the right sort. They are therefore 'legal' rights and responsibilities" (Dworkin 1986, 93). Dworkin also subscribes to OST. See, e.g., Dworkin 2011, 400–415. I am grateful to Thomas Bustamante for the latter reference.

It is a strange conception of morality that entails that a four-year-old boy has a *moral obligation* to try everything on his plate. While Hank is an extremely intelligent child, he is too young to be held *morally* accountable for his behavior because, *at four years of age*, he does not understand the difference between right and wrong and has not yet developed the capacity to reason well enough with moral rules to be bound by them, which is evinced to some extent by the quoted passage above.[5] For this reason, Hank doesn't *yet* have any moral responsibilities or obligations to other people – though he certainly has moral *rights* against other people.[6] Indeed, the most basic point of parenting – apart perhaps from providing the material necessities (which isn't really a matter of *parenting* per se) – is to instill the abilities needed to thrive in a society in which the child will eventually be held both morally and legally accountable for his wrongs and punished (possibly severely) for such wrongs.[7]

Because he overlooks this, Hershovitz misses an opportunity to say something interesting about how children develop a sense of morality. Hank, like every child his age I have ever known, seems to have an inherent resistance to being told what to do by other people. This sense that others lack something like authority to tell us what to do leads naturally to the idea that there are universal norms that govern not only such authority but also define limits on what persons with authority can justifiably demand of other; insofar as these norms are not created by some human authority, they are objective in character. While it is true children initially believe parents have unlimited authority and, later on, that law does, they eventually achieve

[5] The notion of parental authority is a complicated one. When a child is as young as Hank is, it is best thought of as custodial authority that binds other moral agents not to interfere in the parenting of Hank.

[6] Rights correspond to obligations: to say that *P* has a right of some kind against *Q* is to say that *Q* owes an obligation of the same kind to *P*. See, e.g., Thomson 1992; Hohfeld 1917.

[7] Not surprisingly, these utterly uncontentious facts about minors are reflected in the criminal and civil law, which treat minors very differently from adults. In 1899, recognizing that minors are still in the process of developing the relevant capacities, Cook County, Illinois, established the first juvenile court; since then, the legal system in the U.S. has treated minors quite differently from adults (Juvenile Law Center 2019). And there is a limit on how young someone can be to be charged with a crime under even the laws governing minors: the youngest child ever charged with a crime was six years old when the crime was committed; and the predictable reaction to that was justified outrage (Corley 2022). It is a baffling that someone with Hershovitz's education and experience, which includes clerking for Ruth Bader Ginsberg while she was on the U.S. Supreme Court, would overlook such conspicuous features of our moral and legal practices.

a perspective that is distinctively moral in character.[8] This is not to say that there is nothing to be learned from these exchanges. However, I think it would have been helpful to situate those views relative to the various theories of moral development and their bearing on our legal practices as they ground theories of the nature of law. Doing so would have enabled Hershovitz to see some of the limits of what the views of young children can contribute to the discussion on the nature of law.

Each chapter is concerned to justify MPT and OT. Chapter 1 discusses the institution of promise-making to illustrate the claim that legal norms, like the moral norms governing promises, *can* be used to rearrange moral relationships between parties, which is a claim about what is causally, or nomologically, *possible*. While that claim is obviously true, Hershovitz infers two *conceptual* claims from it that, again, purport to express necessary truths about the nature of law: (1) that the point of law as such is to rearrange moral relationships in the relevant respect, and (2) that legal obligations are ontologically identical with moral obligations.[9] The problem is that it is obviously fallacious to infer *conceptual* claims about what is *necessarily* true of law – and, for that matter, necessarily true of *anything else* – from claims about what is *nomologically possible* about even the kind of interest.

Chapter 2 considers a controversy in the theory of constitutional interpretation as a means of articulating that law, by its nature, is a moral practice in the relevant sense (43). It is true, as Hershovitz points out, that disagreements about the principles of constitutional interpretation are often moral in character. However, he claims, implausibly, that the issues dividing Supreme Court Justices concerns the *legality* of various theories of interpretation. The problem is that it is clear that the Supreme Court's decisions establish the law regardless of which such theory the majority employs – a point that even Dworkin, who was perhaps the first to articulate and defend OST, concedes. As Dworkin puts this utterly uncontentious point in *Law's Empire* (20):

---

[8] See, e.g., Kohlberg 1981. Kohlberg's theory has been justifiably criticized on the ground that he focused exclusively on the moral development of boys. Carol Gilligan argued that girls develop an ethic of care that is not captured in Kohlberg's theory (Gilligan 1982). Gilligan's theory has been criticized on a number of grounds. See, e.g., Senchuk 1990.

[9] Either way, it is no surprise that law and morality typically overlap so much in content; both law and morality, after all, are concerned with promoting human well-being by restricting acts that can result in harm. But one obvious difference between the two is that, in every *existing* municipal legal system of which we know, the criminal law, unlike moral norms with roughly the same content, is backed by sanctions that purport to provide a prudential reason to comply, when moral reasons are not likely to induce compliance.

> [The] Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office.[10]

That „last word" establishes the content of the law on the matter and hence pertains to the rule of recognition in the U.S., which affords final authority on the Supreme Court over constitutional decisions. As it is implausible to think any Supreme Court Justice has ever been confused about this, the most plausible interpretation of their disagreements is that those disagreements pertain to what the Justices believe are the correct standards of moral legitimacy, which are concerned, as Dworkin points out, with justifying the use of the state's coercive machinery – and, again, not with the conceptual conditions of legality.[11]

Chapter 3 argues for the claim that *law* does not consist of a set of norms. As Hershovitz condescendingly explains, „the *original sin* among philosophers of law is *the rigid insistence* that this and not that set of norms counts as the law of a community" (83, emphasis added). Although he concedes that legal norms count as law, he believes there are other elements of our legal practices that also count as part of the law:

> The problem comes when someone insists (as some who style themselves „legal realists" are wont to do) that the law just is the set of norms *that are enforced*, and nothing else. That's a problem because it obscures facts that we need to keep in view. For instance, if a cop does ticket someone driving just a mile or two over the limit, courts will not hear his complaint that the law „really" permits him to drive up to ten miles an hour over the limit. That's because the courts aim to apply norms that are authoritative, not the norms that are generally enforced (83, emphasis added).

[10] See, e.g., Himma 2005.

[11] It should be noted that one can consistently hold that morality and law form one system and still distinguish between legitimacy and legality. Some of the rules in this one system govern legitimacy while others govern legality.

There are two conspicuous problems with this discussion. First, it is simply false that courts in the U.S. won't „hear" that complaint. I have had the fines for speeding tickets reduced, or thrown out entirely, by arguing I was only five miles over the limit and doing so not to impede the flow of traffic. Of course, there is no guarantee that a court will do either of those things (though they do them more often than Hershovitz realizes), but that is a different issue. Second, it is silly to think that accepting Hershovitz's suggestion that believing law consists entirely of norms will prevent someone from realizing that cops rarely ticket anyone for speeding unless s/he exceeds the speed limit by more than five miles per hour but would be legally justified in doing so.

But, next, in a dazzling non sequitur, Hershovitz argues that H.L.A. Hart shares his view that the law is not just a set of norms, in essence, because Hart rejects the idea that law is inherently coercive in the sense explained above:

> Hart took Holmes to task for his suggestion that the law is just a prediction about what courts will do. Courts appeal to the law, Hart pointed out, to justify the decisions that they make, so the law cannot just be the set of norms they are likely to enforce; a law has to exist independently of its enforcement if it is to play a role in justifying it. Hart offered his own suggestion: the law is the set of rules validated by a rule that judges accept. But that's not what is at issue in court either. What's at issue is the norms that are authoritative (83).[12]

This is simply confused. The disagreement between Hart and those who believe, as I do,[13] that law is inherently coercive does not in any way implicate the truism that the law consists of just the norms that count as legally authoritative. That disagreement between us concerns whether it is a necessary condition for a norm to count as legally *valid* and hence as legally authoritative in some legal system *S* that its enforcement is authorized in *S* for noncompliance. There is nothing in Hart that would justify thinking he denies the law consists entirely of norms – construed, of course, to leave open the possibility that it includes legal principles.

[12] On Hershovitz's view, „norms are authoritative, if they are, only in virtue of moral principles that establish their authority" (85) – a claim he makes repeatedly without ever making an argument.

[13] See, e.g., Himma 2020.

Further, he gets Hart's reasoning and position here wrong. Hart rejects Austin's command theory of law principally on the ground that it overlooks the distinction between primary norms and secondary norms; the latter are concerned to define the criteria that a *primary norm* must satisfy to count as legally valid. He gives a number of other arguments rejecting the view that even the primary norms of law are inherently coercive – including the gunman writ large argument and the argument that the primary norms of international law lack sanctions but count as law.[14] But none of these arguments will support drawing any of the interpretive conclusions about Hart's view that Hershovitz attempts to draw here.

Chapter 4 attempts to reconcile the claim that law is a moral practice with the claim that there can be immoral laws. Hershovitz devotes much space to showing how the notion of a moral practice is broad enough to accommodate the existence of immoral laws, which is less in need of defense than any of the principal claims in the book. But he says nothing by way of reconciling the existence of egregiously immoral laws – like the Fugitive Slave Act which required officials to return persons who escaped conditions of slavery to those who create and maintain those conditions – with the much stronger claim that every legal obligation is ontologically identical with a moral obligation.

There is, of course, a great deal of overlap between morality and legality; however, absent exceptional circumstances that do not obtain in the case of the vast majority of immoral laws, an immoral law does not give rise to a moral obligation. It is counterintuitive, to put it quite charitably, to think the Fugitive Slave Act created even a prima facie moral obligation to comply – though it obviously defined a legal obligation to do so. Even in legal systems that are generally just, there is a limit on how wicked a legal norm can be and still generate a moral obligation to comply; no contemporary philosopher of note has ever defended the preposterous claim that we have an absolute moral obligation always to comply with the law.

One can always claim, of course, that immoral norms cannot count as law in the purely descriptive sense of the word that positivism takes itself to explain – and there might be some natural law theorists who hold that strong view. But that is a view that cannot be reconciled either with our ordinary views or with the conceptual or legal practices which ground them.

[14] For criticisms of both arguments, see (Himma, 2020) and (Himma, forthcoming).

Moreover, though it is commonly thought that Finnis and Dworkin take that position, there is good reason to think both would deny this implausibly strong claim.[15]

In any event, the ostensible lesson of Chapter 4, which includes an interesting discussion of Mafia rules and wicked laws, is that „it is important that we maintain a clear-eyed sense of the shortcomings of our legal practices. To do that, we have to treat them as potential sources of obligations and note the ways in which they fall short" (111). Notwithstanding that one might sensibly deny Mafia rules create social obligations, it is a conceptual truism that any mandatory legal norm, no matter how wicked, creates a *legal* obligation. The facially absurd claim that there cannot be a wicked norm that defines something that counts as a *legal* obligation, which *seems* to be Hershovitz's view, needs a defense, apart from the question-begging OST, that it never gets.

Chapter 5 offers an extended discussion of M.B.E. Smith's rejection of the idea that there is even a „prima facie" moral obligation to obey the law. As Hershovitz correctly points out, whether or not we have a moral obligation to obey an immoral law depends on the circumstances; it is clear, after all, that the moral reasons for obeying an immoral law might, in some instances, outweigh the moral reasons for disobeying it. The demands of morality are complicated and often appear to conflict. That is part of what makes it so challenging to live a morally good life.

But beyond pointing out that we might sometimes be morally required to do what is morally wrongful, his reasoning is problematic. Hershovitz argues, among other things, that putting the question in terms of whether we have a moral reason to comply with the law „is misleading [because] it presupposes that we can identify the content of the law independently of ascertaining its moral force" (114).[16]

---

[15] Dworkin concedes, for instance, that there can be wicked law in that purely descriptive usage, which he characterizes as the *preinterpretive* usage of the term *law*: „We need not deny that the Nazi system was an example of law [...] because there is an available sense in which it plainly was law" (Dworkin 1986, 103). His theory in *Law's Empire* is concerned to explicate an „interpretive" use of law that has some morally evaluative content. Similarly, Finnis explicitly accepts the separability thesis as being true of the same descriptive usage of law (Finnis 1996, 203, 204).

[16] I say „comply" here instead of „obey" because I agree with Hershovitz that „obey" connotes that the obligation is owed to some authority. It is true we owe some legal obligations to others, such as an obligation not to murder, breach contracts, or negligently fail to take reasonable care in protecting others; however, there is no obvious central authority to which every legal obligation is owed. Assuming we have a legal obligation owed to the court to comply with court orders, it seems clear

There are two problems with the quoted claim. First, it clearly begs the question against legal positivism. Second, the U.S. Constitution's Fugitive Slave Clause and the statutory Fugitive Slave Act of 1850 are obvious counterexamples to the claim we can't identify the content of the law without considering its moral force, as well as to OT.[17] As a general matter, a statute that prohibits intentionally killing a person for any reason than those permitted by the law itself can be interpreted simply by consulting the statute – when the statute is clear enough to convey reasonable notice of what behaviors are prohibited, as is required of criminal law in the U.S. to satisfy the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Chapter 6 is, for the most part. a sensible discussion of the case of Roy Moore's refusal to conform to the constitutional rule prohibiting the establishment of a state religion, which has been interpreted to preclude displaying religious symbols in courts and legislatures. But this case doesn't need as much discussion as it gets. It is largely uncontentious, even among political conservatives, that the removal of Moore from state office was justified both from the standpoint of legal rules and from the standpoint of moral rules – or, as the matter is commonly put, justified all things considered. But Hershovitz conflates the two issues of justification, asserting without defense that „[the claim] that Moore had a duty to follow the rulings of the federal courts – is a moral claim every bit as much as it is a legal one" (138).

Again, this begs the question against the standard view that law and morality are distinct systems. The standard view is not only more elegant; it is far more intuitive and more in line with our conceptual *and* legal practices. While one might, I suppose, make an argument to the effect these practices

that the obligations created by most criminal and civil laws are not owed to judges, legislators, or members of the executive branch. As Hershovitz helpfully explains the problem: „Smith's question is troublesome for its invocation of obedience. Asking whether we are obligated to obey the law suggests that the primary way in which law makes a moral difference is through the exercise of authority" (116).

[17] The Fugitive Slave Clause provides as follows: „No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." Article 4, Section 2, U.S. Constitution. The Fugitive Slave Act of 1850 was enacted to ensure that southern states complied with the Fugitive Slave Clause.

should be revised (or „reengineered"),[18] Hershovitz makes no such argument – and this is because there is simply no need to talk about such matters in a different way. The standard view does all the work that MPT and OT do but without denying what is a truism, given the way we use the words, that law and morality are separate systems. Adopting OST would require revising much in our conceptual practices without any obvious redeeming social benefits.

Chapter 7 argues for the surprising claim that lawyers have moral expertise whereas philosophers, including moral philosophers, lack it. Moral philosophers should not be thought to have such expertise, on Hershovitz's view, for a variety of reasons, including that the problems they work on are either too general (presumably in the case of ethical theory) or too specific (presumably in the case of applied ethical issues). Though that claim is not obviously absurd, he argues, much less plausibly, that lawyers have moral expertise because they study a wide variety of moral issues:

> If I am right [...] that moral expertise exists, [...] then it follows that lawyers are moral experts, at least for a narrow but important set of moral questions. They are the sorts of questions that lawyers study, in a sustained way, starting in law school and continuing through their careers (156).

The argument that lawyers have moral expertise depends critically, of course, on OST and hence begs the question against the standard view. However, it is worth noting, against OST, that the only courses required of law students that explicitly deal with morality are exclusively concerned with the professional duties that lawyers owe to their clients and to the courts. Every other required course is concerned with the statutes and common law decisions pertaining to that area of law. One can, I suppose, count those latter courses as courses in morality but only if one thinks that statutes and common law *necessarily* establish the content of morality. Putting aside the facial implausibility of that latter claim, it is difficult to reconcile with Hershovitz's view that morality is objective and hence practice-independent in character.

[18] Conceptual engineering is concerned with engineering new concepts and reengineering old concepts that need revision because they are problematic in some way. See, e.g., Chalmers 2018. It is crucial to note that this is not just being done by academics; gender concepts are being reengineered both among the academic community and among the general public.

The book concludes with an Appendix that answers „FAQs“,[19] most of which are concerned to situate Hershovitz's views pertaining to positivism, classical natural law theory, and Dworkin's interpretivism. If forced to complain about the Appendix, which is, on my view, the strongest discussion in the book *by far*, I think that many of these questions would have been more helpfully answered in the chapters – and especially in the Introduction.

If one has any doubts that Hershovitz's theses are metaphysical, the Appendix makes clear that he intends his theses as a conceptual claim about the nature of law and morality. Given, for instance, that he pits his MPT against the various conceptual theories of law, it is fair to assume he intends MPT as a claim about the nature of law – that is, as a claim that purports to be necessarily true of law as such – and, moreover, one that is objectively true in the sense that its truth value does not depend at all on what we do with our conceptual or legal practices.

Hershovitz is forced to claim that his theses are objective truths about law because they are utterly detached, as he often delights in boasting, from the views of lawyers, philosophers, and ordinary folks. And, in all fairness, it is not obviously preposterous to think both that there are such objective truths about the nature of law and that we can be mistaken, even collectively, about our views.

However, there are conspicuous limits on how much a theory of the nature of law can conflict with what we do with words and still remain plausible. Claiming we are all mistaken in believing such truisms as that law consists of norms is analogous to claiming, for instance, we are all mistaken in believing the concept of bachelor applies only to human beings. On this weirdly revisionist view, all male dogs would really count as bachelors, regardless of our social practices, because they cannot marry. For this reason, Hershovitz's theory amounts to an error theory of law that – despite having an enhanced burden of proof, like all error theories – is rarely given even minimal support.

Either way, none of the cases that Hershovitz discusses in the chapters provides any support for the claim that legal obligations are ontologically identical with moral obligations because they are all logically consistent with the standard view that they are ontologically distinct, which is implied

[19] It is indicative of the high esteem in which Hershovitz holds himself and his views that he characterizes these questions as „FAQs“ – as if the world is as familiar with his views as it is with, say, social media apps like Facebook and Instagram.

by the claim that law and morality are separate systems. There is simply nothing in the book that provides even a prima facie reason to question the standard view.

There's an easy way to see this; and Hershovitz is aware of the problem. To even get his view off the ground, he must assume objective morality exists. That is not necessarily problematic, given that most of us assume this. But what is problematic is that he links skepticism about the existence of an objective morality to skepticism about the existence of law:

> I won't try to talk you out of your skepticism here. What I will say is that, if you are skeptical about moral claims, you should be skeptical about legal claims too (194).

This is just question-begging nonsense; and it is patently false. Anyone who has ever been charged with a crime or had to defend a civil suit in court *knows* we have a legal system that consists of norms that govern our behavior. Indeed, I doubt one could find any competent adult in the U.S. who does not know we have a system of law. We are as epistemically justified – and obviously so, on any standard of epistemic justification that does not require Cartesian certainty for empirical knowledge – in believing that triviality as we are in believing the claim we need to eat to survive.

What we are not *obviously* justified in believing is that there exists an objective morality – though I share his belief that there is. This is why moral skepticism is a viable position and one commonly seen among students in introductory courses in ethics who struggle to understand, as is sensible, how there could be objective moral truths. Moral skepticism takes two forms – one epistemological and the other ontological. Epistemological moral skepticism is the position that, even if an objective morality exists, we do not have reliable epistemic access to any truths about it.[20] Ontological moral skepticism is the position that there is no objective morality.[21] Again, the point here is not to endorse either form of skepticism, but simply to point out that we lack an obvious argument that would establish the existence *and* knowability of an objective morality.

Far more worrisomely, Hershovitz also assumes that there are objective, and hence mind-independent, truths about *the nature of a kind* – which poses a very different problem than those concerned with the existence of an objective morality. But even if that counterintuitive claim is true, it is

[20] For a general discussion of moral skepticism, see, e.g., Sinnott-Armstrong 2024.

[21] *Ibid*.

simply not clear how any ordinary mortal could have epistemic access to the nature of a kind as it is determined independently of anything we do down here with language. However, even if there are God's-eye truths about the nature of law,[22] discerning them would require a God's-eye perspective that none of us can plausibly claim to have. Given that Hershovitz so often rejects conceptual claims about law, which positivists and anti-positivists accept as truisms about the nature of law, he seems to think (and sometimes insinuates as much) that he has more reliable epistemic access to the nature of a kind, as determined independently of our conceptual practices than the rest of us do; it seems clear that he cannot reject so many claims that are accepted by both academics and layperson if he is concerned with how the nature of law is determined by our conceptual practices.

One can, of course, sensibly be skeptical about much having to do with law. One can, for instance, justifiably be skeptical about the contentious claim that there are always right answers in the law for hard cases, as well as about the conflicting claim that the law does not always provide right answers to hard cases. One can even be justifiably skeptical of the idea that there are any right answers at all to even easy cases.

What one cannot be sensibly skeptical about is the claim that law exists – regardless of whether morality is objective. Because Hershovitz falsely conflates law and morality, he is forced to equate moral and legal skepticism; whatever benefits this might yield, which are never explained, conflating moral and legal skepticism comes at the prohibitive cost of having to deny claims that count as truisms given the way we use the words – for no apparent reason and to no evident advantage.

Hershovitz's view that the point of law as such is to rearrange our moral relationships is also strikingly implausible. Far more plausible is the claim that its point is to prevent enough violence to enable us to live together in comparative peace so that we can benefit from social cooperation – i.e., to keep us out of a Hobbesian state of nature; after all, every legal system in human history has criminalized violence and backed those prohibitions with stiff sanctions. We might, I suppose, sometimes use law simply to rearrange our moral relationships, though that is not something I have ever done, or even seen done, and is certainly not true of criminal law and the contempt

[22] While the problem is analogous to the problem of explaining how beings like us have access to objective *moral* truths (assuming there are such truths), it strikes me as more difficult. One might reject the claim there are objective moral truths, but that claim is coherent. It is hard to make sense of how there could be such objective truths about the nature of things.

sanction that backs court orders. However, law cannot do this – or, for that matter, anything else it is intended or contrived to do – without at least minimally keeping the peace.

The claim that the basic point of law is to keep the peace might be contentious among anglophone conceptual jurisprudents but not among normative political philosophers who do legitimacy theory – including Dworkin. And the reason for the latter is not difficult to see: one need only look to what is happening in Haiti after the fall of the government to see why political philosophers almost universally accept this claim. As CNN described the tragic horrifying situation as it began unfolding recently in Haiti:

> For three weeks, Haiti's capital has been trapped in a gory cycle that far exceeds the kidnapping and gang violence for which it was already known. An insurgent league of heavily armed gangs is waging war on the city itself, seeking new territory and targeting police and state institutions. Scared and angry, vigilante groups are blocking off their neighborhoods with felled trees and chains, killing and burning outsiders suspected of gang membership. It's the only way, they say, to defend themselves. Human remains are lying in the streets, yet the multinational security mission long touted by Haiti's neighbors as a game-changer for its gang problem is nowhere to be found (Stephens Hu *et al.* 2024).

In essence, this amount to the war of all against all that Hobbes predicted will happen in any anarchic condition. It is true that Haiti differs from more affluent nations in that it has struggled with brutal, life-threatening poverty throughout the course of its history. However, it would be hubris to think we in more affluent nations could dismantle the coercive machinery of the law without deteriorating into a state-of-nature scenario like this.

It might take us a little longer to descend into such profoundly harmful chaos. But, given human nature and our material circumstances, as they will be increasingly impacted – and in frighteningly negative ways – by artificial intelligence and climate change, it is plausible to surmise that eventually such chaos would find its way into even the most placid suburbs. The idea that the basic point of law is to rearrange our moral relationships is preposterously optimistic about our ability to get along in a world of increasingly acute material scarcity where we must compete for everything – including romantic companionship. We can't even get along on Instagram – and neither AI nor climate change has eliminated jobs or career prospects of large segments of the population...yet!

There is one consistently irritating feature of the book that warrants a comment before I close this out. Hershovitz is unable to content himself with just expressing his disagreement with existing theories of law. Instead he feels an inexplicable need to dismiss them with an almost Trumpian arrogance and glee; as Trump absurdly boasted at the 2016 Republican National Convention, „I alone can fix it" (Applebaum 2016).

One recurring example of this, as noted above is that he insists on using the word *clutter* to describe the entire history of contemporary legal philosophy:

> My plan in this book is to cut past some of the *clutter*, so as to provide a concise account of the idea that law is a moral practice. That means that, for the most part, I won't engage these philosophers or the many others who have made important contributions to the debate (11, emphasis added).

and

> I haven't yet used any of the labels that pervade philosophical discussions about law: positivism, natural law, realism, and the like. I will have a lot to say about them later on, but they are part of the *clutter* that I want to cut past. The positions these labels name presuppose particular ways of thinking about the problems in jurisprudence – ways that can be counterproductive (15, emphasis added).[23]

But, far and away, the most offensive remark that Hershovitz makes in the book comes in the context of a discussion of Antonin Scalia's textualism and is directed at positiv*ists*, the people – rather than at positiv*ism*, the theory: „Hart's partisans sometimes suggest that lawyers, like Scalia, insist that there is law, even where there are no shared tests for identifying it, simply in the hopes of hoodwinking people" (49). This is not just false and disrespectful. It is astoundingly unprofessional – and Hershovitz should know better.

While there are a number of interesting discussions in *Law is a Moral Practice*, the book is marred by Hershovitz's tone, unsound reasoning, and assumptions. To be as candid in assessing the book as he is in assessing any view he disagrees with, its most basic problem is Hershovitz's outsized ego. If he had gone into writing this book with even the slightest inkling of humility

[23] It should be noted that he never gives an example about how these „ways of thinking" can be „counterproductive."

or fallibility, the book would have been much better. Although he would still have a steep hill to climb defending OST, MPT, and OT, he would not missed so many opportunities to defend these claims because he would not have dismissed the rest of us and might have learned something important about how play this game in a civilized way.

REFERENCES

[1] Applebaum, Yoni. 2016. I Alone Can Fix It. *The Atlantic*, July 21. *https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/*, last visited August 27, 2024.

[2] Chalmers, David. 2018. What is Conceptual Engineering and What Should it Be? *https://philarchive.org/archive/CHAWIC-3v2*, last visited August 27, 2024.

[3] Corley, Cheryl. 2022. In some states, your 6-year-old child can be arrested. Advocates want that to change. *NPR*, May 2. *https://www.npr.org/2022/05/02/1093313589/states-juvenile-minimum-age-arrested-advocates-change*, last visited August 27, 2024.

[4] Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.

[5] Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge: Harvard University Press.

[6] Finnis, John. 1996. The Truth in Legal Positivism. 174–188. *The Autonomy of Law*, edited by Robert P. George. Oxford: Clarendon Press.

[7] Gilligan, Carol. 1982. *In a Different Voice*. Cambridge: Harvard University Press.

[8] Himma, Kenneth Einar. 2005. Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism. *Law and Philosophy* 44: 1–45.

[9] Himma, Kenneth Einar. 2020. *Coercion and the Nature of Law*. Oxford: Oxford University Press.

[10] Himma, Kenneth Einar. Forthcoming. *The Nature of Law.* Cambridge Elements Series. Cambridge, UK: Cambridge University Press.

[11] Hohfeld, Wesley Newcombe. 8/1917. Fundamental Legal Conceptions. *Yale Law Journal* 26.

[12] Juvenile Law Center. 2019. Youth in the Justice System: An Overview. *https://jlc.org/youth-justice-system-overview*, last visited August 27, 2024.

[13] Kohlberg, Lawrence. 1981. *The Philosophy of Moral Development*. New York: Harper & Row.

[14] Senchuk, Dennis M. 1990. Listening to a different voice: A feminist critique of Gilligan. *Studies in Philosophy and Education* 10.

[15] Sinnott-Armstrong, Walter. 2024. Moral Skepticism. *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman. *https://plato.stanford.edu/entries/skepticism-moral/*, last visited August 27, 2024.

[16] Stephens Hu, Caitlin, David Culver, Harold Isaac, Evelio Contreras. 2024. Carnage on the streets of Port-Au-Prince as world stalls on a promised intervention for Haiti. *CNN*, March 22. *https://amp.cnn.com/cnn/2024/03/21/americas/haiti-council-gang-intl-latam*, last visited August 27, 2024.

[17] Thomson, Judith Jarvis. 1992. *The Realm of Rights*. Cambridge: Harvard University Press.

Boris BEGOVIĆ, PhD*

Kertzer, David I. 2022. *The Pope at War: The Secret History of Pius XII, Mussolini, and Hitler***. New York: Random House, 788.**

'The Pope. How many divisions has he?'

Attributed to Joseph Vissarionovich Stalin

The incumbent Pope Francis is the 266th pontiff of the Roman Catholic Church and it is now almost 2,000 years since the first one was inaugurated. Given such a long history, it is not surprising that some of the pontiffs have been rather controversial. The reign of Alexander VI (born Rodrigo de Borgia) from 1492 to 1503 is often considered controversial, and this label is used more as a courtesy to the spiritual institutions, as history books and literature about his time in power have provided so few kind words.

Moving closer to the present day, it is evident that the 20th century also had its share of controversial popes. The book under review is about one of them – Pius XII (born Eugenio Pacelli), who ascended to the papal throne, i.e. St. Peter's throne, on 2 March 1939, and reigned for almost 20 years. Accordingly, the book examines the head of the Roman Catholic Church who was a controversial historical character, at the time marked by uncontroversial, indisputable evil of the most horrible sort. Those whose view of the pope is favourable (Blet 1999, Hesseman 2022) argue that in those dark times Pius XII did everything that could have been done. Those who think differently consider him to be 'Hitler's Pope' (Cornwell 1999). In contrast, David Kertzer lets the reader judge the pope and his accomplishments, or rather the lack of them, providing ample facts arranged in a very orderly and logical manner, as the ground for such a value judgment. These facts are occasionally supplemented by Kertzer's own, not

* Professor (retired), University of Belgrade Faculty of Law, Serbia, *begovic@ius.bg.ac.rs*, ORCID iD: 0000–0001–7343–190X.

at all imposing, almost unassertive considerations of the topic. The facts that are provided in the book include those based on the insights into the recently opened the Vatican archive of Pius XII, since Pope Francis decided that this Vatican archive would become accessible for academic research in March 2020.

At the very beginning of the book, the author points out that the newly accessible archive materials should be considered in the context of the time. They should not be pondered in isolation, but in conjunction with previously accessible Vatican archive material, as well as archive material of other countries, especially the great powers of that era. By consistently adhering to these methodological guidelines, the author provides the reader with a detailed report on every momentous event from two viewpoints. For example, on the one hand, the reader is provided with an insight into a note (request or appeal) of a government of a country that is submitted by its envoy (ambassador, in contemporary parlance) to the Holy See, followed by the materials for the meeting with that envoy that were prepared for Pius XII by the Vatican's secretariat of the state, and memorandum from that meeting, written by the Vatican's officials. Furthermore, the reader is also acquainted with the memorandum of the very same meeting written by the envoy and his evaluation of the meeting – both dispatched by the cable to the ministry of foreign affairs of the country in question – providing information not only on how the meeting was, what were the contents and outcome, but also on the reasons for such outcome. What follows is the author's interpretation of the event in the context of ongoing developments and his explanation of the reasons for such outcome.

Fully equipped with these archival materials and having the strong determination to provide the reader with a comprehensive and clear picture of the earthly endeavours of Pius XII, the author crafted a voluminous novel-like chronicle of his reign at the time of the Second World War, with an appropriate prologue. On the one hand, the prologue deals with the ascent of Cardinal Pacelli to the Papal throne, and on the other hand, it covers the development of the institutional framework that Pius XII faced when he took the office/throne.

Regarding the first issue, the future pope spent nearly his entirely priestly career in the corridors of the Vatican, serving the leadership of the Roman Catholic Church. He was, notably, papal nuncio to Germany for 13 years, starting in 1917. The time in Germany left a lasting impression in him, not only regarding the perfect German language he practised. Before he ascended to the throne, for nine years he had been the Vatican's secretary of state – second only to the pope (Pius XI at the time) in terms of influence and leverage.

As to the second issue, the status of the Vatican was resolved only in 1929 by the Lateran Agreement between Italy and the Roman Catholic Church – the Vatican became a sovereign state. The Italian dictator at the time was not a calm, decent and reasonable person, meaning he had latitude for credible threats of rescission of the agreement or at least non-fulfilment of the obligations from its provisions, especially considering the asymmetry of the (earthly) power between Italy and the Vatican. Furthermore, it was only in July 1933 that the Concordat between Germany and the Vatican was concluded. The German dictator, contrary to the Italian one, was not a man of threats, but a man of action. From day one of the enforcement of the Concordat, he started to violate its provision, of course, against the interest of the Roman Catholic Church and its flock in Germany. If anything, he was consistent, as he violated all agreements that he concluded and signed. For example, immediately after the inauguration of Pius XII, Hitler violated Germany's obligations from the infamous Munich Agreement, invaded Czechoslovakia and dismembered that country. Pius XII was silent about that. He was also silent later. Throughout his papacy he was always silent about Hitler and his deeds.

This (wartime) chronicle has elements of a historical novel.[1] There are many characters, and it is beyond any doubt who is the central one. This writing style enables the reader, if they wish, to step into Pius XII's shoes, and to try to guess what were his beliefs, motives, aims, and how he made his decision, and to try to understand his reasoning – the mechanism which resulted in his actions or, in many cases the lack thereof. That does not necessarily mean that the reader should sympathises with him or justify his conduct.

In his book, Kertzer provides ample evidence based on which the reader can positively conclude that Pius XII, in his official earthly considerations, was interested only in the Roman Catholic Church as an institution, maintaining its prestige, the way he felt it, the protection of its social influence, and the increase of its non-spiritual power. Pius XII did not differentiate the Church from himself. Accordingly, he was interested in all those issues for himself. Furthermore, according to the author, the pope dreamed of becoming – a peacemaker. What a dream: to be a person who would intermediate between two sides and to be glorified for bringing the peace that would

[1] This is only to say that Kertzer's book features some elements of a novel. From the other viewpoint, this is not to say this book is a novelised history – an approach in which historiographic insights on some events are disclosed in the form of the novel, like, for example, Lenin's travel from Zurich to Petrograd in 1917, organised so well by the German government (Marridale 2016).

end the bloodshed! Nonetheless, the German envoy to the Vatican, cited in the book, cheerfully reported that it was the pope who believed that such a peace should be based on justice. Since justice can mean anything – and the information about the pope's beliefs comes from the German envoy – the author of this review presumes that peace based on justice is the one in which Germany is triumphant and a peace that is not based on justice is the one achieved by the Treaty of Versailles after the First World War.

Removing God from the equation, what did Pius XII believe in? According to the evidence in the book – in autocracy (a right-wing one, of course). He despised democracy and was horrified by communism, needless to say, not because it lacks democracy. He was repulsed by liberalism and disgusted by the constant liberal preaching that church and state should be separated. He firmly believed that the church, as an institution, i.e. the Roman Catholic Church, meaning his church, should decide about public policies, though without (political) consequences for its decision.

The reader wonders whether Pius XII believed in anything else beyond God. For example, in the desirability of ubiquitous peace on Earth, in the peaceful resolution of disputes, in equality of all people, and non-discrimination due to race or confession. Did he believe in tolerance and other things considered today by many as empty slogans of political correctness? The answer to all these questions should indirectly be inferred by the answer to the other one. With whom did Pius XII conclude the accord? With none than – Adolf Hitler. He could have hardly found more horrific Mephisto.

According to the book, the accord was built step by step. On the occasion of the first Hitler's birthday during Pius XII's pontificate, on 20 April 1939, Pius XII instructed his nuncio in Germany to personally deliver to the Führer the pope's best birthday wishes and ordered (the Roman Catholic Church is a strictly hierarchical organisation) all the Catholic church bells to peal in celebration, as priests and their congregation prayed for God's blessing upon the Führer. What a harmony! This action demonstrated a clear alignment of the Roman Catholic Church with the Nazi regime. For the record, all that happened slightly less than three months after Hitler's Reichstag Prophesy speech (30 January) in which he announced the 'annihilation of the Jewish race in Europe' in case of a war – a war he was planning and actively preparing (Browning 2004).[2]

[2] 'If international finance Jewry inside and outside Europe should succeed in plunging the nations once more into a world war, the result will be not the Bolshevization of the earth and thereby the victory of Jewry, but the annihilation of

The next steps followed. In 1939, the year in which the Second World War commenced, secret negotiations between Germany and the Vatican started and they were successfully concluded the following year. These negotiations are documented in detail in newly accessible Vatican archive materials, providing not only hard evidence that these secret negotiations actually happened, but also revealing their content. Hitler's personal envoy Philipp von Hessen sought, on behalf of his principal, improvement of relations with the Vatican, meaning the pope's commitment not to speak publicly about 'the racial issue', and that the Roman Catholic Church in Germany, specifically in the Reich (with a substantially increased number of Catholics after the *Anschluss* and annexation of Sudetenland) would not interfere with political issues. Pius XII went one step further. It was important for him to convince Hitler's personal envoy that the Catholics of the Reich would no longer face any conflict in loyalty between the Church and the state. The author points out that such successful secret negotiations paved the way for the visit of German Minister of Foreign Affairs Joachim von Ribbentrop to the Vatican in March 1940. The *Reichminister* was delighted with the visit, as Pius XII clearly and unequivocally claimed that there was no 'political Catholicism'. In short, the Roman Catholic Church did not contest Nazism. Furthermore, Pius XII emphasised to his guest that there was no reason for the Vatican to interfere with the 'historical processes' in which, from the political point of view, the Vatican was not interested. Translation of the pope's statement: Germany can attack whomever it likes, invade whomever the way it likes, Germany can do whatever it would like to do, the Vatican would not interfere in it, and the pontiff of the Roman Catholic Church would not be publicly speaking about it. It was not surprising that von Ribbentrop was extremely pleased with such a successful visit – and so was the one who sent him on that mission.

Pius XII swiftly demonstrated that he was a person who honoured his words. He did not interfere, and he did not publicly speak – about anything. Not only was his very first encyclical in his pontificate (the war has already started) tightly packed with uncommitting general statements about universal brotherhood and hard times for mankind, but Poland and its horrible disaster were not mentioned in this very document, let alone condemning those who were responsible for that horror. It was precisely at that time that the pogrom of the Poles, both the laypeople and clergy of the Roman Catholic Church in Poland was taking place and, with the papal

the Jewish race in Europe.' A translation of the entire speech can be found at: *https://en.wikisource.org/wiki/Adolf_Hitler's_Address_to_the_Reichstag_(30_January_1939)*, last visited July 23, 2024.

silence – was also accelerating. Accordingly, it is not surprising that in the following years Pius XII never publicly referred to any of the German aggressions on the neutral countries (the list is long), never mentioned the *Luftwaffe* bombing of civilian quarters of cities around Europe (again – a long list), never reacted to the *Wehrmacht* and *SS* atrocities and massacres of civilians, nor condemned Italian entry to aggressive war.[3] None of that happened. Although, according to the insights from the book, many governments appealed to the pope to do exactly that.

Here comes the most difficult word – the Holocaust. Did Pius XII know about it? Did he comprehend the scale of what was happening? Based on the insights from the book, supported by evidence from the documents from the Vatican archive, the unequivocal answer is – yes. The first reports about the Holocaust started arriving in the Vatican in the autumn of 1941, from Italian (of course Catholic) military chaplains embedded in the Italian units on the Eastern Front. This was before the Wannsee Conference, at the time when *SS* extermination squads (*Einsatzgruppen)* started the implementation of the Final Solution by shooting hundreds of thousands of Jews in the occupied part of the Soviet Union. Even if the pope did not trust the reports about the Holocaust that were coming from the Allies, even if he discredited these reports as biased and the numbers in them as propaganda-motivated exaggerations – the reports by Italian Roman Catholic chaplains from the Eastern Front were highly reliable.

What did Pius XII do? He kept silent. He never mentioned the word 'Jews'. Let alone 'Nazis'. Nonetheless, let us remove announcements from the equation, the question is: did Pius XII do anything behind the scenes? He only intervened on behalf of baptised Jews, those who had converted to Catholicism, that they should not be treated the same way as those who were defiant and who had not changed their confession. Since those who had converted were from that moment under the auspices of the Roman Catholic Church, they should be protected – not for their own sake, but because of the Church which should be revered.

[3] Quite the contrary, the Roman Catholic Church, i.e. its leadership, publicly endorsed the decisions of the Italian government/dictator to step into an aggressive war both in 1939 (occupation of Albania) and 1940 (aggression against France and Great Britain) and, according to the insights from the book, the ministers of the Roman Catholic Church in Italy appealed to the flock to back Mussolini, to support the war leader in the hard times for the country. For Italians, things would become much harder in the following years.

Honouring the Roman Catholic Church was sacrosanct for Pius XII. A piece of evidence supporting this insight is a document from the Vatican archive, revealed in the book. According to the document, it was Pius XII who complained in early January 1940, through a clandestine envoy, to Adolf Hitler about the discrimination of Catholics in Germany and the scorning of the Roman Catholic Church in the country. As an example of this discrimination practice, the pope pointed out that Catholics could not be promoted within the *SS* if they did not denounce their affiliation to the Roman Catholic Church. What an injustice – a good Catholic could not become even *Standartenführer*! For Pius XII it was not an issue what on Earth a Catholic was doing in this murderous organisation, and in his eyes, there was no contradiction between the Christian values and the values cultivated within the organisation headed by Heinrich Himmler.[4] The only relevant issue for the pope was that those who managed to negotiate such a schizophrenic dualism could not advance in this criminal organisation, at least at the same pace as other devout Christians.[5]

How can such behaviour on the part of Pius XII be explained? The author provides ample evidence based on which the reader concludes that it was the pope's political calculation that this was the best way (in the already developed framework for relations with the Nazis) to protect the interests of the Roman Catholic Church. It is interesting to explore the details of this calculation. The point is that the German government authorities constantly violated the provision of the Concordat to the detriment of the Roman Catholic Church in the Reich, i.e. Germany. Pius XII did not trust Hitler and did not believe in his promises – instead, the pope was only monitoring his deeds. However, Pius XII considered the fate of the Roman Catholic within the wider picture – a global one, but predominantly European. Up to the second half of 1942, the pope was convinced that Europe's postwar order would be a Nazi one. His political calculation was based on that assumption, since he was a sovereign without earthly power, without divisions (infantry or armoured) – all these things the Nazis had – but he wanted to preserve and enhance the power of the institution he headed. Considering all these

[4] Himler himself was a baptised Catholic, and he was brought up in a devout Roman Catholic family in Bavaria. Obviously, he previously managed to resolve the issue of promotion, since even as Catholic he was promoted to the rank of *Reichsführer-SS* – the highest rank in the SS. Furthermore, his sole superior was born into an Austrian family of devout Catholics.

[5] Legally speaking, *SS (Schutzstaffel)* was proclaimed a criminal organisation only in 1946 by the decision of the International Military Tribunal in Nürnberg. Nonetheless, its undisputed criminal reputation this organisation acquired much earlier, and it was *Kristallnach*t, the November 1938 pogrom of Jews in Germany, that can convince every sceptic about the true nature of the *SS*.

things, the author concludes that the reason Pius XII did not stand up to Hitler – was not to infuriate the future victor. It was the pope's inferiority based on fear.

Nonetheless, if there were any second thoughts during the following (1942/43) winter, in mid-1943 it was clear even to Pius XII that the postwar world would not be Nazi-dominated after all. Did this shift of strategic constellation change anything about his stance? Did the pope, after this revelation, condemn Hitler, Nazism, German aggressive war and the Holocaust? Not at all – everything remained the same. It is the pope's other political calculation in 1943 that produced the same outcome, according to the book. It is the Red Army, a godless pack in the pope's interpretation, that was advancing into Europe from the East and, according to Pius XII's assessment, only Hitler and Nazi Germany were the bulwark that could save Europe from the communist plague. Accordingly, the savour of Western civilisation was not to be denounced or infuriated. The shortsightedness of this political calculation by the pope was demonstrated by the fact that the Red Army (contaminating all the taken territories with communism) reached the Elbe and was unable to move further westward only because of the Western Allies and their armed forces – not because of Nazi Germany and the completely shattered *Wehrmacht*.

Nonetheless, notwithstanding a flawed conclusion and completely missed political calculation, the pope's reasoning provides insight into his way of thinking. According to the author, Pius XII was not a person of strong moral convictions or clear political vision but rather the head of the church who made his decisions according to their short-term usefulness. The author supports this insight with a number of archive documents that clearly testify to how the pope's decisions were prepared, what was, for example, the process applied in the case of considering requests or appeals of various countries or even clerics of the Roman Catholic Church related to the war events. Everything was done step-by-step, in a calm and piecemeal way, with responsible officials and advisers being engaged, starting from the Vatican secretariat of state, they provided their opinion and recommendations – without any rush – and at the end of this time-consuming process, it was Pius XII himself who made the decision, based on the current suitability, considering only the interests of the Roman Catholic Church as an institution, as interpreted autonomously by the pope himself.

The reader wonders whether the pope's undisguised pragmatism can explain his deeds, especially those related to Hitler and Nazi Germany. Is there something else, besides cynical pragmatism? Reading the book provides two fascinating, even shocking pieces of information.

The first one is almost grotesque. The British envoy had been told that Pius XII had hoped that there would be no 'coloured' servicemen – effectively Black soldiers, Afro-Americans, according to the modern politically correct vocabulary – among Allied troops that will be garrisoned in Rome. The pope probably thought that they would contaminate Rome.[6] The reader infers that it is not colour in itself that is the problem, since black was the colour of uniforms of *SS* units that in 1943 conducted a massive raid on Jews in Rome and their deportation to Auschwitz-Birkenau and perpetrated wholesale shooting of the local (Catholic) population due to the partisan actions. In that case, the black colour was not a problem for the pope. The reader cynically concludes that the problem of the promotion of Catholics in the *SS*, which the pope had complained about to Hitler several years earlier, must have been solved.

The second piece of information is sinister. In mid-March 1943 the papal nuncio in Istanbul, Bishop Angelo Roncalli (later Pope John XXIII), sent a dispatch to Pius XII in which he pleaded the pope to mediate with the head of Slovak puppet government, a Catholic clergyman Josef Tiso, to enable the transfer of one thousand Jewish children, who were awaiting deportation to Poland and certain death, to Palestine, via Turkey and with British authorisation. The pope delegated the preparation of this decision to the officials of the Vatican secretariat of state. Those officials pointed out in their reports, extensively referred to in the book, that such immigration of Jews to Palestine should not be allowed because it would 'offend the religious sentiment of all Catholics and all of those who ... call themselves Christians' and that Jews are 'swindlers'. Accordingly, the recommendation of the State Secretary to the pope regarding the plea to rescue Jewish children for Slovakia was that nothing should be done. Accepting this recommendation, in May 1943 Pius XII refused the appeal of his own nuncio and informed him in a very polite letter that he would do nothing, and he did not contact the head of the Slovak puppet government, despite him being a Catholic clergyman. Quite expectedly, the Jewish children were deported to Poland and ultimately transported to Auschwitz-Birkenau.

[6] When one starts down this path, then the things will be reduced *ad absurdum*. According to the book, in January 1945 the Vatican's secretary of state officially complained to Allied authorities that a bordello was operating at a given location in Rome (street name and number are provided in the document) and that its customers were Black American GIs. Accordingly, at the time of the liberation of Auschwitz, the Vatican was concerned with brothel – though prostitution itself was not the problem, but rather the colour of the skin of the customers.

The racism of Pius XII and the Vatican's upper echelon pour out of these two episodes, and other very similar occurrences are also highlighted in the book. Nonetheless, this is not to say that racism and devotion to right-wing autocracies are the only or even the basic explanation of the pope's acquiescence to Hitler and Nazi Germany. Nonetheless, the reader concludes that this rather ideological explanation complements Kertzer's primary explanation of short-term usefulness as the main driver of the pope's obedience to Hitler, considering that Hitler's arguments of brute power and trepidations, especially regarding the status of the Roman Catholic Church in the Reich, were clearly understood by the Vatican and worked extremely well. At the time when these arguments were substantially weakened by the actions of the Allied armed forces and substantial German military losses, on 1 September 1944, in his radio broadcast dedicated to the commemoration of the fifth anniversary of the beginning of the Second World War (though without saying it started with the German aggression on Poland), in what was his first worldwide radio address since the liberation of Rome, among many general statements and empty declarations, Pius XII was only specific about focusing on how much Rome and Italy had suffered from the war (read they suffered due to the Allied bombing).[7] Pius XII demonstrated that he was a person of consistency over time, a steadfast character, not to be shaken by events. When he chose a side, he stuck with it. Once aligned with Nazi Germany, always against the Allies!

Finally, when Hitler and Mussolini vanished from the Earth, when their accomplishments had been destroyed and ideas eradicated, in his Christmas address in December 1945, the pontiff of the Roman Catholic Church condemned totalitarianism – suddenly, out of the blue, the word 'bloodshed' appeared; it had been absent all those years – and he unequivocally denounced the power of the totalitarian state. In his dispatch to the Foreign

[7] It is worth noting that, according to the author, a letter to *The Times*, dated 4 September 1944, offered 'a common English view, expressed in a typically ironic way'. The author quoted the letter in its entirety, and it is worth done it again in this review: 'I am sorry, indeed, if I have missed the Papal denunciations of Germany's crimes; but I find that my friends are in the same state of woeful ignorance. In fairness to his Holiness, and for the instruction of your readers, perhaps you would permit your correspondent to give us the texts of the pronouncements condemning the German invasions of Poland, France, Holland, Belgium, Norway, Greece, Russia, &c., the systematic slaughter and torture of Poles and Jews, the mass deportations and vast robberies, the bombardments of Warsaw, Rotterdam, Belgrade, London, &c. I have been searching hopefully for such an utterance in your long report ... of the Pope's broadcast address on the fifth anniversary of the war. I do not find it. There is nothing here to show the historians that the war was not begun by America or Greece' (p. 487).

Office, the British envoy to the Vatican laconically remarked that Pius XII had waited until (of the totalitarian states) only the Soviet Union remained, before he denounced totalitarianism.

After all that has been written so far, perhaps the reader of this book review may conclude that there are extremely few nice things to be said about Pius XII. Accordingly, it is reasonable to ask the question: what makes him a controversial figure? What has been written about the pope by those who praised him, justified his deed, or only had some compassion for him? Kretzer leaves the defence of Pius XII to one of his most eloquent and sophisticated defenders (Blet 1999). According to Kertzer, with extensive quotations from the source, two of Blets' insights are relevant: two basic explanations and justifications of the pope's silence.

The first one is that the pope's public condemnation of Nazis would not have produced any gain for the prosecuted and would have only worsened their position. Kertzer has no second thought about this explanation and justification, pointing out that the mechanism of the Final Solution had already been moved into the top gear of annihilation and no words or deeds by the pope could make things any worse than they already were.[8] The aim for the extermination Europe's Jews had already been set to 100 per cent. The effective percentage of extermination of the Jews depended basically on the answers to technical questions, whose solving had been allocated to Adolf Eichman *et al*.

Nonetheless, Kretzer uses this claim to develop an essential counterfactual argument. Some (perhaps a substantial segment) of those who participated in the Holocaust, who directly or indirectly killed people, were, at least nominally Catholics, hence the appeal of the pontifex of the Roman Catholic Church could have influenced their actions, created some anxiety in them, or triggered some second thoughts about what they were doing. Perhaps some of those Catholics would not have unconditionally obeyed the orders they received. Defenders of the pope (Hasemann 2022a) reject this counterfactual hypothesis, and this attitude is explained by assuming that the pope's message would not have reached the German public, considering the efficiency of the Nazi propaganda machine and the iron grip on the media. Nonetheless, there is a persuasive counterargument to this assumption

[8] As demonstrated (Browning 2004; Longerich 2021) there was no single decisive moment in the implementation of the Final Solution, not even the Wannsee Conference, but rather there was a set of incremental steps of intensifying the murderous actions that resulted in millions of deaths in the Holocaust. Nonetheless, it is indisputable that the extermination machine of the Holocaust started to operate at full power in the first half of 1942.

(Parks 2022). For Catholics, the media were hardly necessary for spreading the word – the pulpit sufficed. For millennia, it has been the words of the priest that made a substantial impact on the flock; state propaganda and media control simply cannot influence these words and the message from the pulpit. The Roman Catholic Church is and has strictly been a hierarchical organisation and anything that comes from the top – from the pope – is inevitably received in the most remote parishes and military units with chaplains regardless of how far away they have been deployed. The reader of this review can check how persuasive this claim is by looking at the recent history of the Roman Catholic Church in Eastern Europe, during the Soviet/communist period, as communist media control and propaganda were comparable to those of the Nazis.[9] What would have been the magnitude of the effect of introducing anxiety in the souls of executioners and any second thoughts in their minds? This is an open question and the answer to it is highly speculative. Perhaps those effects would have been negligible, but the words of the priest condemning the Holocaust could not have worsened the position of the Nazi victims, which is claimed in the first line of the defence of Pius XII and the justification of his silence.

The other excuse, even justification for the silence of Pius XII (Blet 1999), with substantial euphemisms and Aesopian vocabulary, is basically the argument that the pope's condemnation of Hitler would have divided the loyalty of the German Catholics. In Kertzer's words, because he wished to make things clear for the reader of his book, Pius XII realised that with his public denunciation of Hitler, German Catholics, those at the reins of the Reich, and the number of that Catholic population was considerable, (slightly more than 30 million), would have to choose between Hitler and the Roman Catholic Church.[10] If that had been the case, it is quite possible that a substantial number of the Catholics would have chosen – Hitler, and not only because of fervent Nazi propaganda. Such a choice would not only have undermined the institution of the Roman Catholic Church, its might and influence, as well as the prestige of its incumbent pontifex, but

[9] Perhaps the best historical episode that confirms this thesis is the activities of the Roman Catholic Church in Poland during the communist period, described in detail by Connely (2020). Even at that time, the pulpit was untouchable – out of reach of earthly power, regardless of how unscrupulous it was. There is no reason to doubt that the outcome would have been the same in Nazi Germany.

[10] According to the population census from 17 May 1939, the total population of the Reich (after the annexation of Austria and Suddetenland) was 79.4 million, and 41 per cent of the population was Catholic. Accordingly, there were 31.8 million Catholics on the territory of the Reich, just prior to the onset of the Second World War. Source: *https://germanhistorydocs.ghi-dc.org/pdf/deu/JEW_RELIGIONZUGEHTABELLE_GER.pdf,* last visited August 13, 2024.

it would have created the possibility of a schism among German Catholics between those who were for the Vatican and those who backed Berlin, more accurately – the Wolf's Lair (*Wolfsschanze*). This explanation is convincing in Kretzer's opinion, for the reader perhaps only up to a point; nonetheless, whether Blet's justification of the pope's silence is acceptable is a completely separate question.

The author of the book provides enough material for the reader to ask and somewhat respond to a key counterfactual question: What would have happened had Pius XII, as the pontiff of the Roman Catholic Church, excommunicated Hitler (who was baptised as a Catholic), publicly denounced Nazism, and condemned German aggression, massive war crimes and especially – the Holocaust? Based on the material provided in Kertzer's book, the reader infers that the position of the victims of Nazi Germany was very unlikely to get worse – because it was already exceptionally bad. Alas, there was little room for deterioration. Nonetheless, regarding the stability of Hitler's rein in the Reich – such a move on the part of the pope could have produced some instability. The answer to the hypothetical question and the probability and intensity of such destabilisation remains speculative.

Nonetheless, a reasonable conjecture is that this probability would not have been negligible. This follows from the Hitler's permanently and clearly communicated wish that the pope remain silent, allowing for peace in the German multiconfessional home, and providing the grounds for the Nazi regime to present, both at home and abroad, that it had the implicit support of the Vatican, and projecting the image of Nazi Germany as the protector of Christianity – especial Catholicism. The insight regarding Hitler's effort to keep the pope silent, indirectly yet strongly indicates the extent to which the German dictator was concerned about a Catholic rebellion in the Reich.[11]

Furthermore, Hesemann (2022a) claims that in 1943, immediately following the surrender of Italy and in a debate regarding German policy on the Apennine Peninsula, von Ribbentrop told Hitler 'If we invade the Vatican, we will definitely have a civil war in Germany one hour after the first bomb is dropped'. It is not known whether Hitler agreed with such an unequivocal and emphatic assessment by his minister of foreign affairs on the danger of Catholic rebellion and a (religious) civil war in Germany. The only thing that is undisputable, perhaps because of that risk, was that there

[11] The insight (Kershaw 2011) that the (unsuccessful) attempt on Hitler's life was a final pivotal moment for his view of the world is quite convincing. After that attempt, Hitler did not show any concern for anyone, only ruthless destruction. Including for Germans. At this stage, the silence of Pius XII and the pope's attitude towards Nazism was not relevant anymore.

was no German air raid or any other military attack on the Vatican – the Germans never bombed Rome, let alone the Vatican.[12] The open question remains whether the rebellion of several tens of millions of Catholics in the Reich would have been more effective for destabilisation of Hitler's regime than the attempted putsch by a few dozen Wehrmacht generals and officers, which collapsed after the failed attempt on Hitler's life on 20 July 1944. Nonetheless, it is inevitable that even defeating German Catholic rebels in a civil war (an unqualified success from the Nazi point of view) would have taken much longer and would have produced many casualties and more human suffering. After all, that would have been a legacy reminiscent of the Thirty Years War.

It is indisputable that the first years of the pontificate of Pius XII were during difficult, sorrowful and tragic times. Nonetheless, it is exactly in these times that strong people show their best face. It is the old truth, as the Antic tragedies have taught us, that it is easy to be nice in good times – it is the hard times that matter, that provide the background for everyone to show their true abilities and limitations. It was destiny, by setting hard times in the first year of Pius XII's pontificate, that provided him an opportunity that very few people other than him had in recent history. He squandered that opportunity. What remains is his profound silence. The reader wonders whether Pius XII was perhaps a person of modest potential and limited abilities. The evaluation of Eugenio Pacelli, by two cardinals, who happened to be French, just prior to him becoming the pope, quoted in the book, can perhaps provide some guidance. One of the French cardinals 'fault [Cardinal Pacelli] for his weakness of character, for being too prone to bend to pressure' (p. 49). The other cardinal thought that 'Pacelli certainly had his merits [...] he was a man of considerable culture and diplomatic ability, but he was too weak, too easily intimidated' (p. 50). In short, the reader concludes that at the time of a gathering storm the conclave elected the pope who had a featureless personality, weak character, narrow worldview – *Weltanschauung*, in his favourite language – and, timid, very timid. In short, the reader infers that Pius XII was unbecoming and ill-suited to be the pope in difficult times.[13]

[12] The Allies did. Although Pius XII requested that the Allies not bomb Rome, there was no understanding of the other side. The British envoy to the Holy See, on behalf of the British government, only assured the pope that the Vatican would not be bombed. According to the book, it actually was bombed by ostensibly strayed Royal Air Force aircraft. The incident was covered up by the British government.

[13] The findings of a book (Dimić, Žutić 2017) on Aloysius Stepinac, an archbishop of the Roman Catholic Church in Croatia, point to the significant personality similarities between Pius XII and Cardinal Stepinac. Furthermore, their careers were

This timid and weak person, though his actions, and especially the lack thereof, undermined not only his moral credibility but the moral authority of the Roman Catholic Church in the world. No one is oblivious to this, the only difference is what one would make of it. The most aware of it are those who feel the greatest pain for the moral plunge – the Catholic intellectuals (theologists, philosophers, historians). That is precisely the reason they have defended Pius XII, hoping to control the damage done to the prestige of the Roman Catholic Church. Accordingly, in their texts, they ask rhetorical questions, such as what else could the Holy Father have done? And it is precisely because of the damage control that they claim that the Holy Father actually did do everything that could have been done – anything else, anything beyond that, would have been fatal and would have cause more death and destruction. Obviously, the topic causes them great pain, and so does Kertzer's book.[14]

Nonetheless, for the truth-searching reader, Kertzer's book provides ample high-quality material for their own conclusions on what happened, why it happened, and for their own value judgments and morals. Irrespective of Pius XII, the book provides plenty of food for thoughts about people in hard times, about moral constraints, human identities – who we really are when time are hard – and loyalties. Regardless of whether the people are Catholics or not.

* * *

On 18 November 1965, in the third year of his pontificate, Paul VI, who was an official at the Vatican secretariat of state during the pontificate of Pius XII, started the procedure of his canonisation. In this procedure, only the first step has been made and that happened 44 years after the (cold) start. On 19 December 2009, based on the recommendation of the Conclave, Pope Benedict XVI declared Pius XII venerable (*venerabilis*). Pius XII still did not progress to the following step; he has not been beatified (*beatus*). When or whether that will happen remains an open question.

---

rather similar: swift ascent in the upper echelons of the Church's administration, almost without any of the pastoral work with the flock on the parochial level. The naval quip would be – 'admirals who never commanded a ship'. In short, it seems that in both cases they were weak characters, unfit for the hard time in which they both held very high offices and were making decisions on crucial matters.

[14] The recent debate on the review of Kertzer's book (Hesemann 2022b) illustrates precisely this way of reasoning.

On 29 April 2020, in an official release to the public on the occasion of the 75th year of the end of the Second World War, the Roman Catholic Bishops' Conference of Germany declared that Pius XII had made many false interpretations of historical events, and, probably more importantly, how considerable the moral responsibility lay with of the Roman Catholic bishops in Germany, because they did not oppose the aggressive war and extermination of the European Jews.

On this occasion, the Vatican did not issue any statement at all. It chose to be – silent. It seems that the spirit of Pius XII still lingers in *Les Caves du Vatican*.

REFERENCES

[1] Blet, Pierre, S. J. 1999. *Pius XII and the Second World War According to the Archives of the Vatican*. New York: Paulist Press.

[2] Browning, Christopher R. 2004. *The Origins of The Final Solution: The Evolution of Nazi Jewish Policy 1939–1942*. London: Arrow Books [2005].

[3] Connelly, John. 2020. *From Peoples into Nations: A History of Eastern Europe*. Princeton Oxford: Princeton University Press.

[4] Cornwell, John. 1999. *Hitler's Pope*. New York: Viking.

[5] Dimić, Ljubodrag, Nikola Žutić. 2017. *Alojzije Stepinac – država, crkva, nadbiskup [Aloysius Stepinac – the state, the church, the archbishop], 1934–1941*. Beograd: Filip Višnjić.

[6] Hasemann, Michael. 2022a. *The Pope and the Holocaust: Pius XII and the Vatican Secret Archives*. San Francisco: Ignatius Press.

[7] Hasemann, Michael. 2022b. The Silence of Pius XII: An Exchange. *New York Review of Books*. 24 November.

[8] Kershaw, Ian. 2011. *The End: The Defiance and Destruction of Hitler's Germany, 1944–1945*. London: Pinguin Press.

[9] Longerich, Peter. 2021. *Wannsee: The Road to the Final Solution*. Oxford: Oxford University Press.

[10] Marridale, Catherine. 2016. *Lenin on the Train*. London: Allen Lane.

[11] Parks, Tim. 2022. The Pope's Many Silences. *New York Review of Books*. 20 October.

/VARIA

UPUTSTVO ZA AUTORE

Anali Pravnog fakulteta u Beogradu objavljuju tekstove na srpskom i engleskom jeziku.

U Analima se objavljuju naučni članci, kritičke analize, komentari sudskih odluka, prilozi iz međunarodnog naučnog života i prikazi. Prihvataju se isključivo analitički, a ne deskriptivni prikazi naučnih i stručnih knjiga.

Predajom teksta, autor izjavljuje da tekst nije ni objavljen ni prihvaćen za objavljivanje te da neće biti predat za objavljivanje bilo kom drugom mediju. Autor takođe izjavljuje da je nosilac autorskog prava, da je obavešten o pravima trećih lica i da je ispunio zahteve koji proizlaze iz tih prava.

Prijem svih tekstova biće potvrđen elektronskom poštom. Redakcija će razmotriti podobnost svih radova da budu podvrgnuti postupku recenziranja. Podobni tekstovi šalju se na dvostruku anonimnu recenziju.

Informacije o uredničkoj politici *Anala Pravnog fakulteta u Beogradu* videti na: *https://anali.rs/eticki-kodeks/*.

Ako želite da predate svoj rad *Analima Pravnog fakulteta u Beogradu*, molimo vas da pratite sledeća uputstva.

Ako predajete rad na engleskom jeziku, molimo vas da pratite posebno uputstvo koje je dostupno na: *https://anali.rs/uputstvo-za-autore/?lang=en*.

Rukopis treba da bude uređen na sledeći način:

1. naslovna strana,
2. apstrakt i ključne reči,

3. rukopis i spisak literature,
4. dodaci, tabele i slike.

1. NASLOVNA STRANA

Naslovna strana rukopisa treba da sadrži sledeće podatke:

- naslov teksta,
- ime, prezime, godinu rođenja i afilijaciju svih autora,
- punu adresu za korespondenciju i adresu elektronske pošte.

Ako je tekst koautorski, molimo vas da dostavite tražene podatke za svakog autora.

2. APSTRAKT I KLJUČNE REČI

Tekstu prethodi apstrakt koji je strogo ograničen na 150 reči. Apstrakt ne sme da sadrži neodređene skraćenice ili reference.

Molimo vas da navedete pet ključnih reči koje su prikladne za indeksiranje.

Radovi na srpskom jeziku treba da sadrže apstrakt i ključne reči i na srpskom i na engleskom jeziku. U tom slučaju, apstrakt i ključne reči na engleskom jeziku treba da se nalaze iza spiska literature.

3. RUKOPIS I SPISAK LITERATURE

Zbog anonimnog recenziranja, imena autora i njihove institucionalne pripadnosti ne treba navoditi na stranicama rukopisa.

Tekstovi moraju da budu napisani u sledećem formatu:

- veličina stranice: A4,
- margine: 2,5 cm,
- font: Times New Roman,
- razmak između redova u glavnom tekstu: 1,5,
- razmak između redova u fusnotama: Easy,
- veličina slova u glavnom tekstu: 12 pt,

- veličina slova u fusnotama: 10 pt,
- numeracija stranica: arapski broj u donjem desnom uglu stranice.

Druge autore treba navoditi po imenu i prezimenu kada se prvi put pominju (Petar Petrović), a zatim samo po prezimenu (Petrović). Ne treba navoditi „profesor", „dr", „g." niti bilo kakve titule.

Sve slike i tabele moraju da budu pomenute u tekstu, prema redosledu po kojem se pojavljuju.

Sve akronime treba objasniti prilikom prvog korišćenja, a zatim se navode velikim slovima.

Evropska unija – EU,

The United Nations Commission on International Trade Law – UNCITRAL

Brojevi od jedan do devet pišu se slovima, veći brojevi pišu se ciframa. Datumi se pišu na sledeći način: 1. januar 2012; 2011–2012; tridesetih godina 20. veka.

Fusnote se koriste za objašnjenja, a ne za navođenje literature. Prosto navođenje mora da bude u glavnom tekstu, sa izuzetkom zakona i sudskih odluka.

Podnaslove treba pisati na sledeći način:

1. VELIKA SLOVA

1.1. Prvo slovo veliko

1.1.1. Prvo slovo veliko kurziv

Citiranje

Svi citati, u tekstu i fusnotama, treba da budu napisani u sledećem formatu: (autor/godina/broj strane ili više strana).

Domaća imena koja se pominju u rečenici ne treba ponavljati u zagradama:

- Prema Miloševiću (2014, 224–234)...
- Rimski pravnici su poznavali različite klasifikacije stvari (Milošević 2014, 224–234)

Strana imena koja se pominju u rečenici treba da budu transkribovana, a u zagradama ih treba ponoviti i ostaviti u originalu. U spisku literature strana imena se ne transkribuju:

- Prema Kociolu (Koziol 1997, 73–87)...
- O tome je opsežno pisao Kociol (Koziol 1997, 73–87).
- Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags– und Universitätsbuch-handlung.

Poželjno je da u citatima u tekstu bude naveden podatak o broju strane na kojoj se nalazi deo dela koje se citira.

Isto tako i / Isto / Kao i Konstantinović (1969, 125–127);

Prema Bartoš (1959, 89 fn. 100) – *tamo gde je fusnota 100 na 89. strani*;

Kao što je predložio Bartoš (1959, 88 i fn. 98) – *tamo gde fusnota 98 nije na 88. strani*.

Pre broja strane ne treba stavljati oznaku „str.“, „p.“, „f.“ ili slično.

Izuzetno, tamo gde je to prikladno, autori mogu da koriste citate u tekstu bez navođenja broja strane dela koja se citira. U tom slučaju autori mogu, ali ne moraju da koriste neku od naznaka kao što su: *videti, posebno videti, videti na primer i dr.*

(videti, na primer, Bartoš 1959; Simović 1972)

(videti posebno Bakić 1959)

(Stanković, Orlić 2014)

Jedan autor

Citat u tekstu (T): Kao i Ilaj (Ely 1980, broj strane), tvrdimo da...

Navođenje u spisku literature (L): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

T: Isto kao i Avramović (2008, broj strane), tvrdimo da...

L: Avramović, Sima. 2008. *Rhetorike techne – veština besedništva i javni nastup.* Beograd: Službeni glasnik – Pravni fakultet Univerziteta u Beogradu.

T: Vasiljević (2007, broj strane),

L: Vasiljević, Mirko. 2007. *Korporativno upravljanje: pravni aspekti*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Dva autora

T: Kao što je ukazano (Daniels, Martin 1995, broj strane),

L: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

T: Kao što je pokazano (Stanković, Orlić 2014, broj strane),

L: Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos.

Tri autora

T: Kao što su predložili Sesil, Lind i Bermant (Cecil, Lind, Bermant 1987, broj strane),

L: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

Više od tri autora

T: Prema istraživanju koje je sproveo Tarner sa saradnicima (Turner *et al*. 2002, broj strane),

L: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

T: Pojedini autori smatraju (Varadi *et al*. 2012, broj strane)...

L: Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Institucija kao autor

T: (U.S. Department of Justice 1992, broj strane)

L: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

T: (Zavod za intelektualnu svojinu Republike Srbije 2015, broj strane)

L: Zavod za intelektualnu svojinu Republike Srbije. 2015. *95 godina zaštite intelektualne svojine u Srbiji*. Beograd: Colorgraphx.

Delo bez autora

T: (*Journal of the Assembly* 1822, broj strane)

L: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

Citiranje više dela istog autora

Klermont i Ajzenberg smatraju (Clermont, Eisenberg 1992, broj strane; 1998, broj strane)...

Basta ističe (2001, broj strane; 2003, broj strane)...

Citiranje više dela istog autora iz iste godine

T: (White 1991a, page)

L: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

Istovremeno citiranje više autora i dela

(Grogger 1991, broj strane; Witte 1980, broj strane; Levitt 1997, broj strane)

(Popović 2017, broj strane; Labus 2014, broj strane; Vasiljević 2013, broj strane)

Poglavlje u knjizi

T: Holms (Holmes 1988, broj strane) tvrdi...

L: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

Poglavlje u delu koje je izdato u više tomova

T: Švarc i Sajks (Schwartz, Sykes 1998, broj strane) tvrde suprotno.

L: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664. *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Knjiga sa više izdanja

T: Koristeći Grinov metod (Greene 1997), napravili smo model koji...

L: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

T: (Popović 2018, broj strane), *R:* Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Navođenje broja izdanja nije obavezno.

Ponovno izdanje – reprint

T: (Angell, Ames [1832] 1972, 24)

L: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Članak

U spisku literature navode se: prezime i ime autora, broj i godina objavljivanja sveske, naziv članka, naziv časopisa, godina izlaženja časopisa, stranice. Pri navođenju inostranih časopisa koji ne numerišu sveske taj podatak se izostavlja.

T: Taj model koristio je Levin sa saradnicima (Levine *et al*. 1999, broj strane)

L: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: Na to je ukazao Vasiljević (2018, broj strane)

L: Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46.

T: Orlić ističe uticaj uporednog prava na sadržinu Skice (Orlić 2010, 815–819).

L: Orlić, Miodrag. 10/2010. Subjektivna deliktna odgovornost u srpskom pravu. *Pravni život* 59: 809–840.

Citiranje celog broja časopisa

T: Tome je posvećena jedna sveska časopisa *Texas Law Review* (1994).

L: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

T: Osiguranje od građanske odgovornosti podrobno je analizirano u časopisu *Anali Pravnog fakulteta u Beogradu* (1982).

L: Anali Pravnog fakulteta u Beogradu. 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288.

Komentari

T: Smit (Smith 1983, broj strane) tvrdi...

L: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

T: Prema Šmalenbahy (Schmalenbach 2018, broj strane), jasno je da...

L: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*L:* Tomić, Janko, Saša Pavlović. 2018. Uporednopravna analiza propisa u oblasti radnog prava. Radni dokument br. 7676. Institut za uporedno pravo, Beograd.

T: (Glaeser, Sacerdote 2000)

L: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Lična korespondencija/komunikacija

T: Kao što tvrdi Damnjanović (2017),

L: Damnjanović, Vićentije. 2017. Pismo autoru, 15. januar.

T: (Welch 1998)

L: Welch, Thomas. 1998. Letter to author, 15 January.

Stabilni internet protokol (URL)

T: Prema Zavodu za intelektualnu svojinu Republike Srbije (2018),

L: Zavod za intelektualnu svojinu Republike Srbije. 2018. Godišnji izveštaj o radu za 2017. godinu. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, poslednji pristup 28. marta 2018.

T: According to the Intellectual Property Office (2018)

L: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html*, last visited 28 February 2019.

U štampi

T: (Bogdanović 2019, broj strane)

L: Bogdanović, Luka. 2019. Ekonomske posledice ugovaranja klauzule najpovlašćenije nacije u bilateralnim investicionim sporazumima. *Nomos*, tom 11, u štampi.

T: (Spier 2003, broj strane)

L: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Prihvaćeno za objavljivanje

T: U jednom istraživanju (Petrović, prihvaćeno za objavljivanje) posebno se ističe značaj prava manjinskih akcionara za funkcionisanje akcionarskog društva.

L: Petrović, Marko. Prihvaćeno za objavljivanje. Prava manjinskih akcionara u kontekstu funkcionisanja skupštine akcionarskog društva. *Pravni život*.

T: Jedna studija (Joyce, prihvaćeno za objavljivanje) odnosi se na Kolumbijski distrikt.

L: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Sudska praksa

***F(usnote)**:* Vrhovni sud Srbije, Rev. 1354/06, 6. 9. 2006, Paragraf Lex; Vrhovni sud Srbije, Rev. 2331/96, 3. 7. 1996, *Bilten sudske prakse Vrhovnog suda Srbije* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16.

T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12 ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

F: Zakonik o krivičnom postupku, *Službeni glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014, čl. 2, st. 1, tač. 3; Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, 60, Art 6 (3).

T: Za reference u tekstu koristiti skraćenice (ZKP ili ZKP RS; Regulation No. 1052/2013; Directive 2013/32) konzistentno u celom članku.

L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

Ne treba koristiti senčenje ili boju na grafičkim prikazima. Ako je potrebno vizuelno istaći pojedine razlike, molimo vas da koristite šrafiranje i unakrsno šrafiranje ili drugo sredstvo označavanja.

Ne treba koristiti okvir za tekst ispod ili oko slike.

Molimo vas da koristite font *Times New Roman* ako postoji bilo kakvo slovo ili tekst na slici. Veličina fonta mora biti najmanje 7.

Grafici ne sadrže bilo kakvu boju.

Naslovi slika su navedeni i na zasebnoj stranici sa dvostrukim proredom pod nazivom – Legenda korišćenih slika.

Slike ne mogu biti veće od 10 cm x 18 cm. Da bi se izbeglo da slika bude značajno smanjena, objašnjenja pojedinih delova slike treba da budu postavljena u okviru slike ili ispod nje.

CIP – Каталогизација у публикацији
Народна бибилиотека Србије, Београд

34(497.11)

АНАЛИ Правног факултета у Београду : часопис за правне и друштвене науке = The Annals of the Faculty of Law in Belgrade : Belgrade law review / главни и одговорни уредник Марија Караникић Мирић. – [Српско изд.]. – Год. 1, бр. 1 (1953)–. – Београд : Правни факултет Универзитета у Београду, 1953– (Београд : Донат граф). – 24 cm

Тромесечно. – Преузео је: Annals of the Faculty of Law in Belgrade. – Друго издање на другом медијуму: Анали Правног факултета у Београду (Online) = ISSN 2406-2693.

ISSN 0003-2565 = Анали Правног факултета у Београду

COBISS.SR-ID 6016514

Fakultetski naučni časopis *Anali Pravnog fakulteta u Beogradu* izlazi od 1953. godine (ISSN: 0003-2565) kao potomak časopisa *Arhiv za pravne I društvene nauke* koji je izlazio od 1906. godine.

Glavni urednici *Arhiva za pravne i društvene nauke* bili su: Kosta Kumanudi i Dragoljub Aranđelović (1906–1911), Kosta Kumanudi (1911–1912), Čedomilj Mitrović (1920–1933), Mihailo Ilić (1933–1940), Đorđe Tasić (1940–1941) i Jovan Đorđević (1945).

Glavni urednici *Anala Pravnog fakulteta u Beogradu* bili su: Mihajlo Konstantinović (1953–1960), Milan Bartoš (1960–1966), Vojislav Bakić (1966–1978), Vojislav Simović (1978–1982), Obren Stanković (1982–1985), Dejan Popović (1996), Miodrag Orlić (1997–2004), Danilo Basta (2004–2006), Sima Avramović (2006–2012), Miroljub Labus (2013–2015) i Mirko Vasiljević (2016–2018).

U časopisu se objavljuju naučni članci, kritičke analize, komentari sudskih odluka, prilozi iz međunarodnog naučnog života i prikazi knjiga. Časopis izlazi i u elektronskom obliku (eISSN: 2406-2693).

Radovi objavljeni u časopisu podležu anonimnoj recenziji dvoje recenzenata, koje određuje redakcija.

Stavovi izraženi u časopisu predstavljaju mišljenje autora i ne odražavaju nužno gledišta redakcije. Za te stavove redakcija ne odgovara.

Časopis izlazi tromesečno.

ISSN 0003-2565

BULEVAR KRALJA ALEKSANDRA 67
11000 BEOGRAD
SRBIJA
anali@ius.bg.ac.rs
anali.rs