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ORIGINAL SCIENTIFIC ARTICLE
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*Maja Sahadžić**

THE RULE OF LAW, THE SEPARATION OF POWERS, AND BIG TECH

Abstract: *The growing influence of Big Tech, backed by technological advancement and platformization, poses significant challenges to traditional concepts of the rule of law and the separation of powers. By privately accumulating functions typically reserved for the state, Big Tech now assumes functions traditionally assigned to the state. In light of this, this paper explores the limitations imposed on the rule of law and the separation of powers. It first revisits the classical understanding of these constitutional principles and then assesses the contemporary challenges posed by Big Tech. The analysis then shifts to the rising private (technological) power of Big Tech as a fourth pillar in the separation of powers. Finally, the paper argues for cooperation and coordinated governance between the state and Big Tech, ultimately concluding with final insights on the adaptiveness of the traditional concepts of the rule of law and the separation of powers.*

Key words: Rule of Law, Separation of Powers, Technology, Big Tech, Public and Private Power.

1. Introduction

The emergence of technology and pervasive entrenchment of large technological companies, collectively known as Big Tech, as a dominant force in contemporary global order has produced profound challenges to foundational constitutional principles, particularly the rule of law and the separation of powers. Moreover, it compels their reexamination. No longer confined to the realms of commerce or communication, Big Tech now exercises unprecedented influence over economic, as well as social, cultural, and political life beyond geographically defined state borders. By controlling infrastructure, intermediary platforms, and applications on a global scale, they wield gatekeeping, informational, and leveraging power. This allows them to take on roles traditionally held by the state effectively positioning themselves as quasi-sovereign entities.

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Traditionally, the rule of law and the separation of powers have functioned as conceptual pillars of constitutional order, designed to limit the concentration of power and ensure that government is held in check. The rule of law is concerned with the nonarbitrary exercise of power while the separation of powers distributes state authority across legislative, executive, and judicial branches to ensure mutual checks and balances. These principles emerged in response to the dangers of centralized power, however, they were developed within a state-centric framework, premised on the assumption that power resides primarily within public institutions. The rise of Big Tech has disrupted this assumption. These companies increasingly perform functions traditionally associated with state authority: they set rules (e.g., through terms of service and policies), enforce those rules (e.g., through content removal), and resolve disputes (e.g., through internal appeals processes). In doing so, they bypass public legal mechanisms. Consequently, Big Tech has come to exercise a form of power that is both institutionally and procedurally similar to that of public authority, yet remains formally private.

To gain a better insight into this, it is necessary to explore how Big Tech constitutes a challenge to a traditional constitutional order by evaluating its impact on the principles of the rule of law and the separation of powers; special focus is on how Big Tech disrupts the traditional boundaries between public and private power. Also, particular attention should be given to the structural characteristics of platformization, the accumulation of gatekeeping, informational, and leveraging powers, and the ways in which these capacities position Big Tech as an actor with legislative, executive, and judicial-like authority, and ultimately as a "fourth pillar" of power. While not formally recognized in constitutional theory, the emergence of this fourth pillar demands rethinking of the concepts and the constitutional order, given that traditional institutional and procedural instruments and mechanisms often fail in addressing the scale and the complexity of Big Tech's influence. Yet, rather than dismantling the classical triadic structure, the goal should be to ensure that the rule of law and the separation of powers endure in the technological age, by preserving their foundational values while incorporating new mechanisms for cooperation and coordination.

2. The Rule of Law

2.1. CONCEPTUALIZING THE RULE OF LAW

The concept of the rule of law is a foundational concept in constitutional law, but is also famously elusive. Although widely invoked in the constitutional framework and its related political discourse, it resists a universally agreed-upon definition. Despite numerous attempts over the

past decade to clarify what the rule of law means (or ought to mean), no single definition has reached consensus.[1] Definitions vary across time and context and reflect the evolving nature of the concept itself. As Bedner and Postema both point out, the term "rule of law" serves as shorthand for a broad family of legal traditions, including the British and American *rule of law*, the German and Dutch *Rechtsstaat*, and the French *état de droit*.[2] Indeed, as Scheppele puts it, "the rule of law has many lives".[3] Though these traditions differ, they share a common concern with the limitations and legitimate use of power under law. Yet it is not, as McKeown notes, "solely in the eye of the beholder".[4]

Dicey, who popularized the term the rule of law, outlined its three interrelated principles: a government constrained by law, legal equality for all citizens, and the protection of fundamental rights.[5] In this tradition, the rule of law is opposed to systems in which the government exercises wide, arbitrary, or discretionary powers.[6] At its core, the rule of law is a normative ideal aimed at curbing the arbitrary and inequitable exercise of power.[7] As such, the rule of law is designed to constrain power and guide its use through institutions and procedures that apply equally to all.[8] This concern with preventing arbitrary rule is echoed by Bedner, who emphasizes that the rule of law exists to limit the unbalanced or arbitrary use of state power. Furthermore, the rule of law serves a protective function, shielding individuals from harm by both the state and fellow citizens,[9] which resonates with due process. Postema reinforces this view by framing the rule of law as a bulwark against the imposition of will by the powerful.[10] This way, the rule of law seeks to channel authority in non-arbitrary ways, guarding against its misuse and abuse in an understandable and predictable way, thus also invoking legal certainty.

1 Bedner, A., 2010, An Elementary Approach to the Rule of Law, *Hague Journal on the Rule of Law*, Vol. 2, No. 1, p. 48; Uvarova, O., 2025, The Rule of Law and Corporate Actors: Measuring Influence, *Hague Journal on the Rule of Law*, Vol. 17, No. 1, p. 4.

2 Bedner, A., 2010, p. 49; Postema, G. J., 2022, *Law's Rule: The Nature, Value, and Viability of the Rule of Law*, Oxford, Oxford University Press, p. 7.

3 Scheppele, K. L., 2024, The Life of the Rule of Law, *Annual Review of Law and Social Science*, Vol. 20, No. 1, p. 18.

4 McKeown, M. M., 2023, The Future of Democracy and the Rule of Law, *Virginia Journal of International Law Online*, Vol. 64, p. 2.

5 *Ibid*.

6 Dicey, A. V., Michener, R., 1982, *Introduction to the Study of the Law of the Constitution*, Indianapolis, Liberty Fund, Incorporated, p. 110.

7 Krygier, M., The Rule of Law: Legality, Teleology, Sociology, in: Palombella, G., Walker, N., (eds.), 2009, *Relocating the Rule of Law*, pp. 45, 60; Bedner, A., 2010, p. 50.

8 Krygier, M., 2009, pp. 45, 60.

9 Bedner, A., 2010, pp. 50–51.

10 Postema, G. J., 2022, p. 8.

2.2. PROCEDURAL AND SUBSTANTIVE APPROACH TO THE RULE OF LAW

The traditional conceptualization, as described in the previous sections, builds towards the procedural aspect of the concept of the rule of law, by which both the government and citizens are bound by and abide by the law.[11] In both his early and later work, Tamanaha equates the procedural aspect with legality.[12] This basic understanding is also echoed in Bingham's account, which stresses that state authorities must be both bound by and benefit from laws that are publicly promulgated, prospective, and administered in courts.[13]

This is a minimalist account of the concept of the rule of law,[14] which views the rule of law primarily as a means to constrain arbitrary power by ensuring that state actions are governed by known, general, foreseeable, and equally applied rules, rather than by *ad hoc* discretion. In this view, the government may impose sanctions or confer benefits only through clear and understandable rules and due process, not arbitrary commands.[15] Following the procedural aspect, the Venice Commission, for example, provides a structured checklist of rule-of-law benchmarks, including legality, legal certainty, prevention of abuse (misuse) of powers, equality before the law and non-discrimination, and access to justice.[16] In this sense, the procedural aspect represents the most basic level of the legal order, as it is primarily concerned with issues such as the prohibition of arbitrariness, equality before the law, legal certainty, foreseeability, and due process. This baseline does not incorporate broader values like democracy or human rights (which Tamanaha, for example, argues should be treated as separate concerns).[17] This aligns closely with classical legal theorists such as Fuller and Raz.[18] This approach is favored by many legal

11 Tamanaha, B. Z., 2012, The History and Elements of the Rule of Law, *Singapore Journal of Legal Studies*, p. 233.

12 Moller, J., Skaaning, S.-E., 2012, Systematizing Thin and Thick Conceptions of the Rule of Law, *Justice System Journal*, Vol. 33, No. 2, p. 136.

13 Bingham, L., 2007, The Rule of Law, *The Cambridge Law Journal*, Vol. 66, No. 1, p. 69.

14 Moller, J., Skaaning, S.-E., 2012, p. 136. See also Moller, J., The Advantages of a Thin View, in: May, C., Winchester, A., (eds.), 2018, *Handbook on the Rule of Law*, Cheltenham, Edward Elgar Publishing Limited, pp. 21–33.

15 Boom, C. D., 2015, The Importance of the Thin Conception of the Rule of Law for International Development: A Decision-Theoretic Account, *Law and Development Review*, Vol. 8, No. 2, p. 295.

16 Council of Europe Venice Commission, 2016. Rule of Law Checklist, 11–12 March; Rosengrün, S., 2022, Why AI is a Threat to the Rule of Law, *Digital Society*, Vol. 1, p. 2.

17 Tamanaha, B. Z., 2012, pp. 233–234.

18 Boom, C. D., 2015, pp. 295–297; Tamanaha, B. Z., 2012, p. 233; Brownsword, R., 2020, *Law 3.0: Rules, Regulation, and Technology*, Abingdon, Taylor & Francis Group, p. 84.

theorists precisely because it avoids normative disputes and focuses on the technical features of law.[19] However, confining the rule of law to procedural requirements alone can risk legitimizing threats to a constitutional system, such as discrimination, climate change, or the use of technology[20] (discussed further in text).

From a substantive aspect, the concept of the rule of law is positioned under much broader, sometimes even maximalist terms.[21] The concept is understood as governance based on a sound public understanding of individual rights.[22] In other words, the rule of law promotes fundamental rights[23] as rule-of-law systems must enable citizens to enjoy a core set of rights and freedoms, such as the right to privacy and freedom of expression. Another cornerstone of the substantive approach is also accountability, both vertical (of government to citizens) and horizontal (separation of powers across the branches of government), given that governments are subject to checks and balances that prevent abuse and misuse of power.[24] Apart from this, the substantive approach incorporates the principle of access to justice,[25] meaning that a rule-of-law system must ensure suitable avenues for individuals to claim their rights. This approach also requires that the government governs not only according to rules but also according to "good and/or just criteria", i.e., those that reflect democratic participation and representation, among others.[26] Overall, the substantive aspect aims to incorporate not only legality but also broader political and moral goals, including separation of powers, accountability, checks and balances, participation, representation, fundamental rights, and access to justice.[27] As such, this approach aligns closely with philosophers Dworkin and Epstein.[28] Boom, indeed, emphasizes the instrumental benefits of this approach, which includes fostering compliance, as citizens are more likely to

19 Shaffer, G., Sandholtz, W., The Rule of Law under Pressure: The Enmeshment of National and International Trends, in: Shaffer, G., Sandholtz, W., (eds.), 2025, *The Rule of Law under Pressure: Transnational Challenge*, Cambridge, Cambridge University Press, p. 14.

20 See McKeown, M. M., 2023, p. 7.

21 Moller, J., Skaaning, S.-E., 2012, p. 136.

22 Dworkin, R., 1985, *A Matter of Principle*, Cambridge, Harvard University Press, pp. 11–12.

23 Bedner, A., The Promise of a Thick View, in: May, C., Winchester, A., (eds.), 2018, *Handbook on the Rule of Law*, Cheltenham, Edward Elgar Publishing Limited, pp. 66–67.

24 Postema, G. J., 2022, p. 115. Similarly Bedner, A., 2018, p. 46.

25 Bedner, A., 2010, pp. 67–69.

26 Boom, C. D., 2015, p. 297.

27 Shaffer, G., Sandholtz, W., 2025, p. 15.

28 Boom, C. D., 2015, pp. 295–297.

obey laws and engage with institutions they perceive as fair and protective of their rights.[29] At the same time, this approach mandates that no power is exempt from judicial scrutiny, in order to ensure compliance with fundamental constitutional values.[30] It is, however, true that this concept is inherently more contested,[31] as it envisions the rule of law as a normative ideal, not just a governance mechanism.

2.3. THE THIN AND THICK RULE OF LAW

The formalist understanding captures the essence of what it means to be ruled by law and is central to many "thin" definitions of the rule of law. The focus here is on the legal order and courtrooms. The substantive approach, however, incorporates broader substantive values, thereby capturing broader, "thick" or *Rechtsstaat* dimensions of the rule of law. The focus here is on the legal system and the nature of the state. Also, while the thin view links to a "minimalist" understanding, the thick view roughly corresponds to a "maximalist" understanding of the concept.[32]

This distinction between the "thin" (or formal) and "thick" (or substantive) concepts of the rule of law is one of the most persistent debates in the literature.[33] Obviously, these two perspectives differ not only in scope but also in the functions they emphasize, the values they incorporate, and the criteria by which they judge a legal system's concept of the rule of law.[34] Still, beneath these elements lie two widely recognized functions that the rule of law is meant to fulfill: first, safeguarding against the potential abuse and misuse of state or public power – central to the development of the rule of law in the Western tradition; second, focusing on the overall legal system and social order – with particular prominence in the context of global rule of law promotion.[35]

While the thin/thick divide is analytically useful, there is no linear progression from thin to thick.[36] Definitions of the rule of law often combine elements in unique ways, some emphasizing equality before the law or legal certainty, others prioritizing fundamental rights or access to jus-

29 *Ibid*., p. 298.

30 Allan, T. R. S., The Rule of Law: Philosophical Foundations of Constitutional Law, in: Dyzenhaus, D., Thorburn, M., (eds.), 2016, *Oxford Constitutional Theory*, Oxford, Oxford University Press, p. 204.

31 Shaffer, G., Sandholtz, W., 2025, p. 15.

32 Moller, J., Skaaning, S.-E., 2012, p. 136.

33 Bedner, A., 2010, p. 54.

34 Rosengrün, S., 2022, p. 2.

35 Bedner, A., 2018, pp. 35–36.

36 *Ibid*., p. 36.

tice. The range of definitions exists on a spectrum, but not all thick concepts build upon thin ones in neat sequence.[37]

However, what has been discussed so far offers a framework for a structured list of rule-of-law benchmarks that aims to discover the main elements of the rule of law. The thin notion is linked to the American term "rule of law" and is a procedural and minimalist approach to the rule of law that focuses on legal order, for the purpose of enabling safeguards against the abuse and misuse of power. As such, it focuses on courtrooms and principles such as the prohibition of arbitrariness, equality before the law, legal certainty, foreseeability, and due process. The thick notion links to the German and Dutch term *Rechtsstaat*;[38] it is a substantive and maximalist approach that focuses on the legal system and the nature of the state to limit the power of the state, while upholding certain values. As such, it focuses on concepts that could be organized as four core values of the rule of law: (1) constitutional governance (legality, separation of powers, accountability, and checks and balances), (2) democracy (participation and representation), (3) respect for fundamental rights, and (5) access to justice.

3. Conceptualizing the Separation of Powers

One of the central pillars of the thick notion of the rule of law is the principle of constitutional governance – an ideal that is inconceivable without the concept of the separation of powers, along with legality, accountability, and checks and balances. Or, in other words, the separation of powers is an implicit requirement of the rule of law.[39] This concern echoes Locke's assertion that "wherever law ends, tyranny begins".[40] In this context, the separation of powers is not merely a structural preference but a constitutional safeguard, directly tied to the prevention and limitation of domination and arbitrariness of state or public power.[41]

The classical articulation of this doctrine is found in Montesquieu's division of governmental power into three basic functions: legislative, executive, and judicial.[42] Vile later refined this into the so-called pure doctrine

37 Bedner, A., 2010, p. 54.

38 Allan, T. R. S., 2016, p. 204.

39 *Ibid.*, p. 211.

40 Locke, J., (1690) 1988, *Second Treatise of Government*, Cambridge, Cambridge University Press, p. 400.

41 Allan, T. R. S., 2016, p. 203.

42 Barberis, M., Sardo, A., The Separation of Powers: Old, New, and Newest, in: Załuski, W., Bourgeois-Gironde, S., Dyrda, A., (eds.), 2024, *Research Handbook on Legal Evolution*, Cheltenham, Edward Elgar Publishing, p. 264.

of separation of powers, composed of the functional distinction between legislative, executive, and judicial, and the division of government into corresponding branches.[43] In practical terms, the separation of powers "means clear identification of the powers and duties of the executive, legislative, and the judiciary,"[44] which "should be organizationally divided from one another."[45]

Based on this, the separation of powers works primarily as a concept of prohibition of the usurpation of power, which bars any institution from exercising powers that have not been constitutionally assigned to it.[46] In practical terms, it aims to prevent or limit concentration or abuse and misuse of power, as it provides for the preservation of legitimacy by implying accountability for the usurpation, abuse, or misuse. On a similar note, the separation of powers also works as a prerequisite for checks and balances, given that, in addition to division, there is a system of mutual constraint.[47] In practical terms, this model, inspired by Montesquieu's broader insight, aims to balance the power through checks.[48] Within this model, power is moderated through reciprocal oversight between the branches, enabling the safeguarding of fundamental rights and providing access to justice, in order to mitigate the causes and consequences of their potential infringement. Ultimately, the value of the concept lies in its utility as a framework for understanding and organizing state power.[49] This makes the division of power tightly connected to other benchmarks of the thick notion of the rule of law.

4. (Contemporary) Challenge(s) to the Rule of Law and the Separation of powers

The rule of law is under mounting pressure today, from a range of challenges. The deep structural threats can be grouped into three categories: subversion, erosion, and weakness.[50] Subversion refers to threats

43 Vile, M. J. C., 1967, *Constitutionalism and the Separation of Powers*, Oxford, Clarendon Press, pp. 13–18.

44 Adewumi, T. A., 2025, Rule of Law, Corporate Governance and AI Humanoid Robots: Charting the Course for a Global Regulatory Framework, *Mizan Law Review*, Vol. 19, No. 1, p. 104.

45 Möllers, C., 2013, *The Three Branches: A Comparative Model of Separation of Powers*, *Oxford Constitutional Theory*, Oxford, Oxford University Press, pp. 43–44.

46 *Ibid.*, p. 48.

47 *Ibid.*, pp. 45–46.

48 *Ibid.*, pp. 45–48.

49 Dahrendorf, R., 1977, A Confusion of Powers: Politics and the Rule of Law, *Modern Law Review*, Vol. 40, No. 1, p. 11.

50 Postema, G. J., 2022, p. 152.

by individuals or groups aimed at undermining the rule of law. Erosion captures the gradual (democratic) decay of the commitment to support legal norms, institutions, and procedures. These two forces are often intertwined. Finally, weakness points to the fragility of the institutional and procedural structures, instruments, and mechanisms that uphold the rule of law, including a lack of adaptiveness.[51] However, beyond these foundational vulnerabilities, there are global threats to the rule of law, which include, among others, sweeping issues such as discrimination, climate change, migration, technology, and pandemics.[52]

Among the significant present-day challenges, one is a particular expression of structural vulnerability: the rise of the private (technological) power, encapsulated in Big Tech companies based on technological development.[53] Big Tech companies rely on their global economic power, in a mainly unregulated technological environment, to circumvent state institutions and procedures and to themselves regulate critical areas such as surveillance, privacy, freedom of expression, consumer behavior, market access, etc.[54] This brings forward the question of the arbitrariness in their behavior, which corresponds to a subversive threat to the rule of law. To that end, state or public power is now implicated in addressing how such private (technological) power can be checked.[55] However, the institutional and procedural structures, instruments and mechanisms seem to display weakness as they are not able to keep up with the speed of technological development. As a consequence, in technological conditions, the rule of law itself faces the challenge of adapting to include governance that extends beyond public, to private forms of regulation, and as such encompasses not only traditional legal rules created by the state or public power, but also rules created by the private (technological) power.[56] These expanded expectations add complexity to the already fragile framework of the rule of law in the modern era.

The vulnerabilities of the rule of law also point directly to growing tensions within the concept of the separation of powers. Building on the challenges already faced by the rule of law, one long-standing general challenge, involving the principle of the separation of powers, lies in the theoretical and practical difficulty of clearly distinguishing the different

51 *Ibid.*

52 McKeown, M. M., 2023, p. 7.

53 *Ibid.*

54 Barberis, M., Sardo, A., 2024, p. 264.

55 Pinelli, C., 2023, Separation of Powers: Past, Present and Future, *Rivista di Diritti Comparati*, Vol. 2023, No. 1, p. 316.

56 Brownsword, R., 2020, p. 84.

functions of government.[57] This is especially true in an age where roles between branches often overlap. More specific challenges include, for example, multilevel governance systems, where the separation of powers has expanded to accommodate autonomy at different (lower) levels. While this reflects an evolution of constitutional design, it also reveals how traditional state-centered models are being challenged and reshaped by newer configurations of power.[58] Another example is the rise of corporate power, which intersects with state authority through political processes, with the aim of accommodating corporate interests.[59]

On this note, the challenge involving the separation of powers is especially intensified by the rise of private (technological) power, substantiated by the development of technology. The rise of private (technological) power subversively threatens public power by introducing its own rule-making capacity, acting as an executive authority and positioning itself as a judicial authority. The rapidly advancing and poorly regulated technology associated with the rise of Big Tech companies exposes the structural weakness of existing state or public institutions and procedures, as they are not able to keep up with challenges such as platformization, its related gatekeeper, information, and leveraging powers. Technology is giving rise to a "new species of power" that is challenging the separation of powers.[60] Importantly, the rise of private (technological) powers is pointing out a major shift: Big Tech companies are no longer just economic actors; they are now political and legal actors too, challenging the notion of the separation of powers and therefore the notion of the rule of law.[61]

5. Rising Private (Technological) Power

To fully understand the scope of this major shift, it is necessary to examine how large technology companies, so-called Big Tech, exercise private (technological) power in ways that they compete and even surpass

57 Bellamy, R., The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy, in: Bellamy, R., (ed.), 2005, *The Rule of Law and the Separation of Powers*, Abingdon, Ashgate Publishing, p. 256.

58 Pinelli, C., 2023, p. 313. See also Sahadžić, M., 2020, *Asymmetry, Multinationalism and Constitutional Law: Managing Legitimacy and Stability in Federalist States*, Abingdon, Routledge, pp. 10–16.

59 Uvarova, O., 2025, p. 8.

60 Crofts, P., Rijswijk, H. van, 2021, *Technology New Trajectories in Law*, Abingdon, Routledge, p. 52.

61 Sun, X., Xiao, Y., 2024, How Digital Power Shapes the Rule of Law: The Logic and Mission of Digital Rule of Law, *International Journal of Digital Law and Governance*, Vol. 1, No. 2, p. 2.

traditional state or public powers.[62] At this point in time, Big Tech encompasses companies, such as Alphabet (Google), Meta (Facebook), Amazon, Apple, and Microsoft, often referred to as GAFAM (Google, Apple, Facebook, Amazon, Microsoft) in the United States, and Baidu, Alibaba, and Tencent, or BAT (Baidu, Alibaba, Tencent), in China, have evolved far beyond their initial status as commercial enterprises. Thanks to the global expansion of the internet and advances in digital technologies, these companies have come to gain power in various sectors, including commerce and industry, but also education, media, entertainment, culture, and politics.[63] Their power does not stem from traditional control of territory and population, but from control of technologies – the power characterized as a contemporary Leviathan.[64] This form of power is exercised through digital infrastructure, digital data, and algorithmic systems, where lines of code embedded in search engines, marketplaces, and content curation platforms subtly but pervasively regulate what information is seen, what goods are bought, and even which social norms are reinforced.[65] They now operate as quasi-sovereign entities, functioning as both "modern public spaces" and "new governors" in the digital age.[66]

For example, Google's search algorithms and Amazon's recommendation systems effectively function as market regulators, shaping consumer behavior, pricing, and business visibility. Google's shift to mobile-first indexing, for example, significantly impacted the ability of small businesses to reach customers online, privileging those with the resources to optimize their web presence in a mobile-friendly format.[67] Moreover, the influence of Big Tech extends deep into the social and cultural fabric. Content platforms such as YouTube, Instagram, and TikTok affect how people communicate, relate, and perceive the world, with measurable effects on social norms and behavior.[68] At the same time, Big Tech acts as a data custodian by collecting, processing, analyzing, and ultimately monetizing massive

62 Coroado, S., 2023, *Leviathan vs Goliath or States vs Big Tech and What the Digital Services Act Can Do About It*, Forum Transregionale Studien, *Working Papers*, No. 25/2023, p. 4; Sun, X., Xiao, Y., 2024, pp. 1–2; Gregorio, G. De, 2019, From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society, *European Journal of Legal Studies*, Vol. 11, No. 2, pp. 66–68.

63 Coroado, S., 2023, p. 4.

64 Postema, G. J., 2022, p. 263.

65 Bayamlioglu, E., Peenes, R., 2018, The Rule of Law Implications of Data-Driven Decision-Making: A Techno-Regulatory Perspective, *Law, Innovation and Technology*, Vol. 10, No. 2, p. 295; Rosengrün, S., 2022, p. 6.

66 Barberis, M., Sardo, A., 2024, p. 272.

67 Rosengrün, S., 2022, p. 6.

68 *Ibid*.

amounts of (personal) information,[69] often making such data available to third parties, thereby blurring the line between private power and public regulation.[70] In doing so, Big Tech has transformed from mere enterprises into platform providers with critical infrastructure for economic life as well as for democratic discourse, raising urgent constitutional and legal questions about how such concentrated private power can be governed by the state or public power in the digital era.

To understand the full extent of private (technological) power, one has to look at the example of digital platforms, which serve as key technological and economic, but also social and political structures through which Big Tech expands and entrenches its power. The emergence of platform power is inseparable from the deployment of digital technology in commercial settings, resulting in private (technological) power.[71] However, digital platforms have evolved beyond digital markets: through restructuring and reshaping, digital platforms have transformed into a technological arena that is a backbone of infrastructure, networks, search engines, algorithms, intermediary services, and service providers.[72] This makes the Big Tech power deeply rooted in the infrastructural entanglements of platforms within the economic, social, and political orders – and ultimately constitutional and legal orders.

As Van Dijck illustrates using the metaphor of the "platformization tree", digital platforms must be understood as multi-layered systems, comprising interconnected roots (infrastructure), trunks (intermediary services), and branches (applications). The roots of platform power are built on global digital infrastructure, consisting of undersea cables, satellites, data centers, microchips, semi-conductors, and coded internet protocols, among others, much of which is now privatized by major private (technological) powers, such as Google and Amazon, leaving states and governments to seek and compete for control of the infrastructurewhile Big Tech remains mostly unchecked.[73] The trunk represents intermediary platforms, such as search engines, browsers, operating systems, app stores, cloud services, login systems, payment systems, email, and messaging services. These serve as gatekeepers, mediating interactions not only between users and content but also between societal sectors and data flows.[74] Big Tech companies, such as Google and Apple, dominate this space through

69 Sun, X., Xiao, Y., 2024, p. 10.

70 Crofts, P., Rijswijk, H. van, 2021, p. 53.

71 Sun, X., Xiao, Y., 2024, p. 10.

72 Coroado, S., 2023, pp. 6–7.

73 Dijck, J. Van, 2021, Seeing the Forest for the Trees: Visualizing Platformization and Its Governance, *New Media & Society*, Vol. 23, No. 9, p. 2805.

74 *Ibid*., pp. 2806–2808; Coroado, S., 2023, pp. 6–7; Gregorio, G. De, 2019, p. 78.

proprietary ecosystems (e.g. Google Suite, now Google Workspace, on Chromebooks or Apple Pay on iPhones), effectively creating an environment in which public activity is channeled into private systems,[75] often without accountability or proper oversight from the state or public power. Further up the tree, the branches represent the applications and services across various sectors, such as public sectors of education and healthcare and public administration, which are increasingly shaped by corporate platform logic.[76] While some platforms from this pool remain in the public domain, private (technological) powers, such as Google and Amazon, are dominant. For example, Amazon's entry into healthcare with Comprehend Medical and its acquisition of PillPack shows how platforms cross-sectorize their influence, connecting user data across formerly separate domains to underpin their private power in the public sector[77] mostly without accountability or checks and balances from the state or public power.

Based on this, and tracing Sun and Xiao, it is possible to identify at least three forms of private (technological) power based on platform power: gatekeeper, information, and leveraging power.[78] Gatekeeper power stems from the platform's control over essential digital infrastructure, allowing it to control how the users operate and participate in technological society.[79] For example, companies that rely on Apple's App Store are structurally dependent on this platform's architecture but also its rules and policies. Information power means that the platform collects and processes vast amounts of personal data, enabling it to engage in practices such as behavioral (micro) targeting or algorithmic content filtering.[80] Moreover, the platforms claim ownership over extracted personal data and shield their practices through, for example, trade secrecy and non-disclosure agreements,[81] ultimately questioning fundamental rights. For example, platforms can use data to charge consumers different prices.[82] Finally, leveraging power allows platforms to expand and integrate across the "platformization tree", often to the detriment of competitors who use the same infrastructure and who often do not have proper access to justice, given the position of Big Tech in the equation. For example, Amazon

75 Dijck, J. Van, 2021, pp. 2806–2808.
76 *Ibid.*, p. 2807; Coroado, S., 2023, pp. 6–7.
77 Dijck, J. Van, 2021, p. 2809.
78 Sun, X., Xiao, Y., 2024, pp. 11–12.
79 *Ibid.*
80 *Ibid.*
81 Postema, G. J., 2022, p. 267.
82 Sun, X., Xiao, Y., 2024, pp. 11–12.

can prioritize its own products over those of third-party sellers on its site, creating a systemic conflict of interest.[83]

Based on the analysis of the platforms as multi-layered systems with gatekeeper, information, and leveraging power, it can be concluded that the rise and concentration of Big Tech's power lies in threefold dynamics: vertical integration, infrastructuralization, and cross-sectorization.[84] Vertical integration is the dynamics in which elements of the "platformization tree" are connected bottom-up and/or top-down. This way the platform can consolidate its own flows and prioritize its own products and services. As Van Dijck notices, Apple restricts access to its built-in NFC chip, reserving it for Apple Pay, and thereby excluding competitors. Infrastructuralization means that platforms have become essential intermediaries in technological life from a horizontal perspective.[85] For example, to sell products to mass customers, a seller is dependent on Amazon.[86] Finally, cross-sectorization suggests that platforms expand across sectors, such as health, education, and finance. For example, public services, even when state-governed, increasingly rely on proprietary systems controlled by private platforms, as seen in the educational use of Google's tools.[87]

The dynamics described above collectively demonstrate how Big Tech companies consolidate their private power beyond its initial market boundaries and against the state or public power. Together, these dynamics imply that Big Tech seemingly constitutes a fourth pillar of power – not one held by public democratic institutions, but by private entities whose power is rooted in infrastructural ownership, technological control, and legal insulation. This raises critical questions about the rule of law, especially as platform power extends to every layer of public and private life, thus challenging the traditional notion of the separation of powers.

6. Big Tech: From Private Power to the Fourth Pillar

To fully grasp how private (technological) power interacts with the principles of the rule of law and the separation of powers – which have traditionally been the concern of public authority – it is necessary to first revisit the foundational distinction between public and private

83 *Ibid*.

84 Dijck, J. Van, 2021, p. 2808.

85 *Ibid.*

86 *Ibid.*, p. 2809.

87 *Ibid.*, pp. 2808–2809.

power. The traditional constitutional and political order has long rested on the assumption that the state is the central and most powerful actor in society. Historically, the concept of power in legal contexts has referred almost exclusively to public or state power.[88] This concept laid the groundwork for the concept of the rule of law and its pertinent instruments and mechanisms, such as the separation of powers, designed to divide and limit branches of power (legislative, executive, and judicial). Uvarova captures this historical assumption succinctly, stating that the rule of law has been understood largely in terms of what the state can and cannot do.[89] Legal frameworks were thus developed primarily with state or public power in mind.

However, this traditional framework is increasingly challenged in the face of the dramatic rise of private (technological) power. The growing power of Big Tech has prompted scholars to consider them as "quasi-states".[90] As Postema argues, advances in technology have created "a new and radically different form of power", one that transcends the boundaries of traditional governance.[91] This is because Big Tech, such as GAFAM or BAT, operates not only as economic actors with global economic power,[92] but also increasingly engages in rule-making and enforcement, which are the roles that traditionally fall within the scope of the legislative and executive powers of the state.[93] As suggested in the previous sections on platformization, this is perhaps most evident in the power held by digital platforms. Zuckerberg himself acknowledged that platforms are now acting "more like a government than a traditional company", setting norms and enforcing rules in ways that affect billions of people.[94]

This transformation poses profound challenges to the traditional understanding of the rule of law and consequently the separation of powers. Barberis and Sardo identify three dimensions of this transformation that coincide with the proposed rule-of-law benchmarks.[95] First, the communication functions, which are essential to democratic participation and representation, have shifted from the state to private platforms. Second, Big Tech's cross-border reach renders national legal frameworks increas-

88 Sun, X., Xiao, Y., 2024, p. 2.
89 Uvarova, O., 2025, p. 2.
90 Coroado, S., 2023, p. 5.
91 Postema, G. J., 2022, p. 265.
92 *Ibid.*, p. 270.
93 Similarly: Sun, X., Xiao, Y., 2024, p. 12; Rosengrün, S., 2022, pp. 6–7.
94 Foer, F., 2017, *World Without Mind: The Existential Threat of Big Tech*, New York, Penguin Press. Quoted in: Rosengrün, S., 2022, pp. 6–7.
95 Barberis, M., Sardo, A., 2024, p. 272.

ingly ineffective, thus challenging their accountability and the checks and balances held over them,[96] and access to justice against them. Third, Big Tech has developed its own legal apparatus, with its own institutional and procedural instruments and mechanisms, beyond the state's separation of powers, to maintain control over infrastructure, intermediary platforms, and applications. This enables them to retain gatekeeper, information, and leveraging power, while operating beyond the scrutiny of state or public power, thus subversively exploiting the weaknesses inherent to institutional and procedural instruments and mechanisms resulting from rapid technological advancement.

On that note, state and public power seemingly can no longer be reduced to the Montesquieu's triad.[97] Although Möllers cautions against hastily declaring any new entity a "fourth power" in the separation of powers, arguing that such claims may be "intellectually lazy",[98] it is difficult to ignore the profound roles Big Tech plays across different dimensions of power. As Dahrendorf warned, the confusion of power creates vacuums that will inevitably be filled and it is clear that private (technological) power, Big Tech, has rushed in to occupy that space.[99]

One of the striking ways that Big Tech imitates legislative power is through its rule-making capacity. As Coroado and De Gregorio both explain, the terms of service imposed on users (public or private) by platforms are not traditional contracts, but unilateral rules that regulate access to a platform or an app and its enforcement. Importantly, these rules cannot be negotiated, and users must accept them, often without an alternative.[100] This way, Big Tech creates a rather problematic quasi-legal framework, as it aims to privately regulate and govern public environments,[101] such as commerce, education, and even healthcare. These rules are not reflective of democratic participation or representation, but of insular corporate logic. Ultimately, this means that Big Tech is not only insertingitself between public and private interests, but it is also blurring boundaries between the two, exerting control in a manner that challenges traditional lawmakers, which are confined to legal frameworks with limited reach.[102]

96 See also Coroado, S., 2023, p. 5; Postema, G. J., 2022, p. 264.
97 Pinelli, C., 2023, p. 313.
98 Möllers, C., 2013, p. 232.
99 Dahrendorf, R., 1977, p. 5.
100 Coroado, S., 2023, p. 13; Gregorio, G. De, 2019, p. 69.
101 Gregorio, G. De, 2019, pp. 69, 82.
102 Dijck, J. Van, 2021, p. 2810.

Beyond adopting rules, Big Tech also enforces them by acting as the executive authorities in their own domains.[103] In the sea of examples, platforms hold unparalleled surveillance capabilities, a power traditionally reserved for law enforcement agencies and state intelligence. Big Tech argues that analytics can produce social good, although they centralize it with minimal checks.[104] This capacity places them in direct tension with the state of public power, which struggles to regulate or even oversee this across jurisdictions.

In replicating judicial processes, Big Tech increasingly positions itself as a judicial authority. Big Tech has so far developed internal instruments and mechanisms for dispute resolution which resemble the judicial environment.[105] As Coroado illustrates, Meta established an institutionalized appellate process through the Oversight Board, which mimics a judicial body and features the characteristics of the judicial system, regarding neutrality, impartiality, and access to justice, for example, although it serves private rather than public interests.[106] In effect, these mechanisms, busy dealing, for example, with freedom of speech, form an extralegal judiciary that operates outside of traditional constitutional frameworks.

Together, these legislative, executive, and judicial functions performed by Big Tech present a compelling case for viewing the industry as a de facto fourth pillar of power in modern governance. As Barberis and Sardo explain, existing regulatory tools, such as antitrust law or administrative interventions, operate on a case-by-case basis and are often insufficient to tackle the abovementioned challenges.[107] Enforcement bodies (national or transnational, such as the EU Commission), while playing vital roles, still remain constrained by institutional and procedural limits and their geographic boundaries.[108] Moreover, the judiciary currently plays a secondary role in addressing the excesses of digital power. Courts often defer to platforms' editorial autonomy. Meanwhile, the entrenchment of the platforms continues to grow. As Sun and Xiao point out, the suggestion that Big Tech companies should be regulated as public utilities reflects a growing recognition that their power is foundational, closer to the power once exclusively held only by states.[109]

103 Gregorio, G. De, 2019, pp. 69–70, 82, 85.

104 Haber, E., Reichman, A., 2020, The User, the Superuser, and the Regulator: Functional Separation of Powers and the Plurality of the State in Cyber, *Berkeley Technology Law Journal*, Vol. 35, No. 2, p. 439.

105 Gregorio, G. De, 2019, p. 82.

106 Coroado, S., 2023, p. 13; Gregorio, G. De, 2019, pp. 86–87.

107 Barberis, M., Sardo, A., 2024, p. 273.

108 *Ibid.*, p. 272.

109 Sun, X., Xiao, Y., 2024, p. 17.

7. Endurance of the Classical Model and the Need for Coordinated Governance

The classical concept of the separation of powers, which posits a tripartite separation of powers into legislative, executive, and judicial branches, aimed at preventing the concentration of power, continues to serve as a critical tool for organizing and distributing power, even amid institutional and procedural diversity despite the influence of Big Tech.[110] Indeed, theoretical and practical limitations of it exist, this indicates, however, that what should possibly occur more "is not strict separation but cooperation, coordination, and sometimes confusion."[111] The classical model of the separation of powers seemingly requires complementary strategies – especially regarding cooperation and coordination – to remain functional under the challenges of Big Tech.

In this regard, Haber and Reichman propose a collaborative model of governance, built precisely on cooperation and coordination. They propose that cooperation between the state and Big Tech should be institutionalized through joint platforms or consortia, allowing for the participation and representation of diverse stakeholders, including regulators, users, and Big Tech, at all stages of digital policy formation. Of course, such an approach must include mechanisms of oversight to avoid consolidation and/or capture of power.[112]

One example of a joint initiative is Gaia-X, a Franco-German project designed to establish a federated and trusted data infrastructure in the EU that can foster an interoperable and secure digital environment. Its vision is to enable decentralized and trustworthy digital ecosystems, while its mission focuses on developing a standard through a framework of specifications, rules, policies, and verification mechanisms. An example of an oversight mechanism is the oversight component integrated into the Decidim platform (used in both public and private contexts such as city councils, universities, NGOs, and trade unions), which enables users to monitor the implementation of proposals and track institutional commitments. While neither Gaia-X nor Decidim represents a flawless solution, both serve as important early models in the evolving landscape of digital governance.

Globally, one of the major such collaborative efforts happened during the 2024 Olympics in Paris, between Big Tech and the French state. Major

110 Möllers, C., 2013, p. 232.

111 Dahrendorf, R., 1977, p. 11.

112 Haber, E., Reichman, A., 2020, pp. 440, 493–495.

technology firms like Atos, Orange, and Intel partnered with government bodies to deliver critical infrastructure for the Games, including digital scheduling, results, and immersive broadcasting, while the French government maintained oversight, ensuring transparency, ethical compliance, and public accountability. This coordination highlighted how technological expertise and state authority can work together.

8. Conclusion

Big Tech has not merely influenced the contemporary state – it has influenced the constitutional logic upon which it was built. By accumulating legislative, executive, and judicial-like powers, Big Tech companies have transcended the role of mere private actors. They are creating and enforcing rules, resolving disputes, or, in other words, performing functions that were once solely the purview of state or public power. Also, Big Tech increasingly acts in legally ambiguous spaces, shaping public discourse while remaining largely beyond the reach of traditional legal checks.[113] In this sense, Big Tech is not simply challenging the traditional separation of powers, it is installing itself as a fourth, unaccountable pillar of power, demanding a radical rethinking of the rule of law.

To that end, it has been suggested that the concept of the rule of law and the separation of powers must be reevaluated to capture both state or public and private (technological) powers,[114] to be able to hold Big Tech in check, accountable, and consistent with fundamental rights requirements.[115] Importantly, while Big Tech presents a profound challenge to traditional constitutional arrangements, it does not it them obsolete. Rather, the rise of platform power reinforces the need to adapt the classical separation of powers, without abandoning its core principles. The classical model still remains a benchmark against which institutional and procedural overreach and encroachment can be assessed.[116] First, as one of the benchmarks of the rule of law, the principle of separation of powers has withstood many transformations but continues to serve as a foundational reference point in most constitutional democracies. As such, it provides a framework through which emerging forms of institutional and procedural overreach and encroachment, such as those posed by Big Tech, can be mapped. In other words, as a tested yardstick, it enables us to evaluate

113 Crofts, P., Rijswijk, H. van, 2021, p. 51.

114 Uvarova, O., 2025, p. 6.

115 Postema, G. J., 2022, p. 270.

116 Moller, J., 2018, p. 17; Haber, E., Reichman, A., 2020, p. 439.

contemporary developments against the core elements of the rule of law. Second, relying on this established framework ensures the continuity of a stable comparative exercise, allowing shifts in power to be traced while preserving analytical clarity and consistency. Finally, the triadic structure provides a stable foundation upon which new forms of governance, such as cooperation and coordination, can be built.

Obviously, this innovation in governance is not incompatible with the endurance of the classical separation of powers model. On the contrary, its very resilience lies in its capacity for adaptation. In the face of rapidly evolving digital power, the goal should not be to dismantle the tripartite structure but to complement it with robust cooperation and well-coordinated partnerships between the state and Big Tech. In doing so, it can be ensured that technological governance remains grounded in the rule of law and the separation of powers.

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VLADAVINA PRAVA, PODELA VLASTI I BIG TECH

Maja Sahadžić

APSTRAKT

Rastući uticaj velikih tehnoloških kompanija (Big Tech), podstaknut tehnološkim razvojem i platformizacijom, predstavlja izazov tradicionalnim shvatanjima vladavine prava i podele vlasti. Akumulacijom funkcija koje su tradicionalno bile rezervisane za državu, Big Tech deluje često izvan domašaja uobičajenih instrumenata i mehanizama kontrole i odgovornosti. U tom svetlu, ovaj rad kritički ispituje ograničenja koja uspon privatne (tehnološke) moći nameće vladavini prava i principu podele vlasti. Rad započinje analizom klasičnog razumevanja ovih ustavnih principa, nakon čega sledi razmatranje savremenih izazova koje nameće Big Tech. Analiza se zatim usmerava na rastuću privatnu (tehnološku) moć Big Tech-a kao četvrtog stuba podele vlasti. Na kraju, rad se završava diskusijom o potrebi za saradnjom i koordinisanim upravljanjem između države i Big Tech-a, zaključujući upućivanjem na prilagodljivost tradicionalnih koncepcija vladavine prava i podele vlasti.

Ključne reči: vladavina prava, podela vlasti, tehnologija, Big Tech, javna i privatna vlast.

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ORIGINAL SCIENTIFIC ARTICLE

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TOWARD A EUROPEAN TORT LAW OF DATA PROTECTION: THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND ITS IMPACT ON NATIONAL TORT LAWS

Abstract: *The paper examines the provisions governing non-material damage resulting from violations of the right to personal data protection under the General Data Protection Regulation (GDPR), as well as their interpretation in the case law of the Court of Justice of the European Union (CJEU). Particular attention is devoted to judgments in which the Court develops autonomous, yet insufficiently precise, legal concepts, thereby creating legal uncertainty and complicating the application of relevant provisions at the national level. Although the CJEU has entrusted national courts with the assessment of damages, the paper emphasizes that in practice it is impossible to fully separate the conditions for awarding damages from the process of determining the amount of compensation.*

Key words: GDPR, Tort Liability, Non-Material Damage, Court of Justice of the European Union.

1. Introduction

The intersection of EU digital regulations and national tort laws is complex and continuously evolving. As new regulations emerge and the Court of Justice of the European Union (CJEU) clarifies and interprets their provisions, national courts must navigate the tension between EU-wide standards and national legal traditions. The CJEU has recently decided several cases on the right to compensation based on the General Data Protection Regulation (GDPR), aiming to define the conditions for compensation of non-material (non-pecuniary) damage and ensure that tort claims related to data protection are handled consistently across the EU.

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This article examines the ways in which the EU's attempts to establish a comprehensive legal framework for regulating the digital frontier have tacitly displaced national tort laws[1] in favor of seemingly autonomous, yet vague and opaque rules, largely devoid of substance. This tendency causes legal uncertainty, complicating enforcement and potentially undermining fundamental principles of liability and redress for infringement of data protection rights when enforced on the national level.

Recently, the CJEU has decided several cases addressing intriguing and novel questions regarding the interpretation of various GDPR provisions such as: do any and all infringements of the GDPR give equal rise to compensation claims? Is infringement in itself enough for liability? To which extent should the level of fault and seriousness of the infringement be taken into account when setting the level of compensation and do damages in the area of data protection also have a punitive function? Under which circumstances can controllers claim that they are not responsible for an infringement, and which standard of care will their conduct be measured against? Underlying these many questions is a broader one: is a data protection claim one that is focused on causes of harm (i.e., objective conduct of the controller or processor leading up to damage) or is it one which focuses on the consequences that a data subject has suffered subjectively?

EU institutions have traditionally refrained from intervening in the overall structure of substantive tort law.[2] This is why the significant judicial activity in recent years raises the question of whether fundamental aspects of tort law are undergoing "backdoor harmonization"[3] and what the broader legal implications and systemic effects of this development may be. Such tendencies can have serious consequences and lead to what Koziol refers to as "double fragmentation of the law".[4] On one side, the CJEU judgments significantly impact national tort laws, introducing provisions that may be unfamiliar to their legal traditions. On the other hand, the EU directives and regulations lack a coherent foundation in tort law concepts, often resulting in inconsistencies among them.

The article starts by introducing the right to data protection and the concept of damages in Article 82 (1) of the GDPR. Although Article 82

1 In this article we use the term tort law. It is also common to use the terms delictual liability, non-contractual liability and extra-contractual liability in the same sense.

2 Bar, C. von, 1998, *The common European law of torts*, Vol. 2, Oxford, Oxford University Press, p. 408.

3 Marcos, F., Sanchez, A., 2008, Damages for breach of the EC antitrust rules: harmonizing tort law through the back door?, *InDret*, No. 1, p. 2.

4 Koziol, H., 2013, Harmonizing Tort Law in the European Union: Advantages and Difficulties, *ELTE Law Journal*, No. 1, p. 76, fn. 15.

(1) GDPR grants data subjects the right to both material and non-material damages, the emphasis will be on non-material damages, as this is the issue that has been in the focus of the CJEU case law. Despite the need to create autonomous tort law rules in the EU, in order to strengthen the European internal market, this is a challenging task, as few issues in tort law are assessed as differently across Europe as non-material damages,[5] making it difficult to reconcile the need for autonomous concepts with the preservation of national legal traditions.

Through the analysis of recent case law of the CJEU, we will focus on questions addressed by the Court in its recent judgments relating to Article 82 of the GDPR, issued in response to preliminary ruling requests from national courts. We will then discuss how the Court has interpreted and introduced autonomous concepts in data protection law, hence de facto harmonizing certain aspects of tort law traditionally regulated at the level of member states. Finally, we will look at how the CJEU case law on Article 82 GDPR challenges the national tort law rules of the member states.

2. Data Protection and the Right to Compensation

The right to the protection of personal data is a type of personality right. Personality rights are often referred to as "private human rights",[6] and cover different legal interests connected to the person, which are protected and enforced through means of private law.

Personal data protection is closely related to privacy, although privacy and data protection are commonly recognized as two separate rights.[7] While privacy is a broader notion that entails the right to hide parts of an individual's life from the view of the wider public,[8] data protection aims to ensure the fair processing (collection, use, storage) of personal data by both public and private actors.[9]

The legal basis for regulating data protection in the EU in contained in Article 16 of the Treaty on the Functioning of the European Union

5 Knetsch, J., 2022, The compensation of non-pecuniary loss in GDPR infringement cases, *JETL*, Vol. 13, No. 2, p. 135.

6 Brüggemeier, G. *et al.*, 2010, *Personality rights in European Tort Law*, Cambridge, Cambridge University Press, p. 6.

7 European Data Protection Supervisor, n.d., Data Protection, (https://edps.europa.eu/data-protection/data-protection_en, 28. 3. 2025).

8 Humble, K., 2020, Human rights, international law and the right to privacy, *Journal of Internet Law*, Vol. 23, No. 12.

9 European Data Protection Supervisor, n.d.

(TFEU), which requires that the EU lay down data protection rules for the processing of personal data. Based on this mandate, the EU has explicitly granted the right to data protection in the Charter of Fundamental Rights of the EU,[10] as well as in the General Data Protection Regulation (GDPR).[11] Regulations are a type of EU legislation that have direct effect in national laws without the need for their implementation in the national legal systems. The EU decision to replace the directive as the regulatory form with a regulation, reflects the need for a higher level of legal unification in this area of law.[12]

Article 79 (1) GDPR provides individuals with the right to an effective remedy when their rights under the Regulation have been violated. Additionally, the abovementioned Article 82 (1) of the GDPR grants data subjects the direct right to receive compensation for both material and non-material (non-pecuniary) damages resulting from infringements of its provisions.[13] While the provision might sound straightforward – after all, courts have dealt with issues of non-material damage for spread of personal information for more than two millennia – the CJEU has established that every aspect of a compensation claim, apart from the final calculation of damages, must be interpreted autonomously.[14]

The interpretation and correct application of Article 82 (1) by national courts, and its integration with domestic procedural and tort rules, with the aim of preventing obstacles derived from the legislative fragmentation, is crucial for ensuring the effective enforcement of data protection rights and equal protection of citizens throughout the EU.

10 Charter of Fundamental Rights of the European Union, 2012/C 326/02, 14 December 2007. Art. 8 states that: "Everyone has the right to protection of personal data concerning him or her."

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

12 Before the EU adopted the GDPR in 2016, data protection was governed by the Data Protection Directive (95/46/EC) from 1995.

13 Directive 95/46/EC also recognized the right to non-material damages, although this right was seldom exercised. See European Union Agency for Fundamental Rights (FRA), 2013, *Access to data protection remedies in the EU Member States*, Publications Office of the European Union, points 3 and 4. The Court had never offered a specific interpretation of the Directive's provision on non-material damages, so the previous legal practice does not offer any clarification. Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 2. Claims for compensation are usually provided for in directives rather than in regulations. Art. 82 (1) is unusual in that regard. See Knetsch, J., 2022, p. 138.

14 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, paras. 29–30.

3. Unification of Tort Law in the EU

Presently, a unified European tort law does not exist, despite multiple initiatives aimed at defining core European tort principles.[15] The EU lacks the general and comprehensive authority to regulate tort law,[16] except when the member states or the EU itself breach their obligations under the treaties.[17] This is why, instead of a systematic approach, the EU has opted for a gradual and sectoral alignment of tort rules in certain fields of law, such as product liability[18] and competition law.[19] In this way, the EU tort law has slowly but surely increased in volume, albeit remaining fragmented.

Existing national tort regimes vary significantly due to differences in legal traditions. These variations impact key aspects of tort law, including fault requirements, the scope of liability, available remedies, and the role of judicial discretion. For example, in some states, such as Germany, Austria and Netherlands, damages for non-material harm are not common, and courts are reluctant to award compensation to data subjects for non-material damages, since due to their nature such claims are often difficult to verify and also bear significant potential for misuse.[20] On the other hand, in France, Scandinavia and Italy, these damages are more readily granted.[21]

In several recent GDPR cases on non-material compensation claims, the CJEU clarified that the concept of non-material damages must be interpreted autonomously for the purposes of the GDPR.[22] The development of autonomous concepts in the case law of the CJEU challenges the diversity of national tort regimes by introducing uniform legal interpretations

15 Examples are the Principles of European Tort Law (PETL) dealing with substantive tort law, and Draft Common Frame of Reference (DCFR) which examines European tort law in a very broad, essentially normative sense. See Giliker, P., What do we mean by EU tort law, in: Giliker, P., (ed.), 2017, *Research Handbook on EU Tort Law*, Cheltenham, Edward Elgar, p. 5.

16 "There is thus no general EU competence to regulate private law in its entirety, but a number of specific competences addressing selected aspects." Mańko, R., 2015, EU competence in private law – The Treaty framework for a European private law and challenges for coherence, *European Parliamentary Research Service*, p. 1.

17 See Art. 260 as well as Art. 340 (2) TFEU.

18 Howells, G., Is European Product Liability Harmonised?, in: Koziol, H., Schulze, R., (eds.), 2008, *Tort and Insurance Law*, *Vol. 23*: *Tort Law of the European Community*, Vienna–New York, Springer.

19 Dunne, N., 2016, Antitrust and the Making of European Tort Law, *Oxford Journal of Legal Studies*, Vol. 36, No. 2.

20 Khalil, S., 2023, EU: CJEU Lowers Threshold for GDPR Damages, (https://www.schoenherr.eu/content/eu-cjeu-lowers-threshold-for-gdpr-damages/, 8. 5. 2023).

21 Giliker, P., 2017, p. 14.

22 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, para. 2.

that may not align with established domestic legal traditions, making it difficult for national courts to apply these rules directly.

4. Criteria for Compensation Claims under the GDPR

The CJEU has outlined three primary criteria for a successful compensation claim: 1) infringement of the GDPR by the controller or a processor ("infringement"), 2) existence of material or non-material damage suffered by the data subject ("damage"), and finally 3) a link between the infringement committed and harm suffered, establishing that the latter occurred as a result of the former ("causal link").[23] This approach taken by the Court is rather universal and sound in terms of its structure – although it must be noted that, much as with national judgements following this pattern of tort liability elements, the CJEU leaves blurry certain lines between the individual elements.[24]

4.1. DOES INFRINGEMENT PER SE CONSTITUTE DAMAGE?

An infringement occurs when an entity fails to comply with one or more obligations under the GDPR. Infringement of a provision of the GDPR is clearly a *conditio sine qua non* for the establishment of successful compensation claims: if the GDPR has not been breached, there can be no grounds for liability under Article 82. We will not go further into the specific actions or omissions that constitute infringement but will focus on the elements of damage (harm) and causal link, as interpreted by the CJEU.

One of the questions the Court had to answer was whether the infringement of the provisions of the GDPR automatically produces harm that gives rise to the right to compensation. The CJEU has spoken seemingly clearly on the topic. First, in the *Österreichische Post* case, where the Austrian postal service collected and processed data on the political opinions of Austrian citizens without their explicit consent, the Court held that "the mere infringement of the provisions of that regulation is not sufficient to confer a right to compensation,"[25] justifying its stance by applying literal interpretation to the text of Article 82. The Court held it apparent that separate references to the terms "infringement" and "damage" clearly indicate

23 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 1; CJEU, case C-687/21, *MediaMarktSaturn*, EU:C: 2024:72, para. 4.

24 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 1; CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 3.

25 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 42.

the legislative intention of the two elements being cumulative. Elaborating, the CJEU held that "it follows, first, that the occurrence of damage in the context of such processing is only potential; second, that an infringement of the GDPR does not necessarily result in damage, and, third, that there must be a causal link between the infringement in question and the damage suffered by the data subject in order to establish a right to compensation."[26] In other words, the Court effectively rejected the claims that any infringement of the GDPR suffices to give rise to a compensation claim solely by the virtue of being an infringement of a fundamental right. The Court re-affirmed this stance in multiple cases down the line – holding, in *VX*, that "the data subject is required to show that the consequences of the infringement which he or she claims to have suffered constitute damage which differs from the mere infringement of the provisions of that regulation,"[27] reiterating in *MediaMarktSaturn* that "the person seeking compensation by way of that provision is required to establish not only the infringement of provisions of that regulation, but also that that infringement caused him or her material or non-material damage."[28]

In *Österreichische Post*,[29] the Advocate General highlighted that, in absence of damage, the compensation no longer would have performed the function of redressing the adverse consequences caused by the breach, but rather another function closer to punishment.[30] He further made a point that in the event of a breach that does not create harm, the data subject is still afforded the right to make a complaint to a supervisory authority under Article 77 (1) GDPR, and that the different mechanisms in GDPR coexist and complement each other.[31]

4.2. CRITERIA FOR DAMAGES

4.2.1. What constitutes non-material damage in GDPR?

Establishing the existence of damage (harm) is a necessary requirement for obtaining compensation. Article 82 of the GDPR does not identify the specific nature, nor the form of non-material damage, nor does

26 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 37.

27 CJEU, case C-456/22, *VX*, ECLI:EU:C: 2023:999, para. 18.

28 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C: 2024:72, para. 61.

29 The legal position of an Advocate General's opinions in the CJEU is that it they are not binding on the Court but serve as an independent and reasoned legal analysis to assist the judges in reaching their decision.

30 Opinion of Advocate General, Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 30.

31 *Ibid.*, point 54.

it refer to the laws of the member states to define the meaning and scope of the term "non-material damage".[32] The national courts have therefore in several cases called upon the CJEU to clarify and define the concept of damages in the context of data protection violations. By addressing this issue, the Court established and determined under what conditions individuals can seek redress for the consequences of data protection infringements.

In *Scalable Capital* the Court explicitly equalized damage caused by data breach with physical injury.[33] By making this comparison, it acknowledged the significant impact that data breach has on data subjects, at the same time recognizing that its psychological and financial consequences can be as serious as a physical injury. With this it confirmed that personal data deserves legal protection akin to physical injury.

According to Recital 146 of the GDPR,[34] the concept of damage "should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation." We will further analyze each of the three elements used to define the concept of damages.

The Court has in the recent case law specified the requirement of broad interpretation of the concept of damage, finding that the loss of control over personal data may already be sufficient to substantiate non-material damages.[35] It has also found, contrary to the opinion of the Advocate General,[36] that Article 82 (1) covers the fear of the potential misuse or

32 Opinion of Advocate General Collins, 26 October 2023, CJEU, joined cases C-182/22 and C-189/22, *Scalable Capital*, point 23.

33 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C: 2024:1123, para. 39.

34 Recitals as such do not have legislative force. The CJEU has consistently affirmed that recitals cannot directly create rights and duties, but they nevertheless play an important role in the EU legal order. The primary function of recitals is interpretative – they are used for explaining the essential objective pursued by the legislative act. See Heijer, M. den *et al.*, 2019, On the Use and Misuse of Recitals in European Union Law, *Amsterdam Law School Research Paper*, No. 2019-31, p. 3.

35 CJEU, case C-200/23, *Agentsia po vpisvaniyata v. OL*, ECLI:EU:C:2024:827, para. 157, "loss of control, for a limited period, by the data subject over his or her personal data, on account of those data being made available online to the public, in the commercial register of a Member State, may suffice to cause 'non-material damage'".

36 Opinion of Advocate General Pitruzzella in: *VB v. Natsionalna agentsia za prihodite* (C-340/21, EU:C:2023:353, points 81–83). See also Opinion of Advocate General Collins, 26 October 2023, on CJEU, joined cases C-182/22 and C-189/22 *Scalable Capital*, fn. 13, where he states: "I agree with Advocate General Pitruzzella that upset or displeasure at the fact that one's data has been 'hacked' does not suffice. To succeed in such a claim the data subject must demonstrate that the fear of misuse of his or her data caused him or her 'emotional damage'." Advocate General Campos Sánchez states in his Opinion of 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische*

personal data that the data subject experiences as a result of the breach.[37] The Court has also recognized psychological and emotional suffering as constituting non-material damage. In *Agentsia po vpisvaniyata*, the Court acknowledged "psychological and emotional suffering [...] namely fear of, and concern over, possible abuse, as well as the sense of powerlessness and disappointment that her personal data could not be protected" as constituting non-material damage.[38]

A very recent judgement by the General Court of the CJEU from January 2025[39] found that data subject had suffered non-material damage in that they were put in a position of uncertainty. This expansive approach implies that psychological distress and anxiety is sufficient to establish non-material damage.

As for the requirement that the concept of damage should be interpreted in light of the case law of the CJEU, the intention of this recital was most likely to refer to judgments on civil liability governed by other directives, since the Court had yet to rule on the concept of damage when the GDPR was adopted. As this interpretation is not clear from the wording of Recital 146 GDPR, a reference to analogy would have provided greater clarity.[40]

The third interpretation requirement is that the GDPR must be understood in a manner that fully reflects its objectives. The GDPR essentially has two objectives: to protect the inherent rights of individuals regarding their personal data, and to support a free, integrated digital market in the EU.[41] By interpreting non-material damages broadly, the GDPR sets high requirements and expectations to data controllers and processors, and ensures that they are incentivized to respect data protection norms. Respecting the objectives of the GDPR means the damages should avoid creating

Post AG, (point 105): "I do not believe, however, that it is possible to infer from this a rule pursuant to which *all* non-material damage, regardless of how serious it is, is eligible for compensation." Further, in point 109 he notes: "In support of my position, I note that the GDPR does not have as its sole aim the safeguarding of the fundamental right to the protection of personal data and that the system of guarantees laid down therein includes mechanisms of different types."

37 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C:2023:908, para. 6.

38 CJEU, case C-200/23, para. 155

39 CJEU, case T– 354/22, para. 197.

40 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 103.

41 Unlike Directive 95/46/EC, which prioritized the free movement of personal data, the GDPR places greater emphasis on the protection of personal data. Nonetheless, Article 1 of the GDPR clearly states that its objective is to reconcile the right to personal data protection with the free movement of such data.

a disincentive for data processing activities that are vital for the free movement of data, while at the same time compensating the victims in full. The challenge is to find a balance and compensate for harm without imposing overly burdensome liabilities that could stifle innovation and cross-border data flows. The balancing itself, however, is reserved for the national courts within their margin of appreciation.

4.2.2. Threshold for non-material damages

Article 82 (1) GDPR does not set a specific threshold for damages. It only states that "any person who has suffered material or non-material damage" has the right to compensation.

In an attempt to ensure that its rulings are not misinterpreted in a way that would let controllers and processors pick and choose which provisions they wish to adhere to and which would be too costly to breach, the Court took several steps. First, it established that any damage, no matter how minimal, can be compensated – subject to rather minimal exceptions.[42]

Secondly, it held that the degree of seriousness of the infringement or the level of fault, or even its intentional nature, are not to be taken into account when determining whether compensation should be awarded.[43] Thirdly, it firmly placed the burden of proof of non-infringement on data controllers, even when third parties were involved, despite the fact that, had it not been for their involvement, there would not have been any damage.[44] In other words, the Court refined its claim that the "mere infringement" is insufficient for damages claim[45] by adjusting the threshold of the other elements of a claim, i.e., the one of fault, burden of proof, causal link, and "damage". In doing so, it established, in essence, a binary system – either there was an infringement which led to no consequence at all, in which case a claim cannot be enforced, or there was an infringement, regardless of how accidental or minor, which has led to damage, no matter how serious or trivial, in which case compensation should be awarded.

Although some EU states, such as Austria,[46] require damages to reach certain threshold of seriousness, the CJEU is clear that no wrongful violation of data protection rights should go uncompensated, however small

42 CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, para. 46.

43 CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, paras. 28–30.

44 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C: 2023:986, para. 72.

45 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C: 2023:370, para. 42.

46 § 1328a, *Allgemeines bürgerliches Gesetzbuch* (ABGB).

the damage. This means that national legislation cannot prescribe a de minimis threshold for compensation claims.[47] This is because, according to the interpretation of the Court, limiting damages under Article 82 of the GDPR to a certain degree of seriousness would be contrary to the broad interpretation of this term.[48]

The approach taken by the Court is contrary to the solutions in Principles of European Tort Law (PETL), a common core of European tort law, which allow the judges to disregard trivial damage, regardless of whether another remedy is available to the victim.[49]

In substance, several effects of the CJEU clarifications are notable. The Court has lowered the threshold for recovering damages, holding that any harm, no matter how minimal, must be compensated – but that it must be specifically proven.[50] The fact that there can be no bar against cases where damages are minimal opens the door to a flood of litigation. On the other hand, the fact that such harm and the causal link must be specifically proven by the data subject, and awarded compensation calculated solely on the basis of that harm – with no regard to the gravity of the breach, its repeated or intentional nature – deprives the court the possibility to take the broader context into account, enforce public policy, and prevent future infringements.[51] This leads to an unfortunate situation where data subjects who have suffered serious harm, but who may struggle to prove a specific link – as is often in privacy cases – will be denied compensation, while those who can prove even minimal harm, mere annoyance, and suffering due to the most minutiae of breaches, will be able to bring lawsuits most legal systems would typically classify as pure nuisance.[52]

Proponents of the subjective concept of non-material damages consider this solution favorable to objective theory, which requires granting monetary compensation without the need to prove that the victim has suffered damages.[53] By granting compensation for the mere infringement of

47 CJEU, case C-456/22, *VX*, ECLI:EU:C: 2023:999, para. 1.

48 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C: 2023:908, para. 81.

49 European Group on Tort Law, 2005, *Principles of European Tort Law: Text and Commentary*, Vienna, Springer, Art. 6:102 PETL.

50 CJEU, case C-456/22, *VX*, EU:C:2024:999, para. 1; CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, para. 4.

51 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 4; CJEU, case C-741/21, *GP v. juris*, GmbH EU:C:2024:288, para. 3.

52 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 4; CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 2.

53 Počuča, M., 2008, *Naknada nematerijalne štete zbog pretrpljenog straha*, Novi Sad, Privredna akademija, p. 133; Aleksandra Maganić emphasizes that objective con-

data protection rights without the need to prove harm, it would appear that personal data has an objectified value, and that monetary compensation represents the remuneration for misuse of this right, which is, of course, not the case. At the same time, there is a contrary argument to be made: that a violation of a fundamental right is, and must be, sufficient grounds to convey compensation, as the interests which they inherently protect, such as autonomy and dignity, must be considered protectable per se.[54]

The evidentiary rules in cases of GDPR infringement are left to the discretion of the national courts. There is, however, a requirement that the damage is concrete, i.e., the claimant must additionally demonstrate that the infringement has caused negative consequences (actual damage).[55] According to the CJEU, it is not enough that the risk of infringement is merely hypothetical[56] or that the victim claims they experienced fear, as the fear has to be well-founded.[57]

This raises the crucial question of how actual damage should be proven. The Regulation does not contain any provision aimed at determining the admissible methods of proof and the probative value.[58] The evidentiary rules in case of GDPR infringement are left to the discretion of the national courts. Different evidentiary issues can, however, cause challenges, such as what type of evidence is required to establish the existence of non-material damages. Should the pain and suffering due to infringement be established by testimony of an expert witness or by personal testimony? Is the special-sensitivity rule, also known as the eggshell-skull

ception of non-material damages could lead to an increase in the number of cases in which the victims would require non-material damages. See Maganić, A., Zaštita prava osobnosti, in: Vukadinović, D. V., (ed.), 2009, *Zbornik radova – Trideset godina zakona o obligacionim odnosima – de lege lata i de lege ferenda*, Belgrade, GTZ, p. 426.

54 See, for example, Radolović, A., 2006, Pravo osobnosti u novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, No. 1; Baretić, M., 2006, Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta u Zagrebu*, special issue, No. 56. In Swiss law, any infringement of a personality right is wrongful in the absence of a ground of justification. However, where personality rights have been recognized as autonomous, either by the courts or by the legislature, a presumption of fault and damage arises. The mere infringement of such a right is therefore sufficient to establish liability, without the need to prove fault or actual damage. See Neethling, J., 2005, Personality rights: a comparative overview, *Comparative and International Law Journal of Southern Africa*, Vol. 38, No. 2, pp. 219–220.

55 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 58.

56 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 68.

57 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI: EU:C:2023:986, para. 85. See also CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 67.

58 Opinion of Advocate General Pitruzzella in: *VB v. Natsionalna agentsia za prihodite*, CJEU, case C-340/21, EU:C:2023:353, point 56.

rule,[59] applicable in these cases? The Court does not provide answers to any of these questions.

4.2.3. Function of the damages

Damages in tort law can serve several functions: compensation, satisfaction, deterrence, or punishment. Compensation aims to restore the injured party to the position they would have been in had the harm not occurred (*restitutio in integrum*). In other words, compensation is intended to restore the balance of the legal situation that has been negatively affected (damaged) by infringement of the right. It is assessed objectively, unlike satisfaction, which acknowledges and vindicates the claimant's rights, providing a sense of justice or redress. Deterrence, or prevention, discourages wrongful conduct, while punishment penalizes the defendant for wrongdoing in order to deter similar misconduct.

In regard to GDPR violations, the Court has explicitly determined that Article 82 (1) of the GDPR must be interpreted as meaning that the right to compensation laid down in that provision fulfils an exclusively compensatory function.[60] However, it has also stated that the right of any person to seek compensation for damage reinforces the operational nature of the protection rules laid down by that regulation and is likely to discourage the reoccurrence of unlawful conduct.[61]

The Court's reasoning appears somewhat contradictory. On the one hand, it asserts that Article 82 (1) GDPR serves an "exclusively compensatory function", implying that the provision is solely intended to compensate individuals for actual harm suffered. On the other hand, it recognizes the deterrent effect of compensation, which suggests that the provision also serves a preventive purpose by discouraging future violations – a function that goes beyond mere compensation but is meant to serve broader societal interests.

Compensation remains a primary – though not an exclusive – function of tort law in most European legal system.[62] The preventive function, traditionally linked to criminal law, is widely acknowledged across Euro-

59 Kohutis, E., McCall, S., 2020, The Eggshell and Crumbling Skull Plaintiff: Psychological and Legal Considerations for Assessment, *Psychological Injury and Law*, Vol. 13, No. 4.

60 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C: 2024:1123, para. 24.

61 See, *inter alia*, CJEU, case C-300/21, *Österreichische Post*, EU:C:2023:370, paras. 38 and 40; and CJEU, case C-741/21, *juris*, EU:C:2024:288, para. 59.

62 Vizner, B., 1978, *Komentar Zakona o obveznim odnosima*, Knjiga druga, Zagreb, p. 913; Boom, W. van, 2010, Comparative notes on injunction and wrongful risk-taking, *Maastricht Journal of European and Comparative Law*, Vol. 17, No. 1, p. 15.

pean jurisdictions,[63] as well as in the PETL,[64] as a secondary aim of the damages awarded for infringements of personality rights. The Advocate General also believes that the action under Article 82 (1) was designed and laid down to support the typical functions of civil liability, damages for the injured party, and, on a secondary basis, damage for future harm.[65] The duty to compensate encourages greater caution in the future by promoting compliance with the rules and avoiding harm. He also stated that it cannot be ruled out that the reparation sought for non-material damage may include other than merely financial components, such as recognition that the infringement occurred, thereby providing the applicant with a certain moral satisfaction.[66]

Recital 146 of the GDPR states: "Data subjects should receive full and effective compensation for the damage they have suffered."

In its practice, the CJEU has further established guidelines for the national legal systems when determining the level of compensation, by requiring that they be "full and effective".[67] Full compensation means the victim should be placed in the same state as if the damage had not occurred, and there is no capping or limitation of damages. But what can be considered effective compensation? The effectiveness of a remedy is demonstrated by its ability to prevent the alleged violation of the law or its continuation, or by offering appropriate redress for any violation that has already taken place.[68] It could also be interpreted as to mean that compensation must be a timely, adequate, and efficient redress for individuals whose rights under the GDPR have been violated.

Besides stating that damages have a compensatory function, the Court further explicitly established that no punitive damages can be claimed under the GDPR.[69] Punitive damages are not mentioned in the GDPR, nor does the regulation require the amount to be calculated to punish the data controller. Unlike compensatory damages, punitive damages are not equal to the damages suffered, but are higher, and focus on the tortfeasor, their level of fault as well as their economic situation. Although punitive

63 An exception is this regard are Italy, Netherlands and Greece. See Abramović, A., 2004, Odgovornost za štetu nastalu objavom informacije, *Hrvatska pravna revija*, Vol. 4, No. 6, p. 43.

64 See European Group on Tort Law, 2005, Art. 2:104.

65 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 44.

66 *Ibid.*, point 89.

67 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 35.

68 Piątek, W., 2019, The right to an effective remedy in European law: significance, content and interaction, *China–EU Law J*, Vol. 6, No. 3–4, p. 163.

69 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, ECLI:EU:C:2023:910, para. 4.

damages are not common in Europe, there are authors advocating their introduction into European legal systems.[70] Besides, we can identify certain punitive elements in European tort law systems, so this function is not completely unfamiliar.[71]

When determining the level of monetary compensation, only damages actually suffered by a person must be taken into consideration.[72] Along the same lines, in *Krankenversicherung Nordrhein*, the Court emphasized that the degree of seriousness of the controller's fault does not influence the amount of compensation for non-material damages, reinforcing the compensatory – not punitive – nature of Article 82.[73] Further, in view of compensatory rather than punitive function, the fact that several infringements have been committed by controller to the same data subject is not a relevant criterion for assessing the compensation.[74] Keeping with this line of thought, we can conclude that other circumstances, such as type of personal data concerned, tortfeasors wealth, or profits made from the infringement, would not impact the level of compensation. This is in line with the Court's argumentation against punitive damages whose purpose is to punish the tortfeasor.

In our view, the broader functions of tort law are inherently linked to the assessment of damages. The purpose of tort law – whether it is aimed primarily at compensation, deterrence, or punishment – directly influences how damages are quantified and awarded. A purely compensatory approach focuses on restoring the victim to their pre-injury state, whereas a deterrent or punitive function may justify higher damages to prevent future misconduct. Therefore, any discussion on the appropriate level of damages must take into account the underlying objectives that tort law seeks to achieve.

70 Müller, P., 2000, *Punitive damages and deutsches schadensrsatrecht*, Berlin, De Gruyter; Mrvić-Petrović, N., 1991, Naknada štete kao alternativna krivična sankcija, *Jugoslovenska revija za kriminologiju i krivično pravo*, Vol. 29, No. 3, pp. 85–86.

71 For Estonia see Lahe, J., 2011, Punitive Damages in Estonian Tort Law?, *Journal of European Tort Law*, Vol. 2, No. 3, p. 286; for Finland see Winiger, B. *et al.*, (eds.), 2011, *Essential Cases on Damage*, Berlin, Walter de Gryter, p. 46; for Italy see Art. 2059 of Civil Code. Article 18 (2) of Commission Regulation (EC) No. 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No. 2100/94 on Community plant variety rights (OJ 1995 L 173, p. 14) is usually cited as an example of punitive elements in EU: "the liability to compensate the holder for any further damage [...] shall cover at least a lump sum calculated on the basis of the quadruple average amount charged".

72 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 66 and the case law cited.

73 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 86.

74 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 64.

4.2.4. Assessment of damages

The GDPR does not contain provisions on the assessment of damages. The rules for deciding the level of compensation itself remain therefore within the scope of the national law of the member states. It is hence up to the legal system in each member state to prescribe the rules for determining the compensation level. This margin of appreciation will allow the states to adapt the level of damages to their standard of living. Unlike personal injury claims, which are typically assessed using predefined tables for pain and suffering in most member states,[75] determining personality rights infringements is more complex and varies significantly. This divergence increases the risk of forum shopping in cases of digital rights violations.

The Court has explicitly ruled that the criteria for determining administrative fines should not be considered when assessing damages for compensation.[76] This is because administrative fines are punitive in nature, and as such pursue different objectives then damages. A large part of the CJEU's reasoning builds upon what it sees as a fundamentally different nature of the right to an effective judicial remedy and the right to lodge a complaint with the data protection authority. As it argued in *MediaMarkt-Saturn*, Article 82, unlike Articles 83 and 84 of GDPR fulfils a compensatory function, in that financial compensation based on that provision must allow the damage actually suffered as a result of the infringement to be compensated in full. In that regard, damages and administrative fines are different, but complementary.[77]

In *GP v. juris GmbH*, the Court reaffirmed that when setting the level of compensation, "it is not necessary, first, to apply *mutatis mutandis* the criteria for setting the amount of administrative fines laid down in Article 83 of that regulation,"[78] and, with nearly identical wording in *AT*[79] and *Scalable Capital*,[80] respectively, that it is not necessary "first, to apply *mutatis mutandis* the criteria for setting the amount of administrative fines laid down in Article 83 of that regulation and, second, to confer on that right to compensation a dissuasive function" and that "the right

75 For example, in Italy: Tabella Unica Nazionale, Presidential Decree No. 12/2025; and in Spain: Baremo tables (Ley 35/2015, de 22 de septiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación).

76 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C: 2024:288, para. 57.

77 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, paras. 47–48.

78 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 57.

79 CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 44.

80 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 43.

to compensation laid down in that provision fulfils an exclusively compensatory function, in that financial compensation based on that provision must allow the damage suffered to be compensated in full." While the CJEU seemed to acknowledge that the prospect of compensation claims could dissuade controllers and processors from infringing the GDPR in a somewhat indirectly, it made it clear that this right is not meant to serve a public, dissuasive and punitive action, and thus took a leap to conclude that the nature of the infringement is a factor without relevance.

Such a leap, however, strikes as somewhat misguided. In cases involving public spreading of private information, the dissuasiveness of remedies plays a significant role not only for the society at large, but also for the one suffering the infringement. In other words, just because certain factors are mentioned as being relevant for setting the level of administrative fines, why does that make them automatically irrelevant for setting the level of compensation, even if we accept that the two rights serve uniquely distinct functions? If one is not to distinguish between a serious, repeated and intentional infringement and an accidental, isolated and minor one – is it too far-fetched to claim that the party committing the former must, at least in general, face measures to dissuade it from future infringements? Or, conversely – if no such dissuasiveness is present, does that not mean that instead of preventing the causes of harm (intentional infringements), one is in effect purely mechanically awarding compensation without regard to any past, present or future context, giving the tortfeasor an opportunity to merely keep infringing the right to data protection as long as they carefully budget for it? How effective are judicial remedies in such cases, in their true substance?

4.2.5. Types of compensation

Article 82 (1) is not limited in scope to material loss, but includes all forms of harm, thereby ensuring that any infringement of data protection rights, whether tangible or intangible, is recognized and remedied. There is nothing in the provision that can be understood as preventing the victim from simultaneously claiming both material and non-material damages, and the level of non-material damages is not dependent on the material damages.

Neither the GDPR nor the Court explicitly limit remedies solely to monetary compensation. The determination of the form and amount of compensation is left to the national courts, which must apply domestic rules while adhering to the principles of equivalence and effectiveness.[81]

81 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, para. 59.

This means that the GDPR does not preclude the possibility of other forms of redress, depending on national laws. Non-material remedies, such as apology or declaration of infringement, can also be relevant as types of non-material remedies in terms of the GDPR. The Regulation contains rights that are in some legal systems considered types of non-monetary remedies, such as rectification[82] and erasure.[83] These measures are particularly relevant in cases where financial compensation alone is insufficient to fully redress the injury.

Some EU member states also recognize symbolic damages, which can create incompatibilities with the Court's interpretation of remedies in the GDPR. French courts often award *franc symbolic* of 1 € at their discretion, even though the plaintiff may seek higher compensation in their claim. Also, in Swiss law, symbolic compensations are awarded in cases of personal violations that have not caused significant consequences.[84]

This question was brought to the CJEU by the German national court in the *Scalable Capital* case.[85] Specifically, the national court asked if minimal compensation, which might be seen as merely symbolic by the injured party or others, is permissible when the damage is of a non-serious nature but still sustained. The Court insists on a substantive remedy corresponding to the actual harm sustained.[86] However, the GDPR does not preclude member states which recognize symbolic damages from offering it to those who are affected by the infringement of a provision, within the remedies provided for in Article 79 of the GDPR, where there is no damage at all.[87]

This was explicitly confirmed in *A v. Patērētāju tiesību aizsardzības centrs*,[88] where the Court provided further nuance, holding that under certain conditions an apology may constitute sufficient compensation for non-material damage, but has emphasized that this form of redress must fully compensate the harm suffered, and cannot be merely symbolic or substitute for financial compensation where the damage remains unaddressed. National courts retain discretion to determine whether an apology achieves full reparation, based on the specific circumstances of each case, thereby respecting the principles of equivalence and effectiveness. In

82 Art. 16 GDPR.

83 Art. 17 GDPR.

84 Article 49 (2) of the Swiss Code of Obligations.

85 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 12.

86 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 59.

87 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, points 91–92.

88 CJEU, case C-507/23, *A v. Patērētāju tiesību aizsardzības centrs*, ECLI:EU:C:2024:854, paras. 30–37.

particular, the Court highlighted that an apology might be appropriate in cases where non-material harm, such as distress, loss of trust, or reputational anxiety, can be meaningfully remedied by a formal acknowledgment and expression of regret. Nonetheless, where harm persists or where the apology does not adequately neutralize the adverse effects suffered by the data subject, this would be insufficient. The ruling thus reinforces that while GDPR remedies are not limited to monetary compensation, any alternative forms must genuinely restore the infringed rights to the greatest extent possible, rather than serving as mere formalities.

4.3. CAUSALITY

4.3.1. Proof of damage

A general principle of tort liability throughout all European legal systems is that there cannot be liability for torts without causality. There are, however, significant differences in the ways that they understand and establish causation.[89] Causation is a flexible concept and allows the member states to exhibit significant margin of appreciation and adapt the GDPR provisions to their own regulations.

The GDPR states that the controller or processor can be exempt from liability only when they "prove that it is not in any way responsible for the event giving rise to the damage".[90] The phrase indicates that EU lawmakers intended to set a very high standard for when a controller can escape liability.

In *Natsionalna agentsia za prihodite*, the CJEU addressed a situation involving a cyberattack on the Bulgarian National Revenue Agency that resulted in the unauthorized disclosure of personal data. The Court addressed the conditions under which controller could avoid liability under Article 82 (3). The CJEU clarified that the mere fact that damage resulted from unauthorized actions by a third party does not automatically exempt the controller from liability. In this case, the proof that the controller was not in any way responsible for the event that caused the damage involved proving that appropriate technical and organizational measures were in place to prevent such breaches, as required by Articles 24 and 32 of the GDPR.[91]

89 Infantino, M., Zervogianni, E., 2019, Unravelling Causation in European Tort Laws, Three Commonplaces through the Lens of Comparative Law, *RabelsZ*, Vol. 83, p. 647.

90 GDPR Art. 82 (3).

91 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C:2023:908, para. 71.

This means that the controller's or processor's responsibility is presupposed unless they prove they were not in any way responsible. This presumption is rebuttable, and it is possible for them to prove otherwise. This reversal of burden of proof protects data subjects as the weaker party, because organizations processing personal data have far greater resources, technical expertise, and access to relevant information compared to the data subject. Any other rule would compromise the effectiveness of the protection.[92]

But does this refer to proof of lack of negligence or lack of causation? The phrase "not in any way responsible" can be interpreted in two ways. A literal interpretation of that provision appears to envisage that any (contributory) negligence or lapse on the part of the controller or processor suffices to exclude the application of the exemption.[93] If responsibility is understood in terms of fault-based liability, proving that they exercised due diligence and adhered to legal obligations (e.g., implementing appropriate security measures) could suffice. This would mean that if they were not negligent, they are hence not responsible. This approach may be more in line with the general tort principles in European legal systems, requiring at least some degree of fault or negligence.

If responsibility is understood more broadly, the controller or processor must demonstrate that their actions (or omissions) were not a cause of the damage. This would mean that, even if there was some failure on the part of the controller of processor, this was not a contributing factor to the harm suffered. The burden of proof is high, requiring clear evidence that they had absolutely no involvement in causing the damage.

In *Krankenversicherung Nordrhein*, the CJEU clarified that establishing liability under Article 82 GDPR requires the existence of fault on the part of the controller. However, this fault is presumed unless the controller can prove that it is not responsible for the event giving rise to the damage. It therefore follows that this article provides for fault-based liability in which the burden of proof rests not on the person who has suffered damage, but on the controller.[94] This interpretation underscores the compensatory nature of Article 82 GDPR and emphasizes that controllers must actively demonstrate their lack of responsibility to avoid liability.

92 Opinion of Advocate General Pitruzzella in: *Natsionalna agentsia za prihodite*, (C-340/21, EU:C:2023:353, point 63).

93 Opinion of Advocate General Collins, 26 October 2023, CJEU, joined cases C-182/22 and C-189/22, point 25.

94 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, paras. 94 and 103.

5. National Tort Rules and Tensions with CJEU Case Law

National tort law frameworks exhibit significant tensions with the presented CJEU case law on the GDPR, highlighting challenges in application and enforcement of EU rules at the national level.

France's Civil Code, in Articles 1240 and 1241, includes the broad concept of *dommage moral* and allows courts to compensate mental or emotional distress,[95] yet French law continues to impose the requirement that such harm be certain, direct, and tightly connected to the defendant's wrongdoing.[96] In practice, courts often rely on standardized point systems, a method that can undermine the demand for individualized compensation outlined by the CJEU in *Scalable Capital*.[97] Although French law accepts non-material harm in principle, reconciling it with recent judgments, such as *VB v. Natsionalna agentsia za prihodite* and *AT*, which forbid *de minimis* thresholds,[98] remains challenging. If the damages are not large enough to deter the infringement of personal data, this opens possibilities for *fautes lucratives*[99] – low compensation amounts that would incentivize tortfeasors to take risks, i.e., not take the necessary level precaution, as they rely on the fact that the damage they will pay will potentially be lower than the cost of due diligence.

Secondary or ricochet harm, where plaintiffs claim compensation for psychological injuries tied to another person's damage, raises similar questions, since the GDPR does not explicitly address indirect damage. By contrast, France's *la perte d'une chance* approach can more readily accommodate fear or anxiety resulting from personal data misuse, aligning with *AT*, which treats even the possibility of data misuse as actionable.[100] However, ensuring that the strict liability for controllers, set forth by the GDPR and acknowledged in *VB v. Natsionalna agentsia za prihodite*,[101]

95 Civil Code of the French, Arts. 1240–1241 (formerly Arts. 1382–1383).

96 See Cour de cassation, 2e civ., 28 May 1954, D. 1954.649 (requiring that harm be certain and direct).

97 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, paras. 31–37.

98 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 71; CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 45.

99 See, e.g., Fasquelle, D., Mesa, R., 2005, Les fautes lucratives et les assurances de dommages, *Revue générale du droit des assurances*, No. 2.

100 On *la perte d'une chance*, see Cour de cassation, 1re civ., 21 November 2006, No. 05-15.690, Bull. civ. I, No. 507.

101 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, point 5 of the operational part of the judgement.

does not conflict with domestic fault requirements remains an ongoing point of contention.[102]

Germany's legal framework presents arguably deeper tensions with the CJEU case law. Section 253 BGB restricts non-material damages to cases expressly authorized by statute,[103] creating a statutory hurdle that does not neatly align with the GDPR's broad mandate under Article 82. German courts' use of *Schmerzensgeldtabellen* seeks to produce consistent awards yet may impede the CJEU's insistence on individualized reparation, most recently confirmed in *Scalable Capital*.[104] In addition, the quasi-punitive "satisfaction function," present in certain *Schmerzensgeld* rulings, conflicts with the Regulation's exclusively compensatory ethos, as explained in *MediaMarktSaturn* and *Krankenversicherung Nordrhein*.[105] Courts must also contend with the *Adäquanztheorie*, which limits liability to reasonably foreseeable consequences.[106] This narrower view of causation can exclude the types of fear or anxiety-based claims upheld by *VB v. Natsionalna agentsia za prihodite* and confirmed in *VX*. Procedural rules further complicate matters: §254 BGB imposes contributory negligence principles, and claimants often bear a heavy burden of proof. While in cases like *AT* the CJEU has clearly stated that no threshold of seriousness should bar compensation,[107] Germany's deep-rooted approach does not readily accommodate intangible harm that does not manifest in a traceable way.

Italian law appears more closely aligned with the GDPR's stance on non-material damage, but still presents its own challenges. Under Article 2059 of the Civil Code, informed by constitutional interpretation, Italian courts can compensate for a wide range of non-pecuniary harms arising from the infringement of fundamental rights.[108] This position coincides with the CJEU's logic in *VB v. Natsionalna agentsia za prihodite*, where the

102 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 68, emphasizing strict liability for controllers under Art. 82 GDPR.

103 Bürgerliches Gesetzbuch (BGB) § 253 (restricting recovery for immaterial damage).

104 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, paras. 29–30 (individualized compensation principle).

105 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 43; CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 56.

106 Bundesgerichtshof (BGH), 23 January 1951, *GSZ* 1/50, BGHZ 2, 263 (defining *Adäquanztheorie*).

107 CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 49 (rejecting threshold for emotional/psychic harm).

108 Italian Civil Code, Art. 2059 (compensation of non-pecuniary damage), read in conjunction with Constitution of Italy, Arts. 2, 3, 32, etc.

controllers' strict liability was articulated, and in *Krankenversicherung Nordrhein*, which stressed that both material and non-material harm must be fully redressed. Italy's predisposition rule, under which defendants are liable even if unaware of the victim's special vulnerability,[109] echoes the near-absolute nature of responsibility in personal data breaches upheld by the Court. The *Barème* system employed by some Italian courts can still pose hurdles if it becomes too rigid. Yet, as long as it remains flexible enough to reflect the particular harm suffered – meeting the requirement in *Scalable Capital* for an individualized approach[110] – Italy largely avoids the pitfalls that Germany and France face with more standardized schemes.[111]

England's law on non-material damage illustrates even further discrepancies.[112] The requirement of "awareness", drawn from cases such as *H West & Son Ltd v. Shephard*,[113] has long shaped awards for pain and suffering, indicating a reluctance to recognize purely anxiety-based or intangible claims. This stands is in stark contrast to judgments such as *VB v. Natsionalna agentsia za prihodite*,[114] which upheld the compensability of "fear experienced by a data subject with regard to possible misuse", and *AT*, which eliminated de minimis barriers in assessing GDPR-related harm. Aggravated damages in English law traditionally factor in the defendant's conduct, reflecting a partially punitive element at odds with the Regulation's exclusively compensatory approach in *MediaMarktSaturn* and *Krankenversicherung Nordrhein*.[115] Meanwhile, the English courts also display reluctance to award damages for psychological distress unless the harm reaches a recognized severity, a stance that diverges from the CJEU's more permissive view of intangible harms. Judicial guidelines, such as the Guidelines for the Assessment of General Damages in Personal Injury Cases,[116] can provide ranges for awards, but *Scalable Capital* suggests that uniform caps or formulaic tables conflict

109 Cass. civ., Sez. III, 31 May 2003, No. 8827, Giur. It. 2003, 2205 (predisposition principle).

110 Trib. di Milano, 8 July 2003, in: *Nuova giurisprudenza civile commentata*, 2004, I, 260 (example of *tabelle di Milano* and personalization).

111 CJEU, case C-456/22, *VX*, EU:C:2024:999, para. 41.

112 The GDPR is retained UK's domestic law as the UK GDPR. However, the CJEU no longer has general jurisdiction over the UK in relation to any acts that have taken place on or after 1 January 2021.

113 *H West & Son Ltd v. Shephard* [1964] AC 326 (HL), pp. 347–349.

114 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 71.

115 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 43; CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 56.

116 See Judicial College, 2022, Guidelines for the Assessment of General Damages in Personal Injury Cases, 16th ed., Oxford, Oxford University Press.

with the principle of fully restoring each individual to the position they would otherwise have occupied.[117]

It seems obvious that the digital frontier calls for a great level of harmonization, and that ensuring predictability, safety and trust in the digital environment must be seen as a priority. The problem, however, is not in the harmonization itself – rather, it is in the way such harmonization, half-coherent as it appears, pays no heed to the differences in national laws, and inserts autonomous terms into systems without drawing any clear lines.[118]

6. Challenges of Fragmented Harmonization of Tort Rules in Data Protection Law

The CJEU's deliberations in the area of non-material damages for infringement have created confusion about where precisely the "GDPR tort law" begins and where it ends.[119]

Although the Court has made it clear that national tort rules determine the level of compensation, they are, by their very nature, inextricably linked with other tort law rules.[120] In other words, one decouples the notion of harm and causality from national law, yet asks for calculation of damages to take place according to such laws. By accepting this approach, a hybrid entity of data protection and tort law is inserted into the legal systems of the European member states.[121]

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117 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 34.

118 See also Angelopoulos, C., 2012, *The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States*, *International Review of Intellectual Property and Competition Law*, Vol. 43, No. 5.

119 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123. para. 5.

120 Laws of contracts and torts in Serbia, Croatia and Bosnia and Herzegovina explicitly state that the purpose of non-material damages is one of the criteria that is taken into consideration when assessing damages. See Art. 200 (2) of Law of Contracts and Torts of Federation of Bosnia and Herzegovina, (Zakon o obligacionim odnosima, *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89, and *Official Gazette of the Federation of BiH*, Nos. 2/92,13/93,13/94; *Official Gazette of Republika Srpska*, Nos. 17/93, 3/96, 39/03, 74/04); Art. 1100 (2) Obligations Act of Croatia (Zakon o obveznim odnosima, *Official Gazette*, Nos. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 155/2023); Art. 200 (2) of Law of Contracts and Torts of Serbia (*Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/2003 – Constitutional Charter and *Official Gazette of the Republic of Serbia*, No. 18/2020).

121 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 4.

In theory, creating a harmonized systemized EU tort law is a laudable effort; anything less, would lead to a patchwork of national laws that is neither consistent nor coherent. Yet, in practice, the Court has created an incoherent framework of its own: the lack of clarity which has left the national courts struggling more than before. Familiar with their national laws, disharmonized as they might happen to be, the courts are attempting to interpret the autonomous system – currently only outlined in broad contours – and to fit its elements in together with other – often hardly reconcilable – principles of their national tort law. The CJEU has attempted to mitigate the issue with a blizzard of cases – with nine rulings in the span of a year and a half – to little success. In the end, the extent of the uncertainty is so great that the Court was asked to invalidate GDPR Article 83 on the grounds of ambiguity.[122] It has refused to do so on the grounds that the referring court did not submit the documentation on the lack of the provision's specificity, declining to rule on the issue.

Instead of a compensation claim being a combined function of the objective assessment of the infringement causing the damage, the subjective consequences are the primary consideration, and given the allocation of burden of proof, under which the controller would have to prove that there was not the slightest breach on their side – establishing infringement becomes a pure formality devoid of context.

The tension is not only present in abstract; it creates serious fault lines across all the elements of a claim, which vary, both to degree and extent, by jurisdiction. For example, it is not immediately apparent how a court that, according to the core principles of its national tort law, awards no compensation for fear of minimal future harm is now to calculate damages under the GDPR?

Beyond country-specific concerns, preexisting rules on procedural and evidentiary thresholds compound the difficulty of incorporating the CJEU judgments. France's requirement of "direct and immediate consequences", Germany's adoption of the *Adäquanztheorie*, and England's demand for tangible proof of harm all contrast with the expansive reach of the GDPR, which the Court has described as capturing various fears, anxieties, and intangible harms even when direct material injury is absent. These diverse national doctrines help explain why certain courts remain cautious about opening the floodgates to a proliferation of claims, which is an underlying worry in Germany, with its strict statutory authorization requirements, and in England, where aggravated damages risk ballooning if courts relax the threshold for psychological injury. At the same time,

122 C-687/21, *MediaMarktSaturn*, paras. 31–34.

Italy and France, though more open to recognizing non-material harm, may over-rely on standardized or symbolic remedies.

In each of these jurisdictions, the CJEU's overarching insistence that no de minimis or seriousness threshold be imposed (*AT*, *VX*) and that controllers face nearly-strict liability for data breaches (*VB v. Natsionalna agentsia za prihodite*) strains against ingrained legislative and procedural traditions. National courts struggle to reconcile their established methods with the Court's emphasis on strictly compensatory personalized redress. Consequently, while the GDPR seeks harmonized outcomes, its broad vision often collides with the particularities of these diverse legal cultures, leading to divergent applications and, at times, friction with judgments, such as *Scalable Capital*, *Krankenversicherung Nordrhein*, *MediaMarktSaturn*, and *UI v. Österreichische Post*.[123]

Until the member states adjust or clarify their tort and procedural rules to better accommodate GDPR liability, the promise of uniformly high standards for data subjects' rights will remain a lofty goal without an anchor. Ultimately, the courts are left with the challenge of seemingly reconcealing the irreconcilable.

7. Conclusion

What on its surface seems to be a well-intentioned drive towards harmonization and uniformity in EU digital law has, in practice, undercut the established structures of law across different member states, without providing a coherent replacement. A framework that was supposed to build clarity has instead generated an "autonomous" layer of rules, creating hybrid legal constructs – a parallel "GDPR tort law", if you will – that national courts will need to reconcile and integrate into their traditional legal systems. The inescapable result is a proliferation of contradictory interpretations, where neither the text of national laws nor the original goals of the European legislation are duly served, and where national laws, or any comparisons between them, lose relevance in favor of ill-conceived and half-baked rules.

123 According to Václav Janeček and Cristiana Teixeira Santos, in *UI v. Österreichische Post* the Court made it even more complicated to seek compensation for liminal harms pursuant to Art. 82 GDPR. This due to the fact that the judgement is open for at least four different interpretations that are capable of reintroducing de minimis threshold of seriousness, which the court wanted to reject. See Janeček, V., Teixeira Santos, C., 2024, The autonomous concept of 'damage' according to the GDPR and its unfortunate implications: Österreichische Post, *Common Market Law Review*, Vol. 61, No. 2, p. 531.

It bears repeating: this article does not advocate for a wholesale rejection of autonomous concepts, nor does it question their utility, nor does it advocate that one should resort to leaving legislative gaps to be filled at the member state level. However, the current approach to regulating the digital realm fails to strike an appropriate balance between complementarity and displacement.

Whether any real benefit emerges from this patchwork remains debatable, especially when the stated pursued objective is to promote clarity and trust in the digital sphere. The unfortunate paradox thus is that in the pursuit of uniformity, European "digital" law has strayed from the very principles of clarity, foreseeability, and integration it once aspired to uphold.

Decades ago, the European Court of Human rights held that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[124] Can we still say that EU digital law is law.

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KA EVROPSKOM PRAVU O ZAŠTITI PODATAKA: SUDSKA PRAKSA SUDA PRAVDE EU I NJEN UTICAJ NA NACIONALNE ODŠTETNE ZAKONE

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APSTRAKT

U ovom radu se analiziraju odredbe o nematerijalnoj šteti zbog povrede prava na zaštitu ličnih podataka prema Opštoj uredbi o zaštiti podataka (GDPR) i njihovo tumačenje u praksi Suda pravde EU. Poseban fokus je na presudama u kojima Sud stvara autonomne, ali nedovoljno precizne pravne pojmove, što dovodi do pravne nesigurnosti i komplikacija u primeni propisa na nacionalnom nivou. Iako je Sud pravde EU procenu iznosa odštete prepustio nacionalnim sudovima, u radu se ističe da je u praksi nemoguće odvojiti uslove naknade štete od postupka određivanja visine odštete.

Ključne reči: GDPR, deliktna odgovornost, nematerijalna šteta, Sud pravde EU.

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ORIGINAL SCIENTIFIC ARTICLE

*Stefan Jovanović**

RECOGNITION AND ENFORCEMENT OF THE BLOCKCHAIN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

Abstract: *Blockchain technology is reshaping a wide range of sectors, from finance and law to art. The rise of blockchain platforms offering "blockchain arbitration" suggests a shift toward faster, cheaper and decentralized dispute resolution. A key advantage often highlighted is the potential for automatic enforcement of decisions using smart contracts. However, since this is only a possibility, many decisions will be enforced through traditional means. Given the inherently global nature of blockchain arbitration disputes, an important consideration is whether their decisions can be recognized and enforced under the New York Convention. This paper explores whether blockchain arbitration decisions qualify as awards enforceable under the New York Convention and whether their decision-making process meets the Convention's enforcement criteria. The author recognizes that the procedural aspect of public policy may be undermined by the way decisions are rendered in blockchain arbitrations.*

Key words: Blockchain Arbitration, New York Convention, Recognition and Enforcement of Arbitral Awards, Public Policy, Smart Contracts, Blockchain Technology, Decentralized Justice System.

1. Introduction: Features of Blockchain Arbitrations

Arbitration has traditionally been the preferred method for resolving commercial disputes. However, due to its characteristics and advantages over litigation,[1] its scope has expanded to include disputes related

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1 On the advantages (and disadvantages) of arbitration, see Knežević, G., Pavić, V., 2013, *Arbitraža i ADR*, 3rd edition, Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 18–21; Stanivuković, M., 2013, *Međunarodna arbitraža*, Belgrade, Službeni glasnik, pp. 29–31; Moses, M. L., 2008, *The Principles and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press, pp. 3–5.

to foreign investments, sports, intellectual property, employment, and any other area where party autonomy plays a significant role and where the parties are free to dispose of their claims. Commercial arbitration itself, as the most typical private dispute resolution mechanism, can be categorized in various ways. Depending on the field in which disputes arise, certain types of arbitration can be further distinguished, such as construction arbitration, consumer arbitration, commodity arbitration, as well as arbitration related to disputes involving smart contracts[2] and crypto arbitration concerning disputes over digital assets.[3]

As a private method of dispute resolution, arbitration continues to be portrayed as the most attractive forum for disputes involving a foreign element, particularly those in which the parties come from different countries and where cross-border enforcement of the award is necessary. The key advantage of arbitration in such cases is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[4] which has been ratified by 172 countries.[5] The Convention provides a limited set of grounds for refusing recognition of an arbitral award, thereby making its recognition and enforcement significantly easier compared to court judgments.

Recently, even laypersons outside the tech industry have become familiar with terms such as cryptocurrencies, digital tokens, blockchain, smart contracts, and Web3. Distributed ledger technology, more commonly known as blockchain technology, along with the associated Web3,

2 A draft of special rules has been introduced by a global arbitral institution, see JAMS, JAMS Smart Contract Clause and Rules, (https://www.jamsadr.com/rules-smart-contracts, 22. 9. 2024).

3 Taylor, E., Wu, J., Li, Z., 2022, Crypto Arbitration: A Survival Guide, *Kluwer Arbitration Blog*, 29 September, (https://arbitrationblog.kluwerarbitration.com/2022/09/29/crypto-arbitration-a-survival-guide, 22. 9. 2024). Some crypto arbitrations have gained prominence on the global stage, such as the one between the world's largest crypto exchange, Binance, and nearly 700 investors. For details on the arbitration and the issues raised, see Montoya, S., 2024, Resolving crypto disputes through arbitration: the Binance case before the Hong Kong International Arbitration Center (HKIAC). *The Law. Mediación y arbitraje*, No. 18, pp. 2–23.

4 UNCITRAL, 2015a, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)*, New York, United Nations, (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf, 23. 4. 2025). Serbia ratified the Convention through the Law on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Official Gazette of the SFRY* – International Treaties, No. 11/81.

5 This makes the New York Convention one of the most successful United Nations conventions in general, not only in the field of international commercial law. New York Convention, n.d., Contracting States, (https://www.newyorkconvention.org/contracting-states, 18. 10. 2024).

is permeating various established industries, revolutionizing the way we conclude contracts, make payments, buy and sell goods, and view art. Predictions suggest that it will also spread to many other sectors, including the real estate market.

Blockchain is a buzzword in both the theory and the practice of dispute resolution.[6] In addition to all the types of traditional arbitration, a new type has recently emerged, which, due to its nature, should be classified into a separate category – blockchain arbitration. Namely, various platforms have appeared on the global stage aimed at resolving disputes on the blockchain, primarily seeking to meet the needs of users in the rapidly growing Web3 industry. The goal is to separate the entire decentralization-driven industry from the hierarchical national courts and to resolve disputes on the blockchain itself in a faster, more efficient, and cost-effective manner. These are not merely theoretical ideas, as data shows that blockchain arbitrations are already being conducted and that a blockchain arbitration decision has been enforced by a national court, albeit through indirect means.[7]

The business community continually seeks more efficient methods of resolving disputes; meaning dispute resolution methods that are both less costly and quicker than traditional court or arbitration proceedings.[8] The

6 New technologies have often sparked innovations in dispute resolution. For example, in China, Internet courts have been established in certain cities, focusing on resolving disputes related to the Internet and new technologies, primarily through online hearings. Spain is currently conducting an analysis of the introduction of specialized courts for blockchain-related disputes. See Álvarez, O. P., Vidal, O. V., Vallespinós, L. D., Unlocking Blockchain Evidence in International Arbitration, *Iurgium*, Vol. 2022, No. 43, pp. 15–30. Moreover, arbitration institutions dedicated to blockchain technology are emerging around the world, with the first established in Japan and the first in Europe located in Poland. This development raises important considerations regarding the potential impact of blockchain technology on traditional arbitration and whether the proliferation of new companies in this sector will lead to an increase in the number of users of conventional arbitration. See Sajjad, R., 2023, Blockchain Arbitration: Promises and Perils, *The American Review of International Arbitration Blog*, (https://aria.law.columbia.edu/blockchain-arbitration-promises-and-perils, 22. 9. 2024).

7 The enforcement of the aforementioned award occurred within a purely domestic arbitration framework and through an indirect method. Following the mandate outlined in the arbitration agreement, the arbitrator in the traditional arbitration setting incorporated the decision from blockchain arbitration, and, as has been the case with any other domestic arbitral awards, it was executed without the requirement of recognition and enforcement. See Sharma, C., 2022, Blockchain Arbitral Award: Potential Challenges in Recognition and Enforcement under the New York Convention, *Revista Română de Arbitraj*, Vol. 16, No. 4, p. 95.

8 Stanivuković, M., Adjudication as a Preliminary Step to Arbitration: A Case of First Impression in Serbia, in: Keča, R., (ed.), 2018, *Harmonisation of Serbian and Hungarian*

blockchain industry features the following characteristics that impact the way disputes should be resolved:[9] (i) decentralization, (ii) removal of intermediaries, (iii) transparency of the transactions, (iv) immutability and security, (v) pseudonymity and anonymity of the users, (vi) efficiency, automation and reduction of operational costs, (vii) the use of cryptocurrencies and tokenization, (viii) innovation and adaptability, and (ix) global reach and influence.

Blockchain arbitration, as an online method of dispute resolution, employs a completely different mechanism for adjudication from traditional methods, such as litigation and arbitration. Its main feature is resolving disputes directly on the blockchain, with the potential accompanying option of automatic enforcement of the decision via a smart contract.[10] Thus, the option of an escrow account is available in small e-commerce disputes, whereby the disputed funds are already held on the platform itself. Once a decision is made, the payment of the awarded funds to the creditor does not depend on the compliance of the losing party. This is a significant advantage of blockchain arbitration.

Law with the European Union Law, p. 138. In an ideal world, the characteristics of the dispute resolution would align with the features of the industry in which the disputes have arisen. Technology, which underpins certain transactions, can become outdated in just a few months and the prices of crypto assets are highly volatile, which necessitates swift action. A particular indicator of this price instability occurred during the so-called "crypto winter" of 2022, which was triggered by a series of preceding events. During that period, investors worldwide reportedly lost USD 2 trillion. See Disparte, D., Walia, M., 2023, 2022 was a hard year for crypto – but it may have been just what the industry needed, *World Economic Forum*, (https://www.weforum.org/agenda/2023/04/2022-was-a-hard-year-for-cryptocurrencies-but-it-may-have-been-just-what-the-industry-needed, 22. 9. 2024). Additionally, the average selling price of non-fungible tokens (NFTs) was USD 6,900 in January 2022, while it dropped to below USD 2,000 by March 2022. See Tan, J. H., 2023, Blockchain "Arbitration" for NFT-Related Disputes, *Contemporary Asia Arbitration Journal*, Vol. 16, No. 1, p. 158.

9 For a dispute resolution forum to be attractive to the blockchain industry, it must meet all these characteristics. Traditional arbitration has consistently demonstrated adaptability and the ability to address the specific needs of various types of users. For a comparison of traditional arbitration with the requirements of users from the Web3 industry, see Jovanović, S., 2023, Arbitration in Smart Contracts Disputes – A Look Into the Future, *Annals of the Faculty of Law in Belgrade*, Vol. 71, No. 4, pp. 767–771.

10 The concept of smart contracts often accompanies blockchain arbitration and can be defined as legally binding agreements in which some or all contractual obligations are defined and automatically executed through a computer program. Smart contracts, including smart legal contracts, aim to follow conditional logic with specific and objective inputs: if "A" occurs, then execute step "B". The definition is from Law Commission, 2021, Smart Legal Contracts, Law Com No. 401, p. 1. See the classification of different types of smart contracts, some of which are more or less "smart" in *ibid.*, pp. 22–23.

The main difference between traditional arbitration and blockchain arbitration lies in who makes the decisions. In the latter, so-called jurors typically decide, and they are generally chosen randomly from a pool of individuals who register to adjudicate a particular dispute, utilizing crowdsourcing. Thus, the parties have no influence over the selection of the jurors, their qualifications, or experience, and often do not even know who they are. The parties also do not have the opportunity to challenge their appointment. On Kleros, which is one of the most well-known and developed platforms for blockchain arbitration, which refer to as "crypto courts" by some authors,[11] jurors are selected from those who have staked the most cryptocurrency (PNK) to participate in adjudicating a particular dispute. Following this, a vote takes place, which is quite simplified, as jurors choose between several potential outcomes of the dispute, demonstrating that the platform is designed for resolving straightforward, binary disputes. The decision is made by majority rule. Jurors are compensated as follows: those who voted against the majority lose their staked cryptocurrencies, while those who voted with the majority receive the cryptocurrencies lost by the others, along with a fee paid by the parties. This decision-making process is conducted using game theory, specifically Schelling points, which involves making decisions based on what one believes other equally informed and rational individuals will decide.[12]

The challenges faced by blockchain arbitration are evident in complex long-term transactions and business projects. High-value contracts of great complexity and duration, such as those in the construction or energy

11 Dylag, M., Smith, H., 2023, From cryptocurrencies to cryptocourts: blockchain and the financialization of dispute resolution platforms, *Information, Communication & Society*, Vol. 26, No. 2, p. 373.

12 While platforms like Aragon use the same decision-making system, other networks, such as Jur and Mattereum, adopt a system that is a step closer to the regulatory framework of international arbitration (such as the New York Convention, the UNCITRAL Model Law on International Commercial Arbitration, etc.) to make their decisions more enforceable worldwide. However, they still lack the flexibility of broader party autonomy and the role of conflict of laws, which are present in classical international commercial arbitration processes. See Lacasa, P., Can Blockchain Arbitration become a proper 'International Arbitration'? Jurors vs. Arbitrators, *Conflicts in Law.net*, (https://conflictoflaws.net/2022/can-blockchain-arbitration-become-a-proper-international-arbitration-jurors-vs-arbitrators, 22. 9. 2024). Certain platforms also incorporate artificial intelligence that can analyze historical data to predict potential outcomes. This is considered an advantage, as it can encourage parties to settle and avoid the entire arbitration process. See Purdue Global Law School, 2023, A Look at the Use of Blockchain Technology in the Arbitration Process, *Purdue Global*, 19 May, (https://www.purduegloballawschool.edu/blog/news/blockchain-arbitration, 22. 9. 2024).

industries, do not involve simple, binary transactions.[13] Therefore, automatic enforcement will generally not be possible. Earlier research has concluded that blockchain arbitration is suitable for low-value and low-complexity disputes, which are typically not suitable for resolution through traditional arbitration.[14] The reasons for this are clearly tied to the characteristics of blockchain arbitration. However, as blockchain arbitration evolves, there is a potential for it to become suitable for resolving disputes arising from long-term, complex and high-value business relationships.[15] Undoubtedly, the winning party will seek to enforce the decision in their favor. With the increase in the value and complexity of the disputes that this type of arbitration can cover,[16] so will the need for its cross-border enforcement worldwide. This is where the previously mentioned New York Convention comes into play.

This paper analyzes whether decisions rendered by blockchain arbitrations can be considered arbitral awards eligible for cross-border recognition under the New York Convention. Furthermore, if the answer is affirmative, the question arises whether a decision made in blockchain arbitration, due to the specific method of selecting decision-makers and their manner of decision-making, meets the requirements of Article 5 of the New York Convention, or whether national courts will refuse to give the decision effect beyond the borders where it was made. To this end, the paper analyzes whether blockchain arbitration, considering its features, is autonomous to the extent that it does not even require the New York Convention (Section 2). Following this, we will explore whether decisions of blockchain arbitration can be regarded as foreign arbitral awards suitable for recognition (Section 3), and whether these decisions meet the conditions for being recognized and enforced under the Convention (Section 4). Given that Kleros is one of the most popular, developed and ambitious platforms,[17] and that a Kleros "arbitral" decision was incorporated into a

13 Sajjad, R., 2023.

14 See the analysis in Jovanović, S., 2023, pp. 777–778.

15 Although blockchain arbitrations, as a decentralized justice system, are designed for blockchain disputes (on-chain), they are not limited to them and can also be used for regular (off-chain) disputes. See Coello, D. M., 2023, The New York Convention on the Enforcement of Decentralized Justice System's Decisions: A Perspective from the Evolutionary Interpretation of Treaties, *ITA in Review*, Vol. 5, No. 2, p. 46.

16 Which is certainly the intention of the developers: Quiros, F., 2020, Federico Ast, cofundador y CEO de Kleros: Blockchain tiene muchas aplicaciones en el ámbito legal, *Cointelegraph*, 10 February, (https://es.cointelegraph.com/news/federico-ast-co-founder-and-ceo-of-kleros-blockchain-has-many-applications-in-the-legal-field, 22. 9. 2024).

17 Due to greater transparency and the large number of documents issued by the platform itself, authors studying blockchain arbitration pay particular attention to Kleros. See Dylag, M., Smith, H., 2023, p. 373.

traditional arbitral award with its seat in Mexico and enforced before the national courts of that country, the primary focus of the research will be on decisions made on this platform.

2. To What Extent is Blockchain Arbitration Autonomous?

Decisions rendered by blockchain arbitration are not based on any national or international law. Moreover, due to the possibility of automatic enforcement against the losing party, opinions have been expressed that an autonomous blockchain legal order is emerging, suggesting that blockchain arbitration itself does not need to rely on existing legal frameworks.[18] Consequently, blockchain arbitration is viewed as autonomous within such perspectives.

The concept of arbitration autonomy, which functions independently of any national legal system, is not new.[19] Nevertheless, it is somewhat implausible to view this autonomy as complete isolation from national systems, as states govern the world through their legislative activities and nothing exists entirely outside their control.[20] Arbitration is a private process with public law functions, and it operates within a framework of relative independence in relation to the courts, which are meant to provide assistance and support.

The concept of "autonomous arbitration" is reiterated in the context of blockchain arbitration, highlighting its independence from states and public interests, while placing strong emphasis on maximizing the autonomy of the parties involved. For arbitration to achieve complete emancipation from the state, it must become a self-sufficient system that does not

18 Chevalier, M., 2021, From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order, *Journal of International Dispute Settlement*, Vol. 12, No. 4, p. 571.

19 In terms of arbitration, three distinct ideas are distinguished: substantive autonomy, procedural autonomy, and total autonomy. See Michaels, R., Is Arbitration Autonomous?, in: Lim, C. L., (ed.), 2021, *The Cambridge Companion to International Arbitration*, Cambridge, Cambridge University Press, p. 115.

20 Michaels, R., 2021, fn. 64: Michaels, R., 2010, The Mirage of Non-State Governance, *Utah Law Review*, p. 31. The autonomy of arbitration is not understood in that sense; instead, it refers to a set of specific policies within state and arbitral institutions that support the arbitration authority. This distinction sets apart states that are attractive arbitration venues and promotes their established arbitration institutions. However, this varies from case to case, depending on the specific state, arbitral institution, the legal issues being addressed and the policies intended to be achieved. See *ibid*., pp. 136–137.

rely on courts or any state law. Closely linked to the autonomy of arbitration is the idea of an arbitral legal order, which encompasses a set of legal principles that are necessary and sufficient for the existence of arbitration. Its source lies in the will of the parties and is independent of all national norms.[21] Attempts to separate arbitration from national states and their laws do not lead to its isolation from international law and conventions, hence, the New York Convention is undeniably crucial for the cross-border existence of arbitration agreements and awards. It appears that, with blockchain arbitration, an additional step is being taken. When discussing blockchain arbitration as an autonomous arbitral legal order, the direction is toward total autonomy, where no legal source from the external world – including the New York Convention – has any influence or compulsion.

In this context, the key question is whether blockchain arbitration can be regarded as fully autonomous, eliminating the need for enforcement assistance from state authorities. This characteristic would exist only if the execution of the decision occurs directly on the blockchain through smart contracts. Achieving a comprehensive ecosystem, where everything takes place in the digital realm, utilizing blockchain, smart contracts, tokens and cryptocurrencies, without requiring any external intervention, is undeniably commendable. If such automatic execution of decisions is possible, then, theoretically, one could conclude that a blockchain arbitral ecosystem exists, which is a *terra incognita* for international arbitration.[22] Conversely, for blockchain arbitral decisions to be enforceable in other states, they must be deemed arbitral awards in accordance with the New York Convention and must fulfill the conditions for recognition and enforcement under that Convention.

3. Can a Decision Rendered by a Blockchain Platform Qualify as an Arbitral Award?

Although various platforms promote their dispute resolution services as blockchain "arbitration", and the term is commonly used in both academic and professional literature, the mere focus on private dispute resolution method does not necessarily mean it qualifies as arbitration in the legal sense recognized by national laws and international conventions. It

21 Steingruber, A. M., 2021, Chapter 4: The Juridical Nature of Arbitration with Particular Regard to its Consensual Nature, *Consent in International Arbitration*, Oxford, Oxford University Press, p. 59.

22 See Ortolani, P., 2019, The impact of blockchain technologies and smart contracts on dispute resolution: arbitration and court litigation at the crossroads, *Uniform Law Review*, Vol. 24, No. 2, p. 434.

is rightly emphasized that distinguishing between arbitration as a concept and arbitration as a legal institution is essential. As a concept, arbitration refers to the process of submitting a dispute to a private individual whose decision the parties have agreed to abide by. As a recognized legal institution, however, arbitration is regulated by both national and international legal frameworks, with the arbitrator's award being final and legally enforceable.[23]

Arbitration always follows trends and, in the pursuit of efficiency, employs modern technologies to facilitate,[24] expedite and enhance the entire process. Hence, the incorporation of blockchain technology and metaverse tools in arbitration is also encouraged.[25] However, is a dispute resolution mechanism that is entirely based on blockchain (on-chain) truly arbitration?

Firstly, it is necessary to start from the basic definitions of the terms arbitration and award. According to Black's Law Dictionary, arbitration is a method of dispute resolution that involves one or more neutral parties chosen by the disputing parties, and whose decision is binding.[26] An award is defined as a final decision or judgment by an arbitrator or jury that assesses damages.[27]

Blockchain arbitration lacks some of the fundamental characteristics of traditional arbitration. For instance, parties cannot freely choose jurors, which is one of the key advantages of arbitration.[28] This results in a loss of influence over the qualifications and nationality of the jurors. Even if such an option was available, the question arises whether

23 Coello, D. M., 2023, p. 48.

24 Sometimes out of necessity, and other times due to trends and efficiency, online hearings are becoming common. See Pavić, V., Djordjević, M., 2021, Virtual Arbitration Hearings: The New Normal?, *Annals of the Faculty of Law in Belgrade*, Vol. 69, No. 3, p. 570.

25 Prominent arbitration conferences are already addressing the issue of arbitration and the metaverse, with one session at the Paris Arbitration Days conducted using metaverse tools. See Chan, E. *et al.*, 2022, Paris Arbitration Week Recap: Metaverse-Related Sessions, *Kluwer Arbitration Blog*, (https://arbitrationblog.kluwerarbitration.com/2022/04/24/paris-arbitration-week-recap-metaverse-related-sessions, 22. 9. 2024).

26 Garner, B. A., (ed.), 2004, *Black's Law Dictionary*, deluxe 8th edition, St. Paul, Thomson West, p. 112.

27 *Ibid.*, p. 147.

28 However, there are also rules of permanent arbitral institutions that, as a rule, provide for the selection of arbitrators to fall within the purview of the institution. See London Court of International Arbitration, 2020, LCIA Arbitration Rules 2020, Art. 5, paras. 6, 7 and 9, (https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020, 24. 4. 2025).

jurors with the necessary qualifications are accessible within the pool of "blockchain arbitrators". On blockchain platforms, parties cannot select the language of the proceedings, the seat of arbitration (which may not even exist), applicable substantive law, and similar factors,[29] which significantly limits party autonomy.

Confidentiality is another key advantage of traditional arbitration. Yet, blockchain arbitration operates like an open court with no safeguards for confidentiality, following a permissionless system. This means that all claims, arguments and even evidence presented by the parties, are recorded in a public, distributed ledger, accessible to anyone.[30] Given that the Web3 community is still largely composed of enthusiasts primarily focused on securing investments for their business ventures, they often meet through forums, social media groups, conferences and networking events. Frequently, they are known by pseudonyms across these various platforms. As a result, other members of the community can discover if a particular member is involved in a dispute, the nature of the dispute, and its monetary value. Such information also becomes readily available to potential investors.[31]

Although some (albeit few) countries recognize the right to appeal arbitral awards, the single-instance nature of arbitration is one of its main features and advantages. In contrast, blockchain arbitration within the Kleros platform allows a dissatisfied party to appeal as many times as they deem necessary – the only restriction being that each appeal has a higher cost. This is because each subsequent appeal is decided by twice as many jurors (plus one to ensure an odd number) as in the previous instance.[32]

Kleros decisions do not need to be thoroughly reasoned. It is only required to provide the parties with a statement explaining the grounds on which the decision was made, along with a brief text clarifying the juror's vote.[33] In contrast, traditional arbitral awards must be reasoned, unless the parties have expressly agreed otherwise.[34] In Kleros, jurors do not apply any national law, rather they resolve the merits of the case using

29 Lacasa, P., 2022.

30 Sajjad, R., 2023.

31 While transparency is a fundamental characteristic of blockchain and a key value in the industry, those who control this data can easily leverage it for their own benefit. Consequently, confidentiality, one of the most significant advantages of traditional arbitration, should not be overlooked.

32 Kleros.io, 2020, *Dispute Revolution: the Kleros Handbook of Decentralized Justice*, Kleros, p. 271, (https://kleros.io/book.pdf, 22. 9. 2024).

33 *Ibid.*

34 Serbian Arbitration Act, *Official Gazette of the Republic of Serbia*, No. 46/2006, Art. 52 (1).

game theory principles. In traditional arbitration, witness statements can be central to establishing facts and assessing credibility, often through oral examination and cross-examination before the tribunal. In blockchain-based arbitration platforms, like Kleros, however, the decentralized, pseudonymous, and text-based nature of proceedings makes it difficult, if not impossible, to conduct meaningful witness examinations. This limitation may reduce the evidentiary depth of such proceedings and, in certain cases, undermine the probative value of the resulting decision, particularly where the facts of the case depend heavily on witness testimony. As the value and complexity of disputes before Kleros increases, similar concerns are likely to arise regarding the use of expert witnesses, whose findings and opinions often play an important role in resolving technically or commercially complex cases.

Comparing blockchain arbitration to traditional arbitration reveals that the former lacks many important features of arbitration.[35] Nevertheless, this does not automatically mean that it cannot be considered a form of arbitral dispute resolution. Arbitration has many variations, and as previously emphasized, it can be tailored to different types of users. For instance, in commodity arbitrations, where speed is prioritized, it is common for a single arbitrator to resolve the dispute, with the appointment left to the institution rather than the parties involved.[36] In investment arbitration, confidentiality is gradually yielding to public interest, leading to the adoption of a convention on transparency,[37] a concept that was previously considered incompatible with arbitration.

Most importantly, blockchain arbitration is based on the parties' agreement to submit their dispute for resolution, therefore, it is a contractually agreed method of dispute resolution, much like traditional arbitration. Just as parties in traditional arbitration agree to follow the rules of various institutions for different types of arbitration, users of blockchain arbitration adhere to the procedural rules of the platform they have chosen. This is where their party autonomy is most evident. The fact that their autonomy is later more restricted than in traditional arbitration does not change the reality that they chose this method. Thus, the use of the

35 Most of the characteristics mentioned in relation to arbitration (e.g., confidentiality) are perceived as essential, but they are not necessarily inherent features of arbitration.

36 See, for example, Belgrade Arbitration Center, 2018, Belgrade Rules on Commodity Arbitration, Art. 15(2) and Art. 16(1), (https://www.arbitrationassociation.org/wp-content/uploads/2021/07/Pravilnik-o-resavanju-berzanskih-sporova.pdf, 27. 4. 2025).

37 UNCITRAL, 2015b, *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (*New York, 2014*) – Mauritius Convention on Transparency), New York, United Nations.

term "arbitration" in the context of blockchain arbitration is not necessarily inappropriate.

However, for parties from different countries, as is common on blockchain as a global network, it is not enough that the mechanism they chose is merely called "arbitration". More importantly, they need the decision to be recognized and enforced globally. The New York Convention enables cross-border recognition and enforcement, so it is necessary to examine whether a blockchain decision can be considered an arbitral award eligible for recognition under this Convention. Guidelines have been developed, offering objective criteria that facilitate the identification of decisions eligible for enforcement under the Convention. An analysis of numerous doctrinal definitions shows that the two primary conditions are that: the decision must be made by an arbitral tribunal, and it must resolve a legal dispute between the parties in a final manner.[38] Gary Born highlights three key elements of an arbitral award: (i) the decision must result from an arbitration agreement that entrusts the dispute to arbitration, (ii) it must meet certain minimum formal requirements, and (iii) it must definitively resolve the merits of the dispute, not merely a procedural issue.[39]

Additionally, the Convention stipulates that the party seeking recognition and enforcement should submit, along with its request, a duly authenticated original of the award or a duly certified copy, as well as the original arbitration agreement or a duly certified copy. [40] As a result, only arbitral awards in written form can be enforced under the New York Convention,[41] meaning that the decisions of blockchain platforms currently do not meet this requirement.

For a final arbitral award to be enforceable, it must be rendered based on a valid arbitration agreement. In blockchain arbitrations, the arbitration agreement may be expressed in the form of a computer code, raising the question of whether it satisfies the formal requirement under the Convention, which mandates that the arbitration agreement be in writing.[42] The provision was adopted in 1958, with no reference to electronic

38 Wolff, R., Article I, in: Wolff, R., (ed.), 2019, *New York Convention: Article-by-Article Commentary*, 2nd edition, pp. 33–34.

39 Born, G. B., 2014, *International Commercial Arbitration*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, p. 2923.

40 The New York Convention, Art. 4.

41 See also Wolff, R., 2019, p. 34.

42 "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term 'agreement in writing' shall include an arbitral clause in a contract or an

communication. However, considering the widespread use of electronic commerce and the functional equivalence approach regarding the form requirement, which underpins the UNCITRAL Model Law on Electronic Commerce,[43] the UNCITRAL Model Law on Electronic Signatures,[44] and the UN Convention on the Use of Electronic Communications in International Contracts,[45] a special recommendation was issued by UNCITRAL on this matter.[46] It explicitly states that Article 2(2) of the Convention should not be applied as a *numerus clausus*. Additionally, Article 7(4) of the 2006 UNCITRAL Model Law on International Commercial Arbitration stipulates that the requirement for a written form can be met through electronic communication, as long as the information on the arbitration agreement is accessible in a way that allows for future reference to that agreement.[47]

From the above, it follows that the written form of an arbitration agreement is flexible, and there is a policy of *in favorem negotii* in place. However, it is necessary to meet the three main purposes for which the written form is required: to serve as proof that the parties agreed to arbitration, to confirm the exact content of that agreement, and to ensure that the parties were fully aware that by opting for arbitration,[48] they were simultaneously excluding the jurisdiction of the courts.[49]

An analysis of the solutions provided by the New York Convention, which sets the highest standard for regulating the formal validity of arbitration agreements, along with national laws that generally relax formal

arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." New York Convention, Art. 2(1 and 2).

43 UNCITRAL, 1999, *Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, New York, United Nations.

44 UNCITRAL, 2002, *Model Law on Electronic Signatures with Guide to Enactment 2001*, New York, United Nations.

45 UN GA Res. 60/21, Convention on the Use of Electronic Communications in International Contracts, UN Doc. A/RES/60/21, (9 December 2005).

46 UNCITRAL, n.d., Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), (https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_award, 23. 4. 2025).

47 Asensio, P. M., 2024, *Conflict of Laws and the Internet*, 2nd edition, Elgar Information Law and Practice, p. 476.

48 The development of technology, particularly artificial intelligence (AI), can lead to issues regarding the declaration of intent in arbitration agreements, in cases when they are concluded through AI.

49 Schramm, D., Elliott, G., Pinsolle, P., Article II, in: Kronke, H. *et al.*, (eds.), 2010, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International, p. 74.

requirements, shows that, due to the flexible and broad interpretation by courts, arbitration agreements in code meet the form requirement under the New York Convention. Therefore, they can be enforced under Articles 1 and 2 of the Convention by national courts.[50] Additionally, based on the "more favourable rule", authors recognize that blockchain arbitration agreements in code would satisfy the form requirement, especially considering the Electronic Communications Convention and the UNCITRAL Model Law on Electronic Commerce.[51] As disputes grow in complexity, traditional written contracts referencing blockchain arbitration, as well as hybrid agreements,[52] will likely become more common, and they will be as valid as other classic written agreements.

Given these dilemmas, it is not surprising that Kleros tested the enforceability of its decisions in an indirect manner. A Mexican court enforced a domestic arbitral award in a dispute where, following the commencement of proceedings, the arbitrator, acting on the instructions of the arbitration agreement, referred the parties to Kleros. After the platform rendered its decision, the arbitrator adopted it as their own award. The Mexican court then enforced this decision like any other arbitral award.[53] This approach allowed the parties to bypass the shortcomings and potential enforcement issues surrounding decisions in blockchain arbitration by incorporating it into a traditional arbitral award.[54] However, while combining traditional and blockchain arbitration may be feasible,

50 For analysis and conclusion, see Sharma, C., 2022, p. 90.

51 See Sanyal, A., 2022, Arbitration Tech Toolbox: Can the New York Convention Stand the Test of Technology Posed by Metaverse Awards?, Kluwer Arbitration Blog, 20 December, (https://arbitrationblog.kluwerarbitration.com/2022/12/20/arbitration-tech-toolbox-can-the-new-york-convention-stand-the-test-of-technology-posed-by-metaverse-awards, 22. 9. 2024).

52 One part of the contract is in coded form while the other part follows the traditional contract format. See Law Commission, 2021, p. 6. In such a contract, the dispute resolution section is often specified in the traditional part of the contract, rather than through code.

53 Sharma, C., 2022, p. 95.

54 While in this case the arbitrator acted pursuant to an explicit mandate from the parties to adopt the decision of the Kleros platform, this approach still raises concerns regarding the professional and ethical duties of arbitrators. The duty to exercise personal, independent, and impartial judgment is a fundamental requirement in arbitration. Even when parties agree to delegate certain decision-making functions, arbitrators must ensure that such delegation does not undermine their core responsibilities or the integrity of the process. Relying mechanically on an external decision without independent and diligent assessment could be seen as incompatible with these duties, potentially affecting the validity and legitimacy of the award. One possible safeguard would be for arbitrators to treat the platform's output as a nonbinding expert report, subject to their own independent assessment, rather than to directly adopt it.

it significantly increases both time and costs compared to the level where blockchain arbitral decisions are enforceable by national courts. These challenges are even greater in a cross-border context.

4. Challenges to Recognition and Enforcement of Blockchain Arbitral Awards

Blockchain arbitrations lack a designated seat, which leads to their characterization as anational or "floating" awards due to the absence of a *lex arbitri*. Anational awards, not tied to any specific country (without a seat of arbitration), pose challenges under the New York Convention. Specifically, Article 1 of the Convention stipulates that it applies to the recognition and enforcement of arbitral awards between individuals or legal entities made in the territory of a country other than in the country where recognition and enforcement are sought. It also applies to awards that are not considered domestic in the country where the recognition or enforcement is sought. Consequently, under the first sentence of Article 1, an award must have a specific affiliation with a state, distinct from the country where recognition is requested. This is logical, as only foreign arbitral awards require recognition. Domestic awards, by contrast, have the same effect as court judgments and are enforceable like any judicial decision in the countries where they are rendered.[55]

However, according to the second sentence of Article 1, the Convention also applies to arbitral awards that are not considered domestic in the country where recognition or enforcement is sought.[56] Based on this provision, there are interpretations in both older[57] and more recent literature[58] that under the New York Convention recognition of anational awards[59] is not impossible. This interpretation implies that, in the country of enforcement, any award that is not domestic may be recognized,

55 Art. 65(1) of the Serbian Arbitration Act stipulates that a domestic arbitral award has the effect of a domestic final court judgment and is enforced in accordance with the provisions of the law governing enforcement proceedings.

56 The New York Convention, Art. 1(1).

57 Rensmann, T., 1998, Anational Arbitral Awards, *Journal of International Arbitration*, Vol. 15, No. 2, p. 55, with references to case law in footnote 128 and literature in footnote 130.

58 For arguments regarding blockchain arbitral awards, see Coello, D. M., 2023, pp. 50–54.

59 There are also the views that the idea of anational decisions should be completely rejected. See Thöne, M., 2016, Delocalisation in International Commercial Arbitration, *SchiedsVZ | German Arbitration Journal*, Vol. 14, No. 5, p. 258.

regardless of whether it was rendered based on foreign national law, *lex mercatoria procesualis arbitralis*, or any other anational legal framework.

The issue of recognizing anational awards does not end with such broad interpretations. Certain national courts may take the view that awards rendered without the application of a national procedural legal framework contradict public policy, which serves as a basis for refusing recognition *ex officio*.[60] Additionally, courts may consider that the inability to review the award in annulment proceedings violates public policy.[61] It is a fact that the public policy clause must be narrowly interpreted and invoked only in cases where the fundamental principles of the state recognizing the award are breached. Nevertheless, the argument that there is no room for applying the public policy clause to anational awards, given that the fundamental principles of procedural fairness are guaranteed by Article 5(1) of the New York Convention,[62] cannot be easily extended to blockchain arbitral awards. In blockchain arbitration, parties often waive many procedural safeguards that are guaranteed by the Convention in favor of a swift, cost-effective, but often rough form of justice. It would not be reasonable to allow them, when contesting recognition, to rely on procedural rules they initially agreed to waive. Since noncompliance with procedural safeguards under Article 5(1) is only considered if raised by a party, the court will not examine these issues in enforcement proceedings. The minimum standard will be the procedural guarantees that are part of the public policy of the state where recognition is sought. Given the uncertainty caused by the lack of a designated seat in blockchain arbitrations, it might be advisable for blockchain platforms to preselect an arbitration seat either in a jurisdiction where the platform is based or in a country that is friendly to blockchain technology and its derivatives (especially cryptocurrencies), in cases where the parties do not specify a seat in a written (or hybrid) agreement.

We believe that, although blockchain arbitrations raise certain concerns regarding compliance with procedural guarantees related to a fair trial, which will be discussed in the following sections, the party dissatisfied with an award cannot later rely on the grounds prescribed in Article 5(1) of the New York Convention, which courts consider only upon the objection of the party challenging recognition. By exercising their autonomy, the party accepted the method of dispute resolution that was

60 Art. 5(2)(b) of the New York Convention, stipulates that the recognition and enforcement of a foreign arbitral award may be refused if the award is contrary to the public policy of the state in which recognition is sought.

61 Rensmann, T., 1998, p. 57, with references to the authors of that view in footnote 139.

62 See *ibid.*, p. 57.

predetermined by the rules of blockchain arbitration. Subsequently invoking those rules as grounds to deny the enforcement of the award could be viewed as an abuse of procedural rights. A dissatisfied party may only invoke the grounds under Article 5(1) that arose during the arbitration proceedings and were not foreseen by the platform's dispute resolution rules. Moreover, only those predetermined procedural rules of blockchain arbitration that violate the procedural guarantees constituting the public policy of the state where recognition is sought could lead to the refusal of recognition and enforcement. The further course of this paper will examine whether the operation of blockchain arbitrations potentially violates the procedural aspect of public policy[63] and whether such awards face a bleak future in the context of cross-border enforcement.

The mandatory provisions of national laws and international conventions that parties cannot derogate from by selecting specific rules have the potential to constitute norms within the procedural aspect of public policy. According to the UNCITRAL Model Law, an arbitrator, before accepting appointment, must disclose any circumstances that may raise doubts about their impartiality and independence.[64] The Serbian Arbitration Act explicitly stipulates that an arbitrator must remain impartial and independent with respect to the parties and the subject matter of the dispute.[65] In traditional arbitration, considerable efforts have been made to ensure compliance with these rules, including the issuance of specific guidelines that, while belonging to soft law, are strongly adhered to in international arbitrations, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.[66]

Under national laws, parties may agree on the procedure for appointing arbitrators.[67] Consequently, if they can delegate the selection to an arbitral institution or an appointing authority, they may also entrust it to a blockchain protocol, provided it follows a predetermined procedure. Nonetheless, a problematic aspect of the Kleros system is the decision-making

63 The procedural aspect of public policy relates to the decision-making process, not the substantive outcome. See Varadi, T. *et al.*, 2020, *Međunarodno privatno pravo*, 19th edition, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 554. The process of enforcing foreign judicial and arbitral decisions verifies whether the minimum standards of fair procedure and the fundamental procedural principles of the recognition country have been observed. See Jakšić, A., 2021, *Međunarodno privatno pravo*, Belgrade, Službeni glasnik, p. 312.

64 UNCITRAL Model Law, Art. 12(1).

65 Serbian Arbitration Act, Art. 19(3).

66 International Bar Association, 2024, IBA Guidelines on Conflicts of Interest in International Arbitration, 25 May.

67 Serbian Arbitration Act, Art. 17(1).

process and the self-selecting mechanism for jurors, which can cast doubt on their independence and impartiality, particularly from a financial perspective. The decisions are made by laypeople who voluntarily apply to resolve disputes, motivated solely by the desire to render a decision that aligns with the majority of other jurors and thus increase their financial stake. Decision-making based on game theory and Schelling points raises further concerns that jurors might not have thoroughly examined all the details of the case, but rather made their decisions based on what they believe an average juror with average attention would conclude from a regular review of the documentation and evidence submitted by the parties. In the Kleros system, jurors who vote against the majority lose their stake, a mechanism designed, according to Kleros, to encourage truthful voting by punishing "dishonest" or dissenting jurors.[68] In traditional arbitral tribunals, it is not uncommon for an arbitrator to hold a dissenting opinion, especially in complex disputes involving numerous legal issues,[69] but such arbitrators are not financially penalized for their differing views.

Contrary to the views of some authors, who argue that the likelihood of a juror having a vested interest in the outcome of the dispute, due to a relationship with one of the parties, is lower than that of arbitrators in traditional arbitration,[70] we believe that the lack of adequate oversight can undoubtedly call into question the integrity of the proceedings. Within the Kleros system, especially when the pool of jurors is limited, there is potential for misconduct. For instance, multiple affiliated individuals could register under different profiles with the highest number of tokens, thereby forming a majority among the jurors.[71] In this way, they could manipulate the outcome by voting contrary to what they believe the majority of other (unaffiliated) jurors will decide. However, they would still "win" because they have formed a majority, allowing them to claim the assets of the other jurors as well as the fees paid by the parties. At the present, the number of potential jurors is not large, and there are Kleros communities on social media (such as Telegram, which is generally popular in the crypto space).

68 Dylag, M., Smith, H., 2023, p. 378.

69 In traditional arbitration, having differing opinions is not prohibited, however, there are varying viewpoints regarding the publication of dissenting opinions. See Rees, P. J., Rohn, P., 2009, Dissenting Opinions: Can they Fulfil a Beneficial Role?, *Arbitration International*, Vol. 25, No. 3, pp. 329–333.

70 Tan, J. H., 2023, p. 159, referring in footnote 77 to Kleros Yellow Paper, supra note 19, p. 9; Ast, F., Dimov, D., 2018, Is Kleros a Fair Dispute Resolution System?, *Kleros*, (https://blog.kleros.io/is-kleros-a-fair-dispute-resolut ion-system, 22. 9. 2024).

71 This is due to the fact that the one who stakes the most tokens has the highest chance of being selected as a juror. See Kleros.io, 2020, *Dispute Revolution: the Kleros Handbook of Decentralized Justice*, Kleros, p. 44.

This raises at least a seed of doubt that some jurors might have the means and opportunity to coordinate and reach a collective decision, which would clearly be against Kleros rules.[72] Although these measures are still insufficient, Kleros is developing mechanisms to prevent manipulation, and any premature disclosure of votes is valid grounds for challenging a decision within the Kleros system.[73]

Some authors suggest that financial bias could be addressed by establishing a control system where external experts would review decisions to ensure they are made for the right reasons, rather than simply aligning with the likely majority opinion.[74] However, we see several shortcomings of this proposal. Key concerns revolve around who would conduct the proposed anonymous peer reviews, how they would be selected, and what should be their qualifications. In the Kleros system, anyone who provides the necessary tokens can potentially serve as a juror, and if external experts are chosen from the same pool, the quality of oversight would be severely limited. Moreover, engaging external experts to review decisions, while possibly reducing the need for an unlimited number of appeals under the current system, would inevitably increase costs for the parties, as it would be a mandatory part of the process rather than a matter of the party's choice to appeal the decision.

The anonymity of jurors[75] (as well as external experts, if that innovation is adopted) is another issue that may prevent the enforcement of an award under the New York Convention. Parties in the Kleros system receive no information about who decided their dispute. Moreover, jurors do not provide statements of independence and impartiality, which are mandatory in traditional arbitration. As a result, parties are unable to request the disqualification of a juror if they suspect bias and conflict of interest. As already emphasized in the section discussing the transparency issues in blockchain arbitration, Web3 communities are still relatively small, thus, despite the use of pseudonyms, a juror might recognize one of the parties in the proceedings and be biased,[76] while the other party remains unaware and unable to address the issue.

72 This issue is also recognized in: Tan, J. H., 2023, p. 162.

73 Lesaege, C., George, W., Ast, F., 2021, Kleros Long Paper v2.0.2, *Kleros*, p. 38.

74 Sharma, C., 2022 with referencing in footnote 129 to DiMatteo, L. *et al.*, (eds.), 2021, Legal Tech and ADR, *The Cambridge Handbook of Lawyering in the Digital Age*, Cambridge, Cambridge University Press.

75 Blockchain platforms must, first and foremost, ensure that the selected juror is an adult, taking into account that national laws require the age of majority for arbitrators. See Serbian Arbitration Act, Art. 19(3).

76 Because they are involved with that party in one of the projects, they are members of the same decentralized autonomous organization (DAO) or a group on social media.

In a case dating back to 1976, the Cologne Court of Appeals concluded that the procedural mechanism for ensuring the impartiality of arbitrators is the challenge procedure against them, and this mechanism can only be effective if the parties know the names of the arbitrators. In this specific case, the mechanism for appointing arbitrators was agreed upon by the parties and involved them ultimately being unaware of who was deciding on the dispute. Both parties participated in the formation of the arbitral tribunal according to the agreed rules and without objection, which served as an additional argument in favor of recognizing the arbitral award. Nevertheless, the Court held that the contractual method of selecting the arbitrator, as well as the behavior of the parties, was contrary to imperative norms that are part of public policy, leading to the rejection of the recognition of the arbitral award.[77]

The question arises whether parties, through their autonomy, can exclude the mandatory provisions of national laws concerning the independence and impartiality of arbitrators, and thus preemptively waive the right to invoke these grounds in proceedings for the recognition and enforcement of an award. This question is particularly relevant given that the parties are aware of the decision-making process, the potential for financial bias, and the lay nature of the decision-making, which lacks guidance from universally accepted principles and does not rely on any national or international law. The answer hinges on whether such an arrangement infringes upon the realm of public policy.

The extent to which parties can influence the selection of decision-makers and the arbitration process itself depends not only on the theory of the nature of arbitration that should predominantly be accepted[78] but also on the nature of the arbitrator's role. The central dilemma is whether the function of the arbitrator is public or private, which is closely tied to the nature of arbitration. Two main theories exist: jurisdictional theory, which likens arbitrators to judges whose authority derives from state sovereignty, and contractual theory, which views arbitrators as service providers whose function stems from the parties' agreement.[79] As is often the case, neither theory, when taken to its extreme, fully captures the

77 For more information about the case before the German court, see Várady, T., 2009, Waiver in Arbitral Proceedings and Limitations on Waiver, *Annals of the Faculty of Law in Belgrade*, Vol. 57, No. 3, p. 18.

78 Gaillard, E., Theories of International Arbitration, in: Kröll, S., Bjorklund, A. K., Ferrari, F., (eds.), 2023, *Cambridge Compendium of International Commercial and Investment Arbitration*, Cambridge, Cambridge University Press, pp. 27–35.

79 Michaels, R., Roles and Perceptions of International Arbitrators, An Introduction, in: Mattli, W., Dietz, T., (eds.), 2014, *International Arbitration and Global Governance, Contending Theories and Evidence*, Oxford, Oxford University Press, p. 68.

essence of arbitration. Just as the hybrid nature of arbitration is often accepted,[80] the arbitrator's role is also hybrid: it includes judicial functions, but the foundation of those functions is the parties' agreement. In practice, party autonomy is increasingly constrained by societal expectations, and the arbitrator's private role is progressively being replaced by a public function, one of whose aims is to protect public interests. Arbitrators are required to uphold public policy. Ongoing discussions, both theoretical and practical, focus on the role of overriding mandatory rules in arbitration. Additionally, human rights are gaining increasing prominence in international commercial arbitration.[81] Arbitrators are, hence, private judges, but their awards are equated with judgments issued by state judges.

In line with the nature of the arbitrator's role, particularly regarding their appointment and the exercise of their function, parties do not have complete freedom. Due to the arbitrator's public function, certain minimum rules must be respected. For instance, an arbitrator must be an adult with legal capacity who is independent and impartial in relation to the parties.[82]

According to Serbian law, it would not be possible for the parties to agree that an arbitrator be a person connected to or dependent on one of the parties involved in the proceedings, as independence and impartiality of the arbitrator are mandatory legal requirements from which the parties cannot derogate.[83] In the case of *Suovaniemi v. Finland*,[84] the European Court of Human Rights (ECtHR) addressed whether parties can waive procedural guarantees in arbitration in advance. In that arbitration proceeding, the arbitrator stated that he had a conflict of interest, but the parties did not object to his appointment. Later, one party sought to annul the award, arguing that it had been revealed during the process that the arbitrator was biased due to the conflict of interest. The national courts did not set aside the award, and the case was brought before the ECtHR,

80 We use the term "often" because courts in many countries accept this approach. However, the cases of accepting contractual or jurisdictional nature of arbitration are far from isolated. See Gaillard, E., 2023, pp. 34–35.

81 Butler, P., Human Rights in International Commercial and Investment Arbitration, in: Kröll, S., Bjorklund, A. K., Ferrari, F., (eds.), 2023, *Cambridge Compendium of International Commercial and Investment Arbitration*, Cambridge, Cambridge University Press, pp. 139–141, 161–163.

82 Conditions are derived from Article 19 of the Serbian Arbitration Act. The Act also adds the condition that an arbitrator cannot be a person who has been sentenced to an unconditional prison term while the consequences of the conviction persist.

83 Stanivuković, M., 2018, p. 142, referencing the Serbian Arbitration Act, Art. 19: "An arbitrator must be impartial and independent in relation to the parties and the subject-matter of the dispute."

84 ECtHR, *Suovaniemi v. Finland*, No. 31737/96.

which concluded that the party had unequivocally waived the condition of the arbitrator's impartiality. According to the ECtHR's understanding, this unequivocal waiver had to be respected, as the party had legal representation, which was a sufficient guarantee that they were aware of the consequences. This was not the first instance where the ECtHR considered it possible to waive procedural guarantees in voluntary arbitration, provided that minimum procedural standards are respected.[85]

In regard to the case before the ECtHR, it is important to mention the IBA Guidelines on Conflicts of Interest in International Arbitration, which, although nonbinding, serve as a benchmark for arbitrators, parties, arbitral institutions, and judges.[86] These Guidelines contain three lists: the Red List, the Orange List, and the Green List, ranked by the severity of the grounds that lead to conflicts of interest or may create the impression that the arbitrator is not independent and impartial. If any ground appears on the Red List (which contains two sub-lists), a conflict of interest exists.[87] Situations that are on the non-waivable Red List represent a gross violation of the principle of independence and impartiality of arbitrators, stemming from the fundamental principle that no one can be their own judge,[88] and should be considered to fall under the institution of public policy. Within this list, one situation noted is where the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the dispute.[89] As previously discussed, jurors in the Kleros arbitration have a financial interest in the outcome of the dispute since their earnings or losses depend on whether the party they voted for wins. By investing tokens to gain the role of a juror, they become directly financially interested in the result of the voting, thereby entering the role of a judge in game theory where their stakes are involved. Just as the losing

85 Kaufmann-Kohler, G., 2009, When arbitrators facilitate settlement: towards a transnational standard, *Arbitration international*, Vol. 25, No. 2, p. 198, with reference to *Suovaniemi v. Finland*.

86 It is noted that the guidelines can also serve as a supplement for national judges in interpreting minimum standards of independence, as they represent a consensus on what is deemed appropriate at the international level. Ali, S., Neuhaus, S. K., The Emergence of Soft Law as an Applicable Source of Procedural and Substantive Law, in: Kröll, S., Bjorklund, A. K., Ferrari, F., (eds.), 2023, *Cambridge Compendium of International Commercial and Investment Arbitration*, Cambridge, Cambridge University Press, p. 544.

87 International Bar Association, 2024, p. 4. It is understood that situations on the Green List do not create conflicts of interest or their appearance. Depending on the facts of the case, situations on the Orange List may raise doubts in the eyes of the parties and must therefore be disclosed by the arbitrators.

88 International Bar Association, 2024, p. 14.

89 International Bar Association, 2024, 1.3.

party forfeits the disputed assets, a juror voting for that party also loses the funds they invested to gain the right to vote. From all this, it is clear that jurors in the Kleros system decide on disputes in which they have a direct financial interest in the outcome.

5. Concluding Remarks

Blockchain technology aims for decentralization, striving to be independent of any central authorities. In this context, blockchain arbitration, rooted in the values of the aforementioned technology, seeks isolation from states and their national courts. However, this goal can only be achieved if decisions are made and enforced directly on the blockchain network, through self-executing smart contracts. In this case, we are dealing with a closed blockchain system where interventions from national courts and their enforcement power, backed by the state, are unnecessary. Moreover, in this scenario, we can talk about a fully autonomous blockchain arbitration that is not only separate from national laws but also from conventions that are key drivers of international arbitration, including the New York Convention. This represents a significant level of development that deserves applause.

Nevertheless, a significant number of decisions made in blockchain arbitrations will concern disputes that exist outside the blockchain network and not on a smart contract. Therefore, the enforcement of these decisions will depend on the willingness of the losing party or an external authority that has the power to enforce them, as is the case with awards from traditional arbitration. By their nature, the disputes will be global, and blockchain arbitrations will need to strive to fall under the scope of the New York Convention if they want to achieve cross-border enforcement of their decisions.

We have primarily examined the Kleros system, recognized as the most advanced and ambitious initiative for delivering decentralized justice. On one hand, despite numerous formal and substantive issues regarding the decisions of blockchain arbitration, we have established that, under the current circumstances or with minimal adjustments, they can be considered arbitral awards under the New York Convention.

On the other hand, if blockchain arbitral awards are submitted for recognition and enforcement before national courts, we are uncertain about their favorable prospects under Article 5 of the New York Convention. National courts may consider that the absence of a seat for blockchain arbitration is contrary to their public policy, as the awards are not

rendered according to any national procedural law and there is no possibility of exercising control over the award through annulment proceedings. However, this problem varies from state to state, while the following issue remains universal.

The juror selection procedure (self-selection) and the manner of their decision-making raise doubts about the financial bias of the jurors concerning the outcome of the dispute. Given that party autonomy is the supreme postulate in arbitration, it can be argued that by consciously choosing blockchain arbitration, the parties waive many procedural guarantees provided by the New York Convention. By opting for blockchain arbitration instead of traditional arbitration, the parties waive their right to invoke violations of procedural guarantees from the Convention that have been overridden by the rules of blockchain arbitration, which courts only consider upon a party's objection. However, they cannot waive the minimal procedural guarantees and principles of fair trial that fall under the public policy of the state of recognition, which the court must consider *ex officio*. Consequently, we have analyzed whether the decision-making process in blockchain arbitration significantly undermines the principle of arbitrator impartiality. Our findings indicate that the existing mechanism, which relies on self-selection of jurors and decision-making based on game theory and the Schelling point, raises concerns about potential financial bias among jurors. This is particularly relevant given that their financial position is contingent upon the outcome of the dispute. If national courts recognize this as well, the cross-border future of blockchain arbitral awards looks bleak.

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PRIZNANJE I IZVRŠENJE ODLUKA BLOKČEJN ARBITRAŽA PREMA NJUJORŠKOJ KONVENCIJI

Stefan Jovanović

APSTRAKT

Blokčejn tehnologija utiče na brojne industrije i oblasti, ne zaobilazeći ni arbitražno pravo. Porast platformi koje nude „blokčejn arbitražu" nagoveštava pomak ka bržem, jeftinijem i decentralizovanom rešavanju sporova. Kao glavna prednost ističe se mogućnost samostalnog izvršenja odluka putem pametnih ugovora. Ipak, budući da je to samo mogućnost, veliki broj odluka biće izvršen tradicionalnim putem. Sporovi koji se rešavaju blokčejn arbitražama su po prirodi globalni, te je potrebno obezbediti prekogranično dejstvo njihovih odluka. Ovaj rad istražuje da li se odluke blokčejn arbitraža mogu smatrati odlukama podobnim za priznanje prema Njujorškoj konvenciji i da li proces njihovog donošenja zadovoljava uslove za priznanje iz Konvencije. Autor u radu prepoznaje da procesni aspekt javnog poretka država priznanja može da bude narušen načinom na koji se donose odluke u blokčejn arbitražama, što je osnov za odbijanje priznanja i izvršenja od strane sudova po službenoj dužnosti.

Ključne reči: blokčejn arbitraža, Njujorška konvencija, priznanje i izvršenje arbitražnih odluka, javni poredak, pametni ugovori, blokčejn tehnologija, decentralizovani pravosudni sistem.

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ORIGINALNI NAUČNI ČLANAK

*Dejan Popović**
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OPŠTI ZAKON O UNIVERZITETIMA IZ 1954. GODINE: PRVI POSLERATNI ZAKON O VISOKOM ŠKOLSTVU U JUGOSLAVIJI I NJEGOVI DUGOROČNI EFEKTI

Prvi deo

Apstrakt: *Posle raskida sa SSSR, jugoslovenski komunisti su počeli da grade drukčiji model socijalizma, u kojem bi visoko obrazovanje dobilo određenu autonomiju, a oni sačuvali monopol vlasti. Od 1952. do 1954. godine vođena je široka rasprava u koju su, pored državnih funkcionera, bili uključeni i univerzitetski profesori i profesionalna udruženja. U njoj su pretresana pitanja nove organizacije univerziteta i fakulteta, uticaja države u upravljanju tim ustanovama, izbora nastavnika i dr. Godine 1954. Savezna narodna skupština donela je Opšti zakon o univerzitetima, koji je odmah postao primenjiv. Tim zakonom su univerziteti i fakulteti dobili status pravnih lica i pravo da donose statute. Njima su upravljali savet (u kojem su profesori i država /sa studentima/ imali po 50% glasova), rektor/dekan i univerzitetska/fakultetska uprava. U državama sukcesorima ex-Jugoslavije i danas se oseća uticaj ovog zakona, a u Srbiji, Hrvatskoj i Severnoj Makedoniji i dalje fakulteti imaju status pravnog lica.*

Ključne reči: Opšti zakon o univerzitetima, svojstvo pravnog lica, univerzitetski savet, rektor, univerzitetska uprava, dekan, univerzitetski nastavnici, studenti, Savez komunista Jugoslavije.

1. Uvod

Sasvim je opravdano da se čitalac pred kojim se nađe ovaj članak zapita koji bi to razlog mogao da bude da se autori uopšte upuste u istraživanje nastanka i efekata jednog propisa donetog pre više od sedam decenija

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od jednopartijske skupštine kroz koju je rukovodstvo Saveza komunista Jugoslavije (SKJ), preciznije Izvršni komitet Centralnog komiteta SKJ,[1] sprovodio monopol svoje vlasti. Istina, bilo je to vreme kada su jugoslovenski komunisti, deset godina po zaposedanju vlasti na talasu pobede partizana u borbi protiv okupatora, njegovih kvislinških saradnika i pristalica monarhije, delom i uz pomoć Crvene armije, mogli mirnije da sumiraju ono što su ostvarili: demontirana je predratna organizacija vlasti, stvarni i potencijalni protivnici nemilosrdno su uništavani (likvidacije bez suđenja, a potom suđenja sa presudama na smrtne kazne ili dugogodišnje robije), kroz različite vidove deprivatizacije (konfiskacija, sekvestar, nacionalizacija) razorena je građanska klasa (buržoazija), sprovedena je etatizacija privrede i umesto tržišne uvedena centralno-planska ekonomija, a uspostavljen je novi sistem vrednosti zasnovan na ideologiji marksizma – lenjinizma, u Staljinovoj interpretaciji. Posle 1948. godine i sukoba sa Informbiroom, rukovodstvo KPJ postepeno dolazi do zaključka da im je, da bi mogli da izdrže svu silinu sovjetskog pritiska, neophodno značajno „prilagođavanje" kako na spoljnom tako i na unutrašnjem planu.

Na spoljnopolitičkom planu započeo je određeni zaokret ka Zapadu kako bi se, uz snabdevanje naoružanjem i donacije (u naturi i u vidu podrške budžetu) za potrebe funkcionisanja privrede, poslala jasna poruka da bi eventualna invazija SSSR i njegovih satelita na Jugoslaviju bila ne samo spremno dočekana nego bi, moguće, otpor bio i neposredno vojno potpomognut od zapadnih sila. Tito i njegovi saradnici u Politbirou bili su svesni da, s jedne strane, takvu podršku moraju da „plate" određenom demokratizacijom u zemlji, ali, s druge strane, nisu želeli da ispuste uspostavljeni monopol vlasti. Jedan od najbližih Titovih saradnika, Milovan Đilas, odstranjen je iz Partije (kasnije je i osuđivan na višegodišnje zatvorske kazne) jer je pomislio da bi „demokratizacija" mogla da Jugoslaviju prevede u red demokratskih država zapadne i južne Evrope.

Na unutrašnjem planu trebalo je, dakle, ne dovodeći u pitanje monopol komunističke vlasti, formulisati drukčije politike od onih koje su se do tada svodile na poslušno kopiranje prakse koju je nudio SSSR; tako se vremenom odustalo od prisilne kolektivizacije poljoprivrede, deo funkcija je sa republičkog prebačen na komunalni nivo, u fabrikama je uvedeno radničko samoupravljanje, a počelo se razmišljati i o uvođenju nekakvog društvenog upravljanja u društvenim delatnostima. Među tim delatnostima posebno mesto su imale nauka i visoko obrazovanje, te je pred sam kraj četrdesetih godina XX veka, 30. decembra 1949. godine, njima posvećen III plenum CK KPJ. U njegovoj su rezoluciji, u delu o školstvu,

1 Do 1952. godine Partija se nazivala Komunističkom partijom Jugoslavije (KPJ), a njeno najuže rukovodstvo činio je Politbiro.

najavljene promene koje će se odvijati na univerzitetima tokom pedesetih godina. Iako se u njoj ponavljaju odranije poznati zahtevi o organizaciji nastave i podizanju ideološko-političkog kvaliteta, pojavile su se i nove parole. Zahtevalo se da se u školama vaspitava „novi, slobodan, odvažan socijalistički čovek čija su shvatanja široka i raznovrsna i kome su tuđi birokratizam i ukalupljenost misli". U skladu s tim, postavljani su zahtevi za debirokratizacijom, decentralizacijom upravljanja u školstvu i „suzbijanjem sektaštva prema starom nastavnom kadru". Ukazano je na greške i priznato da se ljudska svest i mišljenje ne mogu menjati administrativno i nasilno. Novi zadatak je bio „voditi borbu protiv reakcionarnih ideologija i negativnog nasleđa, ali i protiv sektaštva, birokratije i dogmatizma". Tražilo se razvijanje slobodne razmene mišljenja, ali „na liniji borbe za idejnost u nastavi i nauci". Osnovni cilj je i dalje bio da se „osigura pravilno sprovođenje partijske linije".[2]

Stavovi III plenuma CK KPJ pokrenuli su procese koji su značajno promenili akademski život u Jugoslaviji, kako u pogledu sadržaja nastavnih planova i programa tako i u pogledu statusa fakulteta i univerziteta i načina upravljanja njima. Tokom pedesetih godina, posebno na terenu društvenih nauka, ostvarivani su sve intenzivniji kontakti sa kolegama s univerziteta u Zapadnoj Evropi i Severnoj Americi, postajala je dostupnom inostrana literatura, a studijski boravci na tim univerzitetima postali su masovni. Naravno, ideološke komisije univerzitetskih, gradskih i centralnih komiteta vodile su računa o tome da se kojim slučajem na jugoslovenskim visokoškolskim ustanovama ne „zapate" masovno ideje liberalne demokratije; ohrabrivana je naročito akademska komunikacija s onim katedrama na zapadnim univerzitetima na kojima su bili uticajni levo orijentisani profesori, ali se kontakti i s ostalim kolegama nisu mogli sprečiti. Otvaranje države prema svetu, relativno uspešan privredni rast i podizanje standarda života učinili su da traume surovih obračuna prvo sa pripadnicima građanske klase, a zatim unutarpartijske čistke Staljinovih pristalica počnu da postepeno blede. Rukovodstvo SKJ je odlučilo da univerzitetima i fakultetima dâ značajno samostalniji pravni status nego što su ga imali od 1945. godine, kada im je pripala uloga svojevrsnih jedinica u sastavu nadležnog upravnog organa – u NR Srbiji: Ministarstva prosvete (1945–1947), Komiteta za naučne ustanove i visoke/velike škole (1947–1950), odnosno Ministarstva za nauku i kulturu (1950–1954).

U tekstu koji sledi pokazaćemo da je pristupanje izradi prvog posleratnog zakona koji bi uređivao visoko školstvo na nivou celokupne države – Opšteg zakona o univerzitetima – predstavljalo prekretnicu u

2 Bondžić, D., 2002, Univerzitetski vesnik (1948–1956), *Istorija dvadesetog veka*, god. 20, br. 1, str. 171.

razvoju univerzitetskog obrazovanja u svim republikama koje su činile tu državu. Naše su polazne hipoteze da je (1) učešće značajnog broja pripadnika akademske zajednice, a ne samo „društveno-političkih radnika", u pripremi nekoliko verzija nacrta toga zakona doprinelo kako određenoj demokratizaciji univerzitetskog obrazovanja i njegovom uključivanju u (zapadno)evropske akademske tokove tokom narednih decenija – dok su trajali jugoslovenski socijalizam i jugoslovenska federacija, tako i (2) donošenju izvesnih institucionalnih rešenja koja se, i gotovo 35 godina posle raspada SFRJ i posle više od 70 godina od donošenja pomenutog Opšteg zakona, kao njegovo nasleđe nalaze u zakonodavstvu država sukcesora nekadašnje SFRJ. Postoji i treća hipoteza. (3) Nastojanje jugoslovenskih komunista da kontrolišu dokle autonomija univerziteta sme da ide (kako se ne bi ugrozio njihov politički monopol), koje se primećuje u Opštem zakonu, postalo je svojevrstan izazov i za nove, postkomunističke vlasti, pa se neka rešenja uvedena 1954. godine mogu naći i u zakonima o visokom obrazovanju koji su na *ex*-jugoslovenskom prostoru na snazi sredinom treće decenije XXI veka.

2. Univerziteti u vremenu od 1945. do 1954. godine

Opšti zakon o univerzitetima je na junskom zasedanju 1954. godine donela Savezna narodna skupština Federativne Narodne Republike Jugoslavije (u daljem tekstu: FNRJ). To je bio prvi zakon o univerzitetima koji je donet u novoj Jugoslaviji. Do tada u narodnim republikama nisu donošeni republički zakoni o univerzitetu,[3] već su pojedina pitanja organizacije i rada univerziteta bila regulisana posebnim propisima. Tako su u NR Srbiji osnovna i najhitnija pitanja organizacije univerziteta bila regulisana Uredbom o univerzitetskim vlastima i nastavnom osoblju[4] iz 1945. godine, Uredbom o prosvetno-naučnoj struci[5] iz septembra 1947. godine, Uredbom o organima i nastavnom osoblju Univerziteta i velikih škola[6] iz 1948. godine, Uredbom o izboru rektora Univerziteta i velikih škola i dekana fakulteta[7] iz 1948. godine, Uredbom o katedrama na fakultetima Univerziteta i velikih škola[8] iz 1948. godine i izvesnim brojem uputstava. Slično stanje je bilo i u drugim republikama.

3 U Crnoj Gori univerzitet nije postojao do 1974. godine.
4 *Službeni glasnik Srbije*, br. 25/45.
5 *Službeni glasnik NR Srbije*, br. 44/47.
6 *Službeni glasnik NR Srbije*, br. 58/48.
7 *Službeni glasnik NR Srbije*, br. 46/48.
8 *Službeni glasnik NR Srbije*, br. 46/48.

Ministarstvo za nauku i kulturu Vlade FNRJ donelo je 1949. godine Opšta uputstva za izradu republičkih propisa o univerzitetima i velikim školama,[9] na osnovu kojih su pojedine republike donele neke privremene propise o organizaciji i radu ovih ustanova. Ukratko, u ovom vremenu od 1945. do 1954. godine univerziteti i fakulteti u njihovom sastavu nisu imali autonomiju i bili su, ponovimo, obična državna nadleštva. Iako su nazivane „budžetskim ustanovama"[10], one su bile „u ovom periodu sastavni dio državnog upravnog aparata".[11]

U sklopu promena koje su nastupile posle raskida sa sovjetskim modelom,[12] prišlo se pitanju uređenja univerziteta i visokog školstva. Ovo je bilo veoma osetljivo pitanje koje je, ponovimo, imalo svoju unutrašnju i spoljnu dimenziju.

Unutrašnju dimenziju je dodatno obeležio rast visokoškolskih ustanova i broja studenata. Na univerzitetima se povećao broj fakulteta, naučnih i nastavnih ustanova, kao i broj nastavnika i saradnika. Broj univerziteta se povećao na pet u odnosu na predratna tri univerziteta – ona u Beogradu, Zagrebu i Ljubljani. Školske 1946/47. godine otvoren je Univerzitet u Sarajevu, a školske 1951/52. godine Univerzitet u Skoplju.

Takođe, značajno je povećan i broj studenata. Na Univerzitetu u Beogradu u školskoj 1945/46. godini bila su ukupno 14.632 studenta na devet fakulteta. U školskoj 1946/47. godini studiralo je 21.195 studenata, u 1947/48 – 25.038 (na sada već deset fakulteta), a u 1948/49 – 30.099.[13] Početkom pedesetih godina XX veka na Univerzitetu u Beogradu i na tada od njega odvojenim velikim školama – Medicinskoj i Tehničkoj – broj studenata samo se nešto smanjio: u školskoj 1951/52. godini bilo ih je 24.532.[14]

Ukoliko se uzme u obzir statistika za celokupnu FNRJ, videće se da je broj studenata na fakultetima početkom pedesetih godina premašio 50.000; u školskoj 1953/54. godini bila su 51.752 studenta u državi. Broj diplomiranih u FNRJ na svim fakultetima bio je iznad 5.000: 1952 – 5.390,

9 Opšta uputstva se navode u: Napomene uz Nacrt, *Nacrt za opšti zakon o univerzitetima*, 1954, Beograd, str. 20.

10 Popović, D., Mirković, Z. S., 2024, *Istorija Pravnog fakulteta u Beogradu*, t. I–II, Beograd, Pravni fakultet Univerziteta u Beogradu & Službeni glasnik, str. 1109.

11 Festić, I., 1965, Razvoj normativne djelatnosti ustanova, *Godišnjak Pravnog fakulteta u Sarajevu*, god. 13, str. 157.

12 O sovjetskom modelu vid.: Neave, G., Patterns, in: Rüegg, W., (ed.), 2011, *A History of the University in Europe*, Vol. IV: *Universities since 1945*, Cambridge, Cambridge University Press, pp. 35–40.

13 *Statistički izveštaj Narodne Republike Srbije za 1949. godinu*, 1950, Beograd, str. 248.

14 *Statistički godišnjak N. R. Srbije za 1951. god.*, 1952, Beograd, Zavod za statistiku i evidenciju, str. 299.

1953 – 5.434, a 1954 – 5.802. Nastavnog osoblja (redovni i vanredni profesori, docenti i honorarni nastavnici) u FNRJ u školskoj 1953/54. godini je bilo ukupno 2.165; od tog broja 154 bile su žene. Pomoćnog nastavnog osoblja (asistenti, honorarni i ostalo) u istoj školskoj godini je bilo 2.101, od toga 510 žena, što govori o tendenciji porasta broja žena u univerzitetskom osoblju u posleratnoj Jugoslaviji.[15]

Donošenje zakona o univerzitetima su izazvale i potrebe novog socijalističkog društva kome su bili potrebni sposobni, obrazovani i odgovorni stručnjaci. To novo socijalističko društvo, koje više nije bilo zasnovano na sovjetskom modelu, tražilo je svoje mesto u saobraćaju sa drugim državama i kulturama. Da bi bili uključeni u međunarodne tokove, jugoslovenski univerziteti su morali dobiti odgovarajući status u svojoj zemlji. Otuda se pojavila i eksterna dimenzija pitanja novog uređenja visokog školstva. Posle devet godina direktnog upravljanja nad univerzitetima, kao običnim državnim nadleštvima, trebalo im je dati samostalnost i autonomiju. Kakvu i koliku – bilo je veliko pitanje u režimu koji nije trpeo institucije na koje nije mogao uticati.

3. Nacrti zakona o Univerzitetima

3.1. TEZE ZA ZAKON O UNIVERZITETIMA U FNR JUGOSLAVIJI

Prvi sastanak Komisije za izradu saveznog zakona održan je februara 1952. godine i tada je zaključeno da savezni zakon treba da bude „opšti", dakle okvirni zakon koji će dati osnovne postavke zajedničke za sve univerzitete u FNRJ, a da će ga republički zakoni dalje razrađivati. U tom cilju Komisija je formulisala nekoliko osnovnih pitanja koja bi savezni zakon trebalo da reguliše: zadatak univerziteta, odnos između univerziteta i državne uprave, odnos između univerziteta i fakulteta, organi univerziteta, nastavno osoblje, režim studija, nastava i naučni rad na univerzitetu, administracija univerziteta i službenički status nastavnog osoblja. Tako je nastao dokument pod naslovom Teze za Zakon o univerzitetima u FNR Jugoslaviji,[16] koji je sadržao smernice za rad na tom saveznom zakonu.

U pogledu zadatka univerziteta, Komisija je zauzela stav da je univerzitet organ koji treba da ima svoje operativne funkcije jer to zahteva i dotadašnja praksa decentralizacije i sve veće osamostaljenje nižih orga-

15 *Statistički godišnjak FNRJ 1955*, 1955, Beograd, Savezni zavod za statistiku, str. 320, 325, 324.

16 Arhiv Jugoslavije, fond 318 – Savezni sekretarijat za obrazovanje i kulturu, fascikla 60 – Visoko školstvo, jedinica opisa 87 – Opšti zakon o univerzitetima (u daljem tekstu: AJ, 318, 60, 87).

na (fakulteta) koji dobijaju na taj način sve širi delokrug rada. O prirodi univerziteta u Komisiji su se formirala dva gledišta. Po prvom, osnovna samoupravna jedinica je fakultet jer „samouprava postoji tamo gde se radi – a to je fakultet, koji je radno telo, dok je univerzitet veštačka tvorevina – prinudna organizacija stvorena iz racionalnih razloga (obavljanje zajedničkih funkcija fakulteta koje se iz razloga celishodnosti prenose s organa uprave na univerzitet). Po ovom shvatanju univerzitet je samo koordinaciono telo. Po drugom mišljenju, univerzitet nije prinudna organizacija nego samoupravno telo iste prirode kao i fakultet. To su dve istovrsne ustanove čije nadležnosti treba razgraničiti u korist operativne kompetencije fakulteta". Komisija je izabrala neki srednji put – da je univerzitet organ sa operativnim kompetencijama kao i fakulteti (nije samo koordinaciono telo).

U pogledu karaktera autonomije univerziteta, Komisija je smatrala da je to administrativna samouprava i da je zato pravno sredstvo „prema nadzornom organu – pravo prigovora Prezidijumu – sasvim opravdano".

U pogledu upravnog nadzora, Komisija je zauzela stav da bi intervencija uprave trebalo da postoji samo u slučaju nezakonitih akata univerzitetskih organa. Ovakve akte nadzorni organ bi obustavljao i dostavljao Prezidijumu da ih on ukine. „U ostalim bitnim slučajevima (izbor rektora, dekana, nastavnog osoblja i sl.) treba ostvariti odnos saglasnosti – jedan organ predlaže, a drugi daje saglasnost. Kod ovih akata davanja saglasnosti ne treba dati pravo prigovora: Nadležni organ daje ili ne daje saglasnost, a na njegovu odluku ne može se činiti prigovor."

Odnos između univerziteta kao celine i fakulteta „izražava se kroz zajedničko rešavanje konkretnih nastavno-naučnih i organizacionih pitanja od strane fakultetskih i univerzitetskih organa, kao što su: pitanje nastavnog plana i programa, osnivanje novih ustanova, unutrašnja organizacija fakulteta, raspisivanje konkursa za izbor nastavnog osoblja, naučne stipendije, šefovi katedara, itd". Kod rešavanja svakog od ovih pitanja Komisija je zauzimala određeni stav, negde se opredeljujući za jedno rešenje, negde ostavljajući mogućnost izbora između dva rešenja. Tako bi rad na programu nastavnih predmeta trebalo pre svega prepustiti katedri, unutrašnju organizaciju fakulteta trebalo bi regulisati uredbama ili pravilnicima fakulteta, a ne unositi u Zakon, pitanje izbora nastavnika pak mora da bude propisano u Zakonu. Komisija je bila za ponovni izbor profesora: „Zbog autoriteta samog profesora" (*sic!*). I nastavlja: „Ako se pređe na ponovan izbor (a ne na unapređenje – *autori*) onda bi uklanjanje nastavnika bilo samo zbog političke nepodobnosti, te bi i tu trebalo izostaviti kompetenciju univerzitetskog saveta." Potvrda izbora nastavnika pripadala bi nadležnom državnom organu kao i do tada.

U delu pod naslovom „Organi univerziteta i fakulteta", koji je, po svemu sudeći, sastavni deo Teza, govori se najpre o stanju pre rata, koje se boji tamnim bojama: „Jedna od karakteristika stare predratne strukture univerzitetskih organa bila je mnogobrojnost organa koji su rukovodili univerzitetom. Univerzitetom su pre rata rukovodila tri organa: 1) Univerzitetsko veće, 2) Univerzitetski senat, 3) Univerzitetska uprava." Podseća se da je posle oslobođenja došlo do ukidanja sva tri predratna univerzitetska organa i „uspostavljen je svega jedan nov: univerzitetski savet", a docnije i univerzitetska skupština. Ti organi bi trebalo i da ostanu, kako se kaže, uz fakultetske savete kao organe na fakultetima. O predratnoj strukturi univerzitetskih organa je zapisano da je imala „izrazito staleško-esnafski karakter", da su „pojedini redovi univerzitetskih nastavnika imali isključiv uticaj na rad i razvoj univerziteta, dok su, s druge strane, čitave kategorije univerzitetskih nastavnika bile lišene skoro svakog uticaja na rad i razvoj univerziteta". Tako su, na primer, „članovi sva tri doratna rukovodeća univerzitetska organa tj. univerzitetskog veća, univerzitetskog senata i univerzitetske uprave mogli da budu i bili samo redovni univerzitetski profesori". „Punopravni članovi fakultetskih saveta mogli su biti i bili samo redovni i vanredni profesori, docenti nisu bili članovi saveta na pojedinim fakultetima." To se posle rata menja i, po mišljenju autora Teza, s pravom se širi krug onih koji učestvuju u radu fakultetskih saveta na docente, predavače, honorarne nastavnike i asistente. Zdušno se podržava da to bude ozakonjeno i budućim Opštim zakonom o univerzitetima. Izlažu se modaliteti o načinu učešća asistenata u radu fakultetskih saveta.

U dokumentu se navodi da su po predratnim propisima rektor, prorektori, dekani i prodekani mogli da budu i uvek i bili samo redovni profesori univerziteta. Posle rata, kako se kaže, omogućeno je da prorektori univerziteta i prodekani fakulteta mogu biti i vanredni profesori, „a nešto docnije omogućeno je da vanredni profesori mogu biti i dekani fakulteta, a za prodekane da mogu biti birani i docenti". Saveznim zakonom o univerzitetima trebalo „bi legalizovati ova prava mlađim redovima nastavnika" i „učvrstiti ono što je već do sada u pojedinim republikama učinjeno na razbijanju predratne staleško-esnafske zatvorenosti rukovodećih univerzitetskih organa". U odbranu predratnog univerziteta, kome pisci Teza pežorativno pripisuju „staleško-esnafski karakter", treba reći da je on bio utemeljen na poštovanju akademske hijerarhije u skladu sa najboljim tradicijama evropskih univerziteta; nastavnicima u nižim zvanjima pružan je tako podsticaj za usavršavanje i napredovanje.

Pisci Teza ističu da karakteristika „nove organizacije univerzitetskih organa koja je do sada izgrađena po pojedinim republikama je u tome što je veći značaj i veća uloga data kolegijalnim univerzitetskim organima

(univerzitetskoj skupštini, univerzitetskom savetu) nego individualnim kao što je bilo ranije rektoru, dekanu itd".

Odlučivanja o najvažnijim pitanjima života i rada univerziteta spada u nadležnost univerzitetske skupštine koju čine svi nastavnici. Ističe se da njenu nadležnost treba proširiti na donošenje statuta univerziteta, potvrđivanje statuta fakulteta, raspravljanje načelnih pitanja o nastavnom i naučnom radu itd. Otvoreno je pitanje učešća asistenata u radu univerzitetske skupštine, pitanje većeg ili manjeg stepena samostalnosti fakulteta u odnosu prema univerzitetu kao celini itd.

Jedan deo Teza je naslovljen „Nastavno i pomoćno nastavno osoblje univerziteta (vrste – izbor – prava i dužnosti)". Kao vrste nastavnog osoblja navode se: redovni profesori, vanredni profesori, docenti, predavači i honorarni nastavnici. I pored jake tendencije u redovima univerzitetskih profesora, kako se kaže, da se zvanje univerzitetskog predavača ukine, praksa, navodno, zahteva da se ono ne samo zadrži nego i da se ustanove i nove kategorije univerzitetskih nastavnika. Pominje se da je na Sveučilištu u Zagrebu ponovo uvedeno zvanje privatnog docenta (koje je tamo, kako znamo, došlo još u XIX veku sa nemačkih, preciznije austrijskih, univerziteta).

Navodi se da postoje tri vrste pomoćnog nastavnog osoblja: lektori, stariji asistenti i asistenti. Ove kategorije ne bi trebalo proširivati nego samo u zakonu preciznije definisati pojedina od ovih zvanja i uslove napredovanja.

Kod izbora univerzitetskih nastavnika i asistenata posebno se naglašava načelo javnosti: javni konkurs (kao i do tada), javnost referata na osnovu kojih se vrši izbor itd. Prema odredbi člana 19. Zakona o univerzitetima iz 1930. i člana 105. Opšte uredbe univerziteta iz 1931. godine mogao je vanredni profesor bez konkursa biti izabran za redovnog profesora ako je novim radovima stekao naučnu kvalifikaciju za redovnog profesora.[17] To je bilo sasvim prirodno u situaciji kada je vanredni profesor, pored redovnog, uživao stalnost i nije podvrgavan ponovnom izboru.

Pominje se i da kod izbora nastavnika ne učestvuju samo nastavnici te i više kategorije, nego da učestvuje i kategorija nastavnika iz čijih se redova kandidat bira u višu kategoriju nastavnika (dakle, da docenti učestvuju u izboru vanrednog profesora odnosno vanredni profesori u izboru redovnog profesora). Predloženo je, takođe, da se od 1945. godine uvedene privremenost i smenjivost određenih kategorija nastavnika (docenata i predavača) prošire i na vanredne i redovne profesore, koji bi bili birani na pet godina.

17 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, priredio Baralić, D. T., 1967, Beograd, Naučna knjiga, str. 263, 305.

U korpusu arhivske građe koja je u vezi sa Tezama za izradu saveznog zakona o univerzitetima pažnju privlači deo teksta koji je naslovljen „Odnos između nadležnog organa republičke državne uprave (saveta) za nauku i kulturu i univerziteta odnosno fakulteta". Taj deo teksta se sastoji iz četiri člana. U prvom je propisano sledeće: fakulteti i univerziteti su samoupravne naučne i nastavne ustanove; osnovna samoupravna ustanova jeste fakultet; univerzitet je ustanova u koju su udruženi fakulteti; „univerzitet ima u nadležnosti poslove od zajedničkog interesa za fakultete, a koji su zakonom stavljeni u njegovu nadležnost". U drugom članu je propisano da Savet za nauku i kulturu vrši nadzor u pogledu zakonitosti rada univerziteta. U skladu sa tim ima sledeća prava prema univerzitetu: a) predlaže zakon o univerzitetu i njegove izmene; b) daje saglasnost na izbor rektora i prorektora; c) utvrđuje opšte smernice u pogledu prosvetne politike i izgradnje stručnih kadrova; d) obustavlja nezakonite akte univerzitetskih organa (skupštine, saveta i rektora) i dostavlja ih prezidijumu republičke skupštine na konačnu odluku. Savet za nauku i kulturu obezbeđuje materijalna sredstva za rad univerziteta i unosi ih u svoj predračun, kao samostalni deo predračuna prihoda i rashoda univerziteta. U trećem članu je propisano da Savet za nauku i kulturu ima sledeća prava prema fakultetima: predlaže uredbe o fakultetima, potvrđuje izbor nastavnika i asistenata, daje saglasnost na izbor dekana i izmenu važnijih delova nastavnog plana i režima studija i ukazuje na nezakonite akte. Savet za nauku i kulturu je dužan da obezbedi materijalna sredstva za rad fakulteta. Predračun prihoda i rashoda fakulteta, kao deo univerzitetskog predračuna, ulazi u predračun Saveta za nauku i kulturu. U četvrtom članu je propisano da protiv akata univerzitetskih organa o ukidanju ili poništavanju nezakonitih akata fakulteta, fakultetski savet ili dekan mogu podneti prigovor Savetu za nauku i kulturu. Protiv takvog akta Saveta za nauku i kulturu prigovor se podnosi prezidijumu republičke skupštine. „Izvan prava koja su zakonom utvrđena za Savet za nauku i kulturu, univerzitet odnosno fakulteti samostalno odlučuju o svim poslovima nastave, naučno istraživačkog rada, školskog i studentskog rada."[18]

Ukratko, Teze su bile osnovne smernice za rad na tekstu Zakona o univerzitetima. Suština Teza je bila da novi, socijalistički univerzitet treba da bude napravljen na drugačijim temeljima od onih na kojima je bio izgrađen predratni univerzitet, koji je imao punu autonomiju (što je značilo nemešanje države u rad univerziteta, osim u onim tačkama gde je država u okviru preovlađujuće liberalno-demokratske koncepcije uređenja društva nužno doticala univerzitetski život), na kome su poštovane univerzitetska hijerarhija i akademske slobode.

18 AJ, 318, 60, 87.

3.2. PRVI I DRUGI NACRT

U toku meseca avgusta 1952. godine Savet za nauku i kulturu Vlade FNRJ dostavio je umnožen Nacrt zakona o univerzitetima savetima za prosvetu, nauku i kulturu narodnih republika na diskusiju.

U arhivskoj građi je sačuvan akt „Spisak davalaca primedbi na prvi Nacrt zakona o univerzitetima", koji su navedeni *in extenso*.

Iz NR Bosne i Hercegovine primedbe su dali Naučno društvo BiH u Sarajevu, Udruženje univerzitetskih nastavnika i naučnih radnika BiH, Nastavni zbor Pravnog fakulteta u Sarajevu, udruženja univerzitetskih nastavnika Poljoprivredno-šumarskog, Medicinskog i Filozofskog fakulteta, Veterinarski fakultet, Tehnički fakultet, Društvo inženjera i tehničara NR BiH, Savjet za prosvjetu, nauku i kulturu NR BiH (potpisao ministar) i Odbor za visoke škole i naučne ustanove toga tela.

Iz NR Hrvatske stigle su primedbe Odbora za visoke škole i naučne ustanove Savjeta za prosvjetu, nauku i kulturu NR Hrvatske, Senata Sveučilišta u Zagrebu, udruženja sveučilišnih nastavnika sa svih devet fakulteta (Medicinski, Filozofski, Tehnički, Prirodoslovno-matematički, Farmaceutski, Veterinarski, Pravni, Ekonomski i Poljoprivredno-šumarski fakultet) i iz Društva nastavnika Sveučilišta, visokih škola i saradnika naučnih ustanova.

Iz NR Slovenije primedbe su stigle iz Odbora za znanost i visoke škole Saveta za prosvetu i kulturu NR Slovenije, Saveta Univerziteta u Ljubljani, Saveta Tehničke visoke škole u Ljubljani, Medicinske visoke škole u Ljubljani, Društva nastavnika visokih škola i naučnih radnika, Društva pravnika Slovenije, Fakulteta za rudarstvo i metalurgiju u Ljubljani, Saveta za zakonodavstvo i izgradnju narodne vlasti NR Slovenije i Akademije za glumu u Ljubljani.

Iz NR Srbije su stigle primedbe iz Udruženja univerzitetskih nastavnika i Odbora za visoke škole i nauku Saveta za prosvetu, nauku i kulturu Vlade NR Srbije, kao i od predsednika Saveta za prosvetu, nauku i kulturu Vlade NR Srbije.

Iz NR Makedonije primedbe su dostavljene sa postojeća četiri fakulteta (Pravno-ekonomski, Filozofski, Medicinski i Poljoprivredno-šumarski fakultet).

U navedenim institucijama i telima, a u izvesnoj meri i putem štampe, vođena je veoma živa, svestrana i temeljita rasprava. Sačinjena su obimna i detaljna mišljenja o Nacrtu, sa sugestijama, predlozima izmena i dopuna, koja su upućena sastavljaču Nacrta.

U arhivskoj građi je sačuvan dokument „Sistematizovane primedbe na Nacrt zakona o univerzitetima“[19] na 33 kucane strane. To je pregled koji sadrži sistematizovane važnije primedbe principijelnog karaktera, koje su učinjene na Nacrt zakona o univerzitetima (Prvi nacrt), na osnovu kojih je izrađen Drugi nacrt tog zakona. Uz pojedine primedbe odnosno predloge u zagradi je označeno i od koga dolaze.[20] „Uz svaki član data je i napomena u kojoj je izneseno u čemu je glavna razlika između prvog i drugog nacrta odnosno koje su primedbe i predlozi usvojeni.“

„Prispele primedbe prodiskutovane su na desetoj sednici Saveta za nauku i kulturu Vlade FNRJ 12. novembra 1952. god., te je, po pojedinim načelnim pitanjima, Savet zauzeo svoj stav. Na osnovu zaključaka Saveta i dobijenih primedbi, posebna komisija je izradila novi tekst nacrta.“ Novi, Drugi nacrt nastao je početkom 1953. godine i nazvan je Opšti zakon o univerzitetima jer je u primedbama kazano da bi „zakon trebalo da bude opšti, da ne ulazi suviše u detalje, tj. da sadrži samo opšte principe na osnovu kojih će republike donositi svoje republičke zakone“.

Oba nacrta je izradila posebna komisija u Savetu za nauku i kulturu Vlade FNRJ.

Taj Drugi nacrt opšteg zakona o univerzitetima imao je 47 članova podeljenih u osam glava (odeljaka). Ovde će biti izložena njegova sadržina, kao i važnije izmene i dopune u odnosu na Prvi nacrt.

U *prvoj glavi*, „Opšte odredbe“, u članu 1. propisano je da su univerziteti „naučne i najviše nastavne i vaspitne ustanove“ u FNRJ, „kojima je društvena zajednica poverila da putem nastave i naučnog rada

- spremaju studente za visokokvalifikovane stručnjake i pripremaju ih za samostalan rad u struci dajući im potrebna teoretska i praktična znanja;
- unapređuju nauku i doprinose razvoju naučne misli;
- uvode studente u metode naučnog rada i podižu naučni podmladak;
- vaspitavaju studente u duhu ljubavi i odanosti prema svojoj socijalističkoj otadžbini za aktivne radnike i pregaoce u izgradnji socijalizma;
- učestvuju u kulturnom, privrednom i tehničkom razvoju i izgradnji zemlje“.

Odredbom člana 2. opredeljeno je da univerziteti i fakulteti „samostalno odlučuju o pitanjima svoga života i rada“, a da stoje pod opštim

19 AJ, 318, 60, 87, Sistematizovane primedbe na Nacrt zakona o univerzitetima, str. 1–2.

20 Iz tehničkih razloga davaoci primedaba i predloga označeni su kombinacijom rimskih i arapskih brojeva (rimski broj označava republiku, a arapski broj davaoca primedbe iz dotične republike).

nadzorom republičkog organa nadležnog za prosvetu i nauku. Stav 2. izrekom kaže: „Univerziteti i fakulteti su pravna lica." Taj stav je bio novina. Predlog da se naglasi da su univerziteti i fakulteti samostalne ustanove i pravna lica došao je od Senata Sveučilišta u Zagrebu, Pravnog fakulteta u Zagrebu, Društva nastavnika Sveučilišta, visokih škola i saradnika naučnih ustanova u Zagrebu, Saveta Univerziteta u Ljubljani i od Saveta za zakonodavstvo i izgradnju narodne vlasti Vlade FNRJ.

U članu 3. predviđena je obaveza univerziteta i fakulteta da upoznaju javnost o svom radu, s obzirom na to da su njihovi zadaci i delovanje od značaja i interesa za čitavu društvenu zajednicu. Član 4. je propisao da se univerziteti i fakulteti osnivaju i ukidaju zakonima narodne republike. Stav 2. je predviđao statute univerziteta i fakulteta, koji su imali da regulišu pitanja njihove organizacije i rada i pitanja osnivanja i organizacije njihovih naučnih i nastavnih ustanova.

Druga glava bila je posvećena organima univerziteta i fakulteta. Organi univerziteta su univerzitetska skupština, univerzitetski savet i rektor. Organi fakulteta su fakultetski savet i dekan (član 5). Senat Sveučilišta u Zagrebu je smatrao da „bi bilo pravilnije da se univerzitetska skupština, univerzitetski savet i fakultetski savet nazivaju: univerzitetsko veće, univerzitetski senat i fakultetsko veće".[21] Ovo nije bilo usvojeno jer donosioci odluka, po svemu sudeći, nisu bili skloni predloženoj terminologiji, koja je korišćena pre rata.

Univerzitetska skupština je najviši organ univerziteta. Njen sastav bi se određivao propisima narodne republike (član 6). Pitanje sastava univerzitetske skupštine je izazvalo brojne uzajamno suprotne primedbe i predloge. Da li treba usvojiti posredni (delegatski) ili neposredni sistem, ko bi bili delegati i tako dalje? Savet za nauku i kulturu Vlade FNRJ, na svojoj sednici od 12. novembra 1952. godine, „stao je na gledište da se pitanje učešća pomoćnog nastavnog osoblja, tj. asistenata, u radu univerzitetske skupštine, zbog praktičnih političkih pitanja prepusti republičkim propisima, jer je problem takav da tu ne mora da preovladava jedinstveni princip".[22]

Učinjeno je više primedbi u pogledu širine nadležnosti univerzitetske skupštine. Postojali su predlozi da se njena nadležnost veoma suzi. Međutim, Komisija ih nije usvojila i samo su učinjene male korekcije u prvobitnom tekstu.[23]

Univerzitetska skupština bi raspravljala i rešavala osnovna pitanja univerziteta, a naročito opšta pitanja naučnog i nastavnog rada, te donošenje statuta univerziteta (koji bi potvrđivao nadležni republički organ) i

21 AJ, 318, 60, 87, Sistematizovane primedbe na Nacrt zakona o univerzitetima, str. 1–6.

22 *Ibid.*, str. 7.

23 *Ibid.*, str. 8–9.

potvrđivanje statuta pojedinih fakulteta, biranje rektora i prorektora, preračun prihoda i rashoda i dr.

Univerzitetska skupština bi se sastajala po potrebi, a najmanje jedanput godišnje. Sazivao bi je rektor – sam ili na zahtev ovlašćenih predlagača (univerzitetskog ili fakultetskog saveta, odnosno jedne četvrtine članova skupštine) (član 8).

Univerzitetska skupština je, ako se uzmu u obzir njene nadležnosti, njen sastav i položaj prema drugim univerzitetskim organima, bila zamišljena kao najviši i glavni organ samoupravljanja na univerzitetu, u skladu sa tada proglašenom idejom o samoupravljanju radnih ljudi i građana. Pokazaće se, međutim, da je u konačno usvojenom tekstu Opšteg zakona ona izostavljena sa liste univerzitetskih organa upravljanja i pojavljuje se samo kao telo koje bira rektora i prorektora i redovno se sastaje jednom godišnje radi pretresa izveštaja o radu univerziteta. Budnom partijskom oku nije moglo da promakne pitanje kako bi država („društvena zajednica") ostvarivala kontrolu nad univerzitetskom skupštinom, telom kojem su poverene brojne važne nadležnosti, a bez svojih predstavnika u njemu, posebno u svetlu činjenice da su među univerzitetskim nastavnicima komunisti i dalje činili manjinu. Zato se najveći broj gorenavedenih nadležnosti skupštine (donošenje statuta univerziteta, izjašnjavanje o statutima fakulteta, propisivanje pravila o disciplinskoj odgovornosti studenata, usvajanje predračuna prihoda i rashoda univerziteta i dr.) u konačnoj verziji Opšteg zakona o univerzitetu našao u delokrugu rada univerzitetskog saveta.

Univerzitetski savet u Drugom nacrtu sačinjavali su rektor, kao predsednik, prorektori, dekani i prodekani svih fakulteta (član 9). Pokazaće se u daljem tekstu da je sastav tog univerzitetskog organa upravljanja, kada su mu kasnije bitno proširene nadležnosti na račun skupštine univerziteta, u konačnoj verziji Opšteg zakona o univerzitetu promenjen uključivanjem jednog broja eksternih članova.

Univerzitetski savet iz Drugog nacrta raspravljao bi i rešavao sva zajednička pitanja univerziteta, a posebno pitanja naučnog i nastavnog rada svih fakulteta, nastavnih planova i režima studija, izbora nastavnika i pomoćnog nastavnog osoblja, izveštaja koji rektor podnosi skupštini, osnivanja i ukidanja nastavnih i naučnih zavoda i instituta, organizacije rada univerziteta kao celine, života, rada i vaspitanja studenata i dr. (član 10). U odnosu na prvobitni tekst u Prvom nacrtu, Komisija je učinila izvesne izmene u formulacijama i unela nove tačke 5 i 8.[24]

Rektor je trebalo da predstavlja univerzitet i upravlja njegovim poslovima u skladu sa odlukama univerzitetske skupštine i univerzitetskog

24 *Ibid.*, str. 10–12.

saveta. Rektor i prorektori bi se birali na dve školske godine, i to rektor iz reda redovnih, a prorektori iz reda redovnih i vanrednih profesora. O izboru rektora i prorektora izveštavao bi se republički organ nadležan za prosvetu i nauku. Ukoliko ovaj organ ne bi izrazio svoju nesaglasnost u roku od 15 dana od dana obaveštenja o izvršenom izboru, izbor bi se smatrao punovažnim (član 11).

Fakultetski savet je bio najviši organ fakulteta i sačinjavali bi ga nastavnici, honorarni nastavnici i predstavnici pomoćno-nastavnog osoblja (čiji bi broj i način izbora odredio statut fakulteta) (član 13). Pošto je Savet za nauku i kulturu Vlade FNRJ na svojoj sednici od 12. novembra 1952. godine odlučio da ukine zvanje predavač, rečju nastavnici bili su obuhvaćeni redovni i vanredni profesori i docenti.[25]

Fakultetski savet bi rešavao sva važnija pitanja fakulteta, a naročito: donošenje statuta, nastavnih planova i programa, briga o nastavnom i naučnom radu i podmlatku, briga o izvođenju i kvalitetu nastave, biranje dekana, prodekana i drugih rukovodilaca fakultetskih ustanova, izbor nastavnika i pomoćnog nastavnog osoblja, predračun fakulteta, predlaganje komisija za odbranu doktorske disertacije i dr. (ukupno 21 tačka – čl. 14).

U odnosu na prvobitni, u Drugom nacrtu u ovaj član su ušle četiri nove tačke, i to tač. 6, 12, 15. i 17, „kao i na kraju dva nova stava o pravu pomoćnog nastavnog osoblja da pri pretresanju izvesnih određenih pitanja učestvuje u raspravljanju i radu fakultetskog saveta kao i da sa pravom glasa učestvuje u izboru, razrešavanju i opozivanju dekana. Vršeno je takođe spajanje pojedinih tačaka, a u pojedinim tačkama vršene su izvesne izmene u formulacijama".[26]

U cilju unapređenja nastave i naučnog rada i povezivanja rada fakulteta „sa društvenom i privrednom problematikom i praksom: fakulteti sazivaju obavezno jedanput godišnje konferencije na kojima učestvuju – pored nastavnog i pomoćno-nastavnog osoblja fakulteta – saradnici fakultetskih ustanova, predstavnici studenata, kao i predstavnici ustanova i društvenih organizacija odgovarajućih struka" (član 15).

Dekan bi trebalo da predstavlja fakultet i rukovodi njegovim radom u skladu sa odlukama fakultetskog saveta. Dekan i prodekani se biraju svake školske godine, i to dekan iz reda redovnih i vanrednih profesora, a prodekani iz reda redovnih i vanrednih profesora i docenata. O izboru dekana i prodekana izveštava se republički organ nadležan za prosvetu i nauku. Ukoliko ovaj organ ne izrazi svoju nesaglasnost u roku od 15 dana od dana obaveštenja o izvršenom izboru, izbor se smatra punovažnim (član 16).

25 *Ibid.*, str. 14.

26 *Ibid.*, str. 16.

Kolegijalni organi univerziteta i fakulteta donose odluke javnim glasanjem. Izbor rektora, prorektora, dekana i prodekana vršio bi se tajnim glasanjem (član 17).

Treća glava je bila naslovljena „Naučni i nastavni rad". Univerziteti i fakulteti razvijaju naučni i istraživački rad u institutima, zavodima, laboratorijama, seminarima, klinikama, oglednim dobrima i drugim ustanovama (član 18). Taj član je bio novina, u odnosu na Prvi nacrt. Nastava na univerzitetu se ostvaruje putem predavanja u vidu osnovnih i specijalnih kurseva, vežbi, seminara, praktičnih radova, terenske prakse, samostalnog rada studenata i drugih oblika rada (član 19). Mogu se organizovati posebni kursevi za specijalizaciju stručnjaka iz prakse i diplomiranih studenata (član 20). Stav 2. toga člana takođe je bio novina u odnosu na Prvi nacrt.[27] U cilju saopštavanja postignutih naučnih rezultata univerziteti i fakulteti i njihove ustanove izdaju zbornike naučnih radova, naučne časopise, biltene naučnih saopštenja kao i druga posebna izdanja (član 21).

Četvrta glava je sadržala odredbe o nastavnom i pomoćno-nastavnom osoblju. Nastavnici univerziteta su lica kojima se poverava vršenje određene društvene funkcije u cilju ispunjavanja zadataka koji su ovim zakonom postavljeni univerzitetima. Pri izboru nastavnika ceniće se njihova stručna i naučna sposobnost kao i vaspitno-pedagoška podobnost. Poveravanje društvene funkcije nastavnicima i pomoćno-nastavnom osoblju univerziteta vrši se na određeno vreme (član 22). Ovim je bilo usvojeno gledište da je u pitanju obavljanje društvene funkcije i da to onda mora biti na određeno vreme.

Nastavnici univerziteta bili bi, ponovimo, redovni profesori, vanredni profesori i docenti. Pomoćno-nastavno osoblje su asistenti i lektori. Propisima narodne republike mogla su se „odrediti i druga potrebna zvanja" (član 23). Član 24. je doživeo novu redakciju u odnosu na prvobitni tekst i glasio je:

> „Za nastavnike univerziteta može biti izabrano lice koje se naučno bavi problemima svoje struke i koje ima samostalne naučne i stručne radove.
>
> Za asistente i drugo pomoćno-nastavno osoblje može biti izabrano lice koje je pružilo dokaza o svojim sposobnostima za naučni i stručni rad. Kandidati za ova zvanja moraju, po pravilu, imati prethodnu praksu u odgovarajućoj struci."

Posebni uslovi za pojedina zvanja tek je trebalo da budu propisani u zakonima narodnih republika i u statutima univerziteta i fakulteta.

Nastava je mogla biti poverena i honorarnim nastavnicima, takođe na određeno vreme. Oni su morali ispunjavati propisane uslove za vršenje

27 *Ibid.*, str. 18–19.

nastavničke funkcije. Honorarni nastavnici su imali prava i dužnosti nastavnika (član 25). Ovaj član je „prestilizovan i dopunjen. U drugom stavu potpuno je izostavljena odredba kojom se honorarnim nastavnicima oduzima aktivno i pasivno biračko pravo u organima univerziteta i fakulteta".

Nastavnici bi bili birani na pet godina, a pomoćno-nastavno osoblje na tri godine. Po isteku tog vremena mogli su biti ponovo birani. Prvi nacrt opšteg zakona o univerzitetima je bio predvideo da „redovni profesor izabran dva puta postaje stalan". Drugi nacrt je propisao da redovni profesor posle pet godina provedenih u tom zvanju podnosi fakultetskom savetu izveštaj o svom nastavnom i naučnom radu, o kojem bi fakultetski savet raspravljao i rešavao. Pozitivnom odlukom fakultetskog saveta redovni profesor bi postajao stalan u svom zvanju (član 26). Povodom redakcije ovog člana pojavilo se veoma mnogo primedaba i predloga, koji su se uglavnom odnosili na sledeća pitanja: 1) koje kategorije nastavnika obuhvatiti reizbornošću, 2) rokovi za reizbornost i 3) da li reizbornost putem konkursa ili sistemom podnošenja izveštaja. Povodom prvog pitanja izneti su razni predlozi za ponovni izbor i protiv njega, o kategorijama nastavnika i pomoćnog nastavnog osoblja koje bi podlegale ponovnom izboru, odnosno koje ne bi itd. U pogledu rokova za reizbornost, postojali su predlozi koji su, u principu, za nastavnike iznosili pet godina, a za pomoćno-nastavno osoblje tri godine. U konačnoj redakciji, Komisija je iz Prvog nacrta prihvatila reizbornost i za nastavno i za pomoćno-nastavno osoblje, kao i iste rokove reizbornosti – pet i tri godine. Razlika u odnosu na Prvi nacrt je bila u tome što je u pogledu redovnih profesora umesto sistema ponovnog tj. još jednog izbora (kao što je predviđao Prvi nacrt) za postizanje stalnosti usvojen sistem podnošenja izveštaja.[28]

Odredbe o postupku izbora nastavnika i nastavno-pomoćnog osoblja iz Prvog nacrta izazvale su veliku pažnju u javnoj diskusiji i brojne primedbe i predloge povodom sledećih pitanja: da li ponovni izbor vršiti putem konkursa ili bez konkursa; kakvi stručnjaci treba da budu referenti, koliko treba da ih bude i u kom roku oni moraju dati ocenu primljenih radova; kako obezbediti poštovanje principa javnosti; ko ima pravo da glasa pri izboru u pojedina zvanja; načina učešća državnog organa u potvrđivanju, odnosno odbijanju izbora i roka u kome treba da donese tu odluku. Komisija je usvojila, u principu, predložena rešenja u Prvom nacrtu, uz sledeće izmene i dopune u Drugom nacrtu: u članu 27. je usvojeno da referenti budu stručnjaci iz uže ili srodne oblasti, a ne samo stručnjaci iz uže oblasti; u članu 29, prema novoj formulaciji, pri izboru docenta ne učestvuju i predstavnici pomoćnog nastavnog osoblja, već samo redovni i vanredni profesori i docenti; u članu 31. je dodato da nadležni državni

28 *Ibid.*, str. 22–23.

organ kome se dostavlja izbor na saglasnost „donosi svoju odluku u roku od 30 dana".[29]

Članovi 27–31. propisali su postupak izbora. Izbor bi se vršio na osnovu javnog konkursa, koji bi raspisivao fakultetski savet sa rokom od najmanje 30 dana. Fakultetski savet bi određivao najmanje dva referenta za ocenu radova prijavljenih kandidata. Propisano je bilo i da referenti budu stručnjaci iz uže ili srodne oblasti za koju je konkurs raspisan, i oni su mogli biti kako nastavnici univerziteta tako i naučni i stručni radnici van univerziteta (član 27). Referat je trebalo objaviti najmanje 30 dana pre sednice fakultetskog saveta na kojoj bi se vršio izbor. U tome vremenu bi stručna udruženja, ustanove i pojedinci mogli „dostaviti fakultetu stručne i druge za izbor važne primedbe u pogledu kandidata ili samog referata". Primljene primedbe bi dekan saopštavao referentima koji bi ih razmatrali i iznosili na fakultetski savet. Lica koja bi dala primedbe mogla su biti pozvana da ih usmeno iznesu pred fakultetskim savetom (član 28). Izbor nastavnika i pomoćno-nastavnog osoblja vršio bi se na sednici fakultetskog saveta. Pri izboru redovnih profesora pravo glasa bi imali redovni i vanredni profesori. Pri izboru vanrednih profesora i docenata pravo glasa bi imali redovni i vanredni profesori i docenti. Pri izboru pomoćno-nastavnog osoblja pravo glasa imali bi nastavnici i predstavnici pomoćno-nastavnog osoblja koji su članovi fakultetskog saveta (član 29). Izbor nastavnika i pomoćno-nastavnog osoblja fakultetski savet bi dostavljao univerzitetskom savetu koji bi davao svoje mišljenje o izabranom kandidatu. „Sve izbore univerzitetski savet, sa svojim obrazloženim mišljenjem, dostavlja na saglasnost organu republike za pitanja prosvete i nauke koji donosi svoju odluku u roku od 30 dana" (član 31).

Član 30. je otvorio mogućnost da „istaknuti stručnjaci i naučni radnici mogu biti birani za redovnog i vanrednog profesora i pozivom". U tom slučaju bi se primenjivali svi ostali propisi koji važe i za izbor putem konkursa.

U članu 32. bila je predviđena disciplinska odgovornost nastavnika i pomoćno-nastavnog osoblja za neizvršenje dužnosti, povredu ugleda univerziteta i druge disciplinske prekršaje pred disciplinskim sudovima (propisima narodne republike trebalo je regulisati organizaciju i delovanje disciplinskih sudova).

Po pitanju starosne granice za prestanak funkcije nastavnika univerziteta, u javnoj diskusiji je izneto više predloga: a) da maksimalna granica bude 65 godina kao u Prvom nacrtu (to su predložili Senat Sveučilišta u Zagrebu, Udruženje sveučilišnih nastavnika Ekonomskog fakulteta u

29 *Ibid.*, str. 23–27.

Zagrebu, Savet Tehničke visoke škole u Ljubljani i Društvo pravnika Slovenije); b) da se maksimalna granica poveća na 70 godina (to je bio predlog Udruženja univerzitetskih nastavnika u Beogradu i Odbora za visoke škole i nauku Saveta za prosvetu, nauku i kulturu Vlade NR Srbije), odnosno da se u izuzetnim slučajevima može produžiti do 70 godine (to su predložili Senat Sveučilišta u Zagrebu, Savet Tehničke visoke škole u Ljubljani i Društvo pravnika Slovenije); c) da se propisivanje maksimalne granice ostavi republičkim propisima (to je predložilo Udruženje sveučilišnih nastavnika Pravnog fakulteta u Zagrebu). Na kraju, odredbe člana 33. su ostale onakve kakve su bile i u Prvom nacrtu. Nastavniku univerziteta prestajala je funkcija sa navršenom 65. godinom života. Ukoliko potrebe nastave to zahtevaju, fakultetski savet, u saglasnosti sa organom narodne republike nadležnim za prosvetu i nauku, „može ova lica pozvati za honorarne nastavnike" (što ne dira u njihovo pravo da budu penzionisani kada se steknu uslovi). Ovaj poziv važio je jednu školsku godinu i mogao se obnavljati.

Nastavnicima i pomoćno-nastavnom osoblju univerziteta mogla je „prestati funkcija zbog stručne i pedagoške nesposobnosti, kao i zbog moralne nepodobnosti, i pre isteka vremena na koje su birani". Fakultetski savet bi donosio odluku o tome, koju bi imao potvrditi organ narodne republike nadležan za prosvetu i nauku. Pored fakultetskog saveta, predlog za prestanak funkcije po ovom osnovu mogao je dati i univerzitetski savet (član 34). U javnoj diskusiji je bilo primedaba „da ovaj član treba uopšte da otpadne, a naročito ako se zadrži ponovno biranje nastavnika". Iz Prvog nacrta je izbačena mogućnost da predlog može dati i republički organ nadležan za prosvetu i nauku.[30]

Peta glava je bila posvećena studentima. Status studenta bi se sticao upisom na fakultet. Upisati su se mogla „lica koja su položila završni ispit potpune srednje škole". Posebnim je propisima trebalo odrediti uslove za upis svršenih učenika srednjih stručnih škola na pojedine fakultete. Strani državljani su se mogli upisati na fakultet po odobrenju republičkog organa nadležnog za prosvetu i nauku (član 35). Studenti su bili dužni da posećuju predavanja, vežbe, seminare i ostale oblike rada i polažu ispite, prema propisima fakulteta (član 36). Studenti su mogli osnivati svoja stručna, kulturna i druga udruženja i „iznositi svoje poglede, predloge i želje po pitanjima koja se tiču rada na univerzitetu i položaja studenata" (član 37). Član 38. je propisao:

> „U celokupnom svom radu i društvenom životu studenti su dužni da se pridržavaju pravila univerzitetskog života i utvrđenog unutrašnjeg reda i propisa, da izgrađuju i čuvaju lik socijalističkog studenta i da čuvaju ugled univerziteta.

30 *Ibid.*, str. 27–28.

> Za povredu dužnosti i ugleda studenta, studenti odgovaraju disciplinski."

Posebnim propisima je trebalo urediti pravo studenata na zdravstvenu i socijalnu zaštitu, pitanje stipendija, saobraćajnih i drugih povlastica i ostala pitanja koja se tiču položaja studenata (član 39).

Status studenta univerziteta bi prestajao završetkom studija, ispisom, isključenjem i gubitkom građanskih prava za vreme dok taj gubitak traje.

Šesta glava je bila naslovljena „Finansijska i materijalna sredstva". Univerzitet je imao samostalan predračun prihoda i rashoda, dok su fakulteti imali svoj predračun prihoda i rashoda u sastavu predračuna prihoda i rashoda univerziteta (član 41). Naredbodavac za izvršenje predračuna univerziteta je bio rektor, a za izvršenje predračuna fakulteta dekan (član 42). U odnosu na Prvi nacrt, gde se upotrebljavao termin „budžet", u Drugom nacrtu je usvojen *terminus technicus* „predračun prihoda i rashoda".

U *sedmoj glavi* („Administracija") u članu 43. propisano je da administrativne, tehničke i materijalne poslove obavlja sekretarijat univerziteta (rektorat), odnosno fakulteta (dekanat). Ovim poslovima rukovodi sekretar univerziteta, odnosno fakulteta pod nadzorom rektora, odnosno dekana. Postavljanje i razrešavanje administrativnog osoblja bilo je dato u nadležnost sekretara. Za sekretara je moglo biti izabrano lice koje ima fakultetsku spremu. U primedbama je postavljeno pitanje da li administrativno i tehničko osoblje treba da postavlja sekretar ili rektor, odnosno dekan ili sekretar u saglasnosti sa rektorom, odnosno dekanom. Postojao je i predlog da pravo postavljanja administrativnog osoblja može imati sekretar, ali u saglasnosti sa rektorom, odnosno dekanom, dok bi se postavljanje i razrešenje tehničkog osoblja (a po jednom predlogu nižeg administrativnog osoblja) trebalo prepustiti sekretaru. (Kasnije, u Opštem zakonu o univerzitetima, ovo ovlašćenje sekretara je otpalo jer je bilo u nadležnosti rektora, odnosno dekana).

U *osmoj glavi* su bile „Prelazne i završne odredbe". Najpre je u članu 44. predviđeno da će propisi narodnih republika odrediti u kojim će se rokovima izvršiti ponovni izbor nastavnika i pomoćno-nastavnog osoblja zatečenog na univerzitetu na dan stupanja na snagu ovog zakona. Potom je odredio da se ponovni izbor nastavnika i pomoćno-nastavnog osoblja, odnosno izveštaj redovnih profesora, kojima je od poslednjih izbora već proteklo vreme predviđeno članom 26. ovog zakona, „ima izvršiti najdalje u roku od dve godine, a svih ostalih najdalje u roku od tri godine od dana stupanja na snagu ovog Zakona". U javnoj diskusiji o Prvom nacrtu iznete su brojne primedbe povodom ovih odredbi, ali one nisu usvojene.

Republičkim propisima je trebalo regulisati pitanje nastavnika zatečenih u zvanju predavača (član 45). Odredbe ovog zakona bi se primenjivale

neposredno do donošenja republičkog zakona (član 46). Članovi 45. i 46. su bili novi u Drugom nacrtu.[31] Na kraju, u članu 47. stoji da Zakon stupa na snagu danom objavljivanja u Službenom listu FNRJ.[32]

Ovim rečima je pisac Četvrtog nacrta opisao prva dva nacrta:

> „Ovi nacrti predviđali su proširenje samoupravnosti univerziteta putem uvođenja univerzitetske skupštine kao najvišeg organa univerziteta i fakulteta, davanje sve više društvenog karaktera univerzitetu kao ustanovi s posebnom društvenom funkcijom, specijalnim sistemom izbora lica kojima se poverava vršenje ove funkcije i posebnim sistemom obaveštavanja javnosti o njegovom radu, kao i razvijanje univerziteta kao naučno-istraživačkih ustanova. O ovim nacrtima vođena je vrlo živa i svestrana diskusija preko pola godine, naročito u redovima univerzitetskog nastavnog osoblja. Diskusija je zaoštravala sve probleme i znatno doprinosila da se dođe do boljih rešenja."[33]

Kao primer kritičkog promišljanja pojedinih rešenja iz ovih nacrta navodimo neke od stavova rektora Univerziteta u Beogradu profesora Vukića Mićovića, proistekle posle rasprave u Rektoratu, održane u aprilu 1953. godine.[34] On je posebno kritikovao odredbu da izbor rektora potvrđuje nadležni državni organ i tražio da u izboru redovnih profesora učestvuju samo redovni profesori, u izboru vanrednih profesora redovni i vanredni profesori, a u izboru docenata svi nastavnici.

3.3. TREĆI I ČETVRTI NACRT

Posle donošenja Ustavnog zakona od 13. januara 1953. godine u Odboru za prosvetu Saveznog izvršnog veća (u daljem tekstu: SIV) izrađen je *Treći nacrt* opšteg zakona o univerzitetima. On je imao šest delova (I osnovne odredbe, II nastava i naučni rad, III fakultetski nastavnici, asistenti i drugi fakultetski saradnici, IV studenti, V upravljanje fakultetima i univerzitetom, VI prelazne i završne odredbe), raspoređenih u 45 članova. Bio je objavljen u listu *Borba* 27. juna 1953. godine.[35] Nakon toga je usledila javna rasprava

31 *Ibid.*, str. 31–33.

32 I na Drugi nacrt su stigle primedbe (zaključno sa 23. majem 1953. godine) Savetu za nauku i kulturu Vlade FNRJ, koje su sistematizovane. Vid. AJ, 318, 60, 87, Sistematizovane primedbe na Drugi nacrt opšteg zakona o univerzitetima, str. 1–35. U tom korpusu građe je i Prilog 1 – Spisak davalaca primedbi i Prilog 2 – Tekst Drugog nacrta opšteg zakona o univerzitetima.

33 Napomene uz Nacrt, *Nacrt za opšti zakon o univerzitetima*, str. 21.

34 *Izveštaj o radu Univerziteta u 1952/1953. godini*, 1953, Beograd. Citirano prema: Bojović, S., 2003, Zakon o Univerzitetu iz 1954. godine, *Godišnjak za društvenu istoriju*, god. 10, br. 1–3, str. 194–195.

35 *https://istorijskenovine.unilib.rs/view/index.html#panel:pp|issue:UB_00064_19530627|page:5*, 15. 1. 2025.

i stigle su već u toku jula meseca primedbe na njegovu sadržinu, od kojih treba izdvojiti primedbe rektora Univerziteta u Beogradu profesora Vukića Mićovića, Senata Sveučilišta u Zagrebu, Društva nastavnika Sveučilišta, visokih škola i saradnika naučnih ustanova NR Hrvatske u Zagrebu, Saveta Univerziteta u Ljubljani, Udruženja univerzitetskih nastavnika i naučnih radnika NR Bosne i Hercegovine, Sekretarijata Centralnog odbora Saveza studenata Jugoslavije, Društva univerzitetskih nastavnika i drugih naučnih radnika NR Makedonije i veoma opširne i stručno napisane primedbe na osam strana bez imena adresanta.[36]

Treći nacrt opšteg zakona o univerzitetima razlikovao se od prethodna dva nacrta u sledećem: samo su fakulteti imali svoje statute (a ne i univerziteti, jer bi oni radili po odredbama zakona o univerzitetima); doktorat se mogao steći samo na fakultetu, a ne i u akademiji nauka; uslovi za izbor nastavnika bili su drugačiji (nego u Prvom nacrtu, Drugi nacrt ih nije ni predviđao, osim opšte odredbe); izbor vrše samo kategorije nastavnika u koje se izbor vrši i više, a ne i kategorije nastavnika iz koje se kandidat bira (za izbor vanrednog profesora, na primer, glasaju samo redovni i vanredni profesori, ne i docenti, kao po propisima Drugog nacrta); redovni profesori imaju stalnost, vanredni profesori se ponovo biraju nakon pet godina, a docenti nakon četiri godine; ukida se institucija pomoćnog nastavnog osoblja, a saradnici imaju status službenika; odluka fakultetskog saveta o izboru dekana nije zahtevala bilo čiju potvrdu (prva dva nacrta su predviđala saglasnost republičkog organa nadležnog za prosvetu i nauku); dekan iz protekle postaje prodekan u sledećoj školskoj godini; univerzitetsku skupštinu su činili svi redovni i vanredni profesori svih fakulteta i od pet do deset delegata svakog fakulteta srazmerno broju nastavnog osoblja fakulteta; umanjene su nadležnosti univerzitetske skupštine (nije bila nadležna da donosi statut univerziteta, pravila o disciplinskoj odgovornosti studenata i da raspravlja o radu univerziteta, univerzitetskog saveta i rektorata, kako je to bilo propisano u Drugom nacrtu).

Treći nacrt opšteg zakona o univerzitetima je, po mišljenju sastavljača Četvrtog nacrta, bio zasnovan na sledećim osnovnim principima: 1) Fakulteti su osnovne univerzitetske jedinice. Univerzitet je ujedinjenje fakulteta radi obezbeđenja određenog jedinstva u rešavanju pitanja opšteg značaja za sve fakultete i radi koordiniranja naučnog, nastavnog i pedagoškog rada; 2) Univerziteti i fakulteti su samoupravne ustanove, tj. ustanove u kojima pored široke autonomije postoji režim samoupravljanja od strane nastavnih kolektiva. Najviši organi upravljanja univerzitetom su univerzitetska

36 AJ, 318, 60, 87, Primedbe na Treći nacrt opšteg zakona o univerzitetima, dokumenti od 1 do 12.

skupština i univerzitetski savet, a fakultetom u osnovi upravlja fakultetski savet. Rektor, odnosno dekan, predstavlja ove samoupravne ustanove i vrši izvršne poslove. Nadalje je zapisano:

> „Princip samoupravljanja na fakultetima unekoliko je proširen društvenim upravljanjem, koje je izraženo u učešću predstavnika stručnih i naučnih udruženja u pretresanju najvažnijih pitanja organizacije i rada fakulteta.
>
> Pošto i ovaj nacrt nije zagarantovao društveno upravljanje ovim ustanovama, uzimanje u pretres ovog nacrta od strane Savezne narodne skupštine privremeno je odloženo, te je tako izrađen priloženi najnoviji nacrt Opšteg zakona o univerzitetima."[37]

Sastavljači su naveli na kojim osnovnim principima je taj najnoviji, Četvrti nacrt bio zasnovan (pored ona dva principa koja su navedena i kod Trećeg nacrta). Naime, na univerzitetu se uvodi društveno upravljanje kroz učešće istaknutih naučnika, stručnjaka i javnih radnika u univerzitetskom i fakultetskom savetu, kao i učešće predstavnika asistenata i saradnika i studenata kod rešavanja određenih pitanja. Nacrt nastoji da podigne uslove za izbor nastavnika na viši nivo, zahtevom za doktoratom ili habilitacionim radom; naglašavaju se mogućnost i potreba za kursevima za usavršavanje i specijalizaciju diplomiranih studenata, kao i kurs za doktorat; pominju se naučni saradnici koji se ne bi posvećivali nastavi; zajemčena je sloboda nastave i naučnog stvaranja, kao i pravo svakog građanina da se pod jednakim uslovima upiše na bilo koji od fakulteta; naglašava se i princip javnosti rada fakulteta.[38]

Četvrti nacrt je imao 58 članova, raspoređenih u šest celina.[39] Taj nacrt je uz određene izmene i dopune postao Opšti zakon o univerzitetima,[40] koji je napokon usvojen 12. juna 1954. godine.[41] Značajnije izmene i dopune su se sastojale u sledećem. Glava IV „Upravljanje univerzitetom i fakultetom" Četvrtog nacrta postala je glava V Opšteg zakona o univerzitetima, a glava V Četvrtog nacrta pod naslovom „Univerzitetski nastavnici, asistenti i drugi saradnici" postala je glava IV „Nastavnici i fakultetski i univerzitetski saradnici" Opšteg zakona o univerzitetima.

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37 Napomene uz Nacrt, *Nacrt za opšti zakon o univerzitetima*, str. 22.

38 *Ibid.*, str. 22–24.

39 *Ibid.*, str. 3–19. Vid. *Predlog opšteg zakona o univerzitetima* iz maja 1954. godine, u izdanju Savezne narodne skupštine.

40 *Službeni list FNRJ*, br. 27/54, od 30. juna 1954. godine. Tekst Opšteg zakona o univerzitetima objavljen je i u: Zbornik zakona i uredbi o Univerzitetu u Beogradu (1945–2000), knjiga 1, sastavila i priredila Grbić, B., 2008, Beograd, Univerzitet u Beogradu, str. 116–134.

41 Ovaj zakon proglašen je Ukazom predsednika Republike od 15. juna 1954. godine.

Četvrti nacrt je odredbu „Nastava i ispiti na fakultetu su javni" predvideo u članu 4. u stavu 2. u Osnovnim odredbama,[42] dok je Opšti zakon istu odredbu propisao u članu 12. u glavi II „Nastava i naučni rad".

Opšti zakon o univerzitetima je studentima dao pravo da učestvuju u radu organa upravljanja na univerzitetu i fakultetu, kao i da „učestvuju u upravljanju ustanovama koje se bave zdravstvenim, socijalnim i materijalnim pitanjima studenata" (član 20), što nije bilo predviđeno u Četvrtom nacrtu.

Krupna novina Opšteg zakona o univerzitetima je bila odredba člana 30. da fakultetski savet može „kad to traže interesi unapređenja naučnog i nastavnog rada u pojedinoj struci ili naučnoj disciplini, odlučiti da se izvan slučaja predviđenog odredbom čl. 24 st. 6 raspiše konkurs za izbor redovnog i vanrednog profesora. U konkursu može učestvovati i profesor koji je zauzimao mesto za koje se konkurs raspisuje". Ovo je na mala vrata uvelo reizbornost i redovnih profesora.

U Četvrtom nacrtu u članu 35. bio je predviđen nastavnički savet, dok Opšti zakon o univerzitetima predviđa fakultetsku upravu (to je današnje nastavno-naučno veće). Član 35. st. 1–2. Četvrtog nacrta glasio je:

> „Fakultetski savet sačinjavaju svi nastavnici fakulteta i predstavnici stručnih i naučnih udruženja i drugi istaknuti stručnjaci koje imenuje univerzitetski savet.
>
> Broj članova fakultetskog saveta koji nisu nastavnici ne može biti veći od jedne trećine od ukupnog broja članova saveta."[43]

Sastav fakultetskog saveta prema odredbama člana 46. Opšteg zakona o univerzitetima bio je nepovoljniji u pogledu autonomije fakulteta. Za razliku od Četvrtog nacrta, prema Opštem zakonu o univerzitetima nisu svi nastavnici mogli da učestvuju u radu fakultetskog saveta, nego samo određen broj nastavnika i saradnika koje bira fakultetska uprava (usvojen je delegatski princip). Pored toga, Opšti zakon o univerzitetima uveo je i člana koga biraju studenti iz svojih redova. Četvrti nacrt nije predvideo učešće asistenata i drugih saradnika fakulteta niti učešće studenata u radu fakultetskog saveta. Istinu govoreći, u osnovnim odredbama u članu 7. Četvrti nacrt je predvideo da predstavnici asistenata i drugih saradnika fakulteta imaju „određena prava učestvovanja u pretresanju i rešavanju ili donošenju pojedinih odluka fakulteta", kao i da „predstavnici studentskih organizacija imaju pravo da učestvuju u pretresanju određenih pitanja nastave i rada fakulteta". Međutim, nije bilo predviđeno koji je to organ fakulteta u čijem radu bi ove kategorije učestvovale.[44]

42 *Nacrt za opšti zakon o univerzitetima*, str. 4.

43 *Ibid.*, str. 12.

44 *Ibid.*, str. 4.

Prema Četvrtom nacrtu, članove fakultetskog saveta sa strane birao bi univerzitetski savet i njihov broj nije mogao biti veći od jedne trećine od ukupnog broja članova saveta. Opšti zakon o univerzitetima je predvideo da eksterne članove fakultetskog saveta bira republička narodna skupština „iz reda naučnih, stručnih i drugih javnih radnika".[45] Taj zakon nije propisao brojni odnos članova sa strane prema članovima sa fakulteta, ali u praksi to je bilo pola-pola. Sve u svemu, Četvrti nacrt je u odnosu na Opšti zakon o univerzitetima jače zaštitio autonomiju fakulteta, makar u pogledu sastava fakultetskog saveta.

U prvoj polovini 1954. godine vodila se javna diskusija o Četvrtom nacrtu.[46] *Univerzitetski vesnik – list Udruženja univerzitetskih nastavnika* u Beogradu objavio je tekstove: 11. i 25. februara – o prvoj međuuniverzitetskoj konferenciji FNRJ, koja je održana 13. i 14. februara 1954. godine i njenim zaključcima; 11. marta – Jovana Đorđevića „Univerzitet i njegov zakon", „Diskusija o Nacrtu zakona u Odboru za prosvetu", Radomira D. Lukića „Izbor univerzitetskih nastavnika" i Mihaila Stupara „O položaju asistenata"; 25. marta – o vanrednoj konferenciji Saveza komunista na Univerzitetu u Beogradu koji svedoči da je Udruženje univerzitetskih nastavnika bilo puka poluga Partije na Univerzitetu, izveštaj sa Drugog kongresa Saveza studenata Jugoslavije pod naslovom „Najviše pažnje posvećeno problemima nastave", dva priloga posvećena pitanju asistenata i društvenom upravljanju i tekst „Studenti i Zakon o Univerzitetima – Iz diskusije nastavnika o Nacrtu" (da li studenti treba da učestvuju u organima upravljanja; o kojim pitanjima – da li o pitanjima izvođenja nastave – dva oprečna mišljenja, jedni su bili protiv, drugi za; opšti položaj studenata; šta sa apsolventima); 8. aprila – „Nastavnici i studenti pozdravljaju nove principe o upravljanju", „Odnos univerziteta i fakulteta"; 13. aprila – „Razvoj Univerziteta i priliv studenata"; 22. aprila – „Pismo Uprave udruženja univerzitetskih nastavnika Odboru za prosvetu" i „Predlog za bolje nagrađivanje asistenata".[47]

4. Ekspoze potpredsednika Saveznog izvršnog veća

Na sednici Saveznog veća Savezne narodne skupštine od 12. juna 1954. godine ekspoze o predlogu Opšteg zakona o univerzitetima podneo je potpredsednik SIV Rodoljub Čolaković. Na početku ekspozea Čolaković

45 Čl. 46, st. 1. Opšteg zakona o univerzitetima.

46 Bojović, S., 2003, str. 193–204.

47 *Univerzitetski vesnik – list Udruženja univerzitetskih nastavnika*, godina V: broj 88 od 11. februara, str. 1; broj 89 od 25. februara, str. 1–2; broj 90 od 11. marta, str. 1–2; broj 91 od 25. marta, str. 1–5; broj 92 od 8. aprila, str. 1–3; broj 93 od 13. aprila, str. 1; broj 93 od 22. aprila 1954. godine, str. 3.

naglašava da se potreba za zakonom o univerzitetima osećala već odavno, „a ova je postala neodložna posle donošenja Ustavnog zakona, jer njegove opšte postavke o samoupravljanju trudbenika u oblasti prosvete iziskuju da se iz osnova menja način upravljanja u celokupnom školstvu, pa i na univerzitetima".

U svom daljem izlaganju Čolaković je izneo najvažnije podatke o razvoju univerziteta, „o brizi države za njihov napredak, poredeći današnja dostignuća sa stanjem od pre rata" (uzgred budi rečeno, svako njegovo poređenje bilo je na štetu stanja od pre rata).

Potom je ukazao na probleme koje univerziteti treba da reše „ako žele da idu u korak s vremenom i da opravdaju pred zajednicom utrošak znatnih sredstava koja im ona daje". „Naši univerziteti – kazao je Čolaković – još uvek nisu dovoljno povezani s praksom, s potrebama našeg društva u raznim oblastima, na prvom mestu u privredi... Ta nepovezanost s praksom odražava se nepovoljno i na nastavne planove i programe mnogih fakulteta. Već godinama se ukazuje na to da nastavni planovi na fakultetima pate od rascepkanosti predmeta, da se kroz njih ne obezbeđuje formiranje stručnjaka opšteg profila, sposobnog da po završetku studija u praksi zauzme određeno radno mesto, a isto tako dovoljno potkovanog da se može specijalizovati u određenoj užoj oblasti svoje struke."

O stručnoj spremi kadrova „koji izlaze sa naših univerziteta" Čolaković je rekao: „Sa naših univerziteta izlazi svake godine sve veći broj ljudi s diplomom, ali malo ih je koji su završili studije na vreme, kao što ih je malo čija stručna sprema potpuno zadovoljava." Izneo je zabrinjavajući podatak da na svim fakultetima u zemlji ima gotovo 20.000 apsolvenata i zatražio da se ispitaju dublji uzroci takvog stanja i nađu trajnija rešenja. Često i zahtevi studenata idu nauštrb rada i posvećenosti na univerzitetu, „kao što je zahtev da se ispiti mogu polagati neograničen broj puta, što bi praktično značilo anarhiju na fakultetima".

Velikoj novini, društvenom upravljanju u oblasti prosvete i kulture, Čolaković je posvetio dosta vremena. Prelazeći na predlog Opšteg zakona o univerzitetima, rekao je: „Osnovne postavke ovog predloga su da oslobodi univerzitete svakog uplitanja od strane državne administracije, da na organe društvenog upravljanja prenese što više poslova koji su do sad spadali u nadležnost Saveta za prosvetu i kulturu, da osigura slobodu u izvođenju nastave i naučnog rada, da podigne nastavu na viši naučni nivo, da demokratizuje unutrašnji život fakulteta i univerziteta, da stvori osnove za stvaranje zdrave atmosfere u kojoj će naučna misao i građanska savest i svest moći da se uspešno bori protiv zapuštenosti, idejnih slabosti i naučne zaostalosti, kao i protiv pojava klikaštva, poltronstva, karijerizma – tog

žalosnog nasleđa prošlosti koga se još nismo sasvim oslobodili na našim univerzitetima."

U nastavku ekspozea govoreno je o novinama u predlogu Opšteg zakona o univerzitetima: organima upravljanja, izboru nastavnika i statutima fakulteta.

Čolaković je naveo da su organi upravljanja na univerzitetima i univerzitetski savet i univerzitetska uprava i rektor, „s tom razlikom što kompetencije prvoga obuhvataju najvažniju funkciju upravljanja". Na fakultetima su to fakultetski savet, fakultetska uprava i dekan. Sastav univerzitetskog i fakultetskog saveta činili su naučni, stručni i javni radnici koje bira republička narodna skupština, određen broj članova iz reda nastavnika koje biraju fakulteti, jedan član koga biraju studenti, jedan član narodnog odbora sa teritorije gde se nalazi univerzitet, odnosno fakultet i rektor i prorektor univerziteta, odnosno dekan i prodekan fakulteta. Čolaković je odbio neke glasove, koji su se pojavili u diskusiji, da se rešenjem o eksternim članovima saveta (koje biraju republička narodna skupština i gradski narodni odbor), koje se nije nalazilo u prethodnim nacrtima zakona, krnji autonomija univerziteta, rečima: „Ako nikada, univerzitet je sada autonomna ustanova, slobodna u svom radu od sitničavog i često nekompetentnog uplitanja državne administracije, slobodna da nesmetano razvija svoj rad. Druga je stvar ako ovi branioci autonomije žele izolaciju univerziteta od društva, od njegovih potreba, oslobođenje od odgovornosti pred društvom za svoj rad. Takve autonomije nema i ne može biti ni u kakvom društvenom poretku, pogotovo ne u socijalističkom poretku."

Deo ekspozea o organima upravljanja Čolaković je zaključio: „Ovako postavljeni i na ovaj način izabrani organi upravljanja osiguraće univerzitetima i fakultetima onu neophodnu vezu sa društvom, njegovim potrebama i stremljenjima, dati im po brizi, koju će im posvećivati predstavnička tela, stručna udruženja, čitava javnost – ono mesto koje im po društvenom značaju rada koji se u njima vrši – pripada u našoj zajednici."

„Ukazujući na to da nivo i kvalitet nastave na fakultetima zavisi prvenstveno od nastavnika", drug Čolaković je izneo da „novi zakon predviđa strožiji kriterijum za izbor nastavnika. Stoga je predviđen obavezan habilitacioni rad ili doktorat, a za neke fakultete može se tražiti i jedno i drugo, zatim naučni radovi priznati u datoj struci".

Za docente i vanredne profesore je predviđen ponovni izbor nakon pet godina. Samo redovni profesori nisu podlegali ponovnom izboru jer su prošli strogu proceduru za izbor za redovnu profesuru, kao i više izbora kod biranja za docenta i vanrednog profesora, obrazlagao je Čolaković. Dodaje, međutim, „jednom odredbom ovog zakona pružena (je) mogućnost da se status svih sadašnjih redovnih profesora revidira".

Zakon je predvideo proširenje prava glasa prilikom izbora za nastavnike. U izboru vanrednih profesora učestvovali su i docenti, a u izboru redovnih profesora i vanredni profesori. Čolaković je ovo obrazložio na sledeći način: „Mislim da će ova novina biti korisna, jer će ona doprineti da se do kraja razbije ona cehovska podvojenost koja se još oseća na našim fakultetima." Po svemu sudeći, ovo je uvedeno da bi mlađi, provereni partijski kadar imao veći upliv u odnosu na starije, naročito predratne profesore, koji, u principu, nisu pripadali Partiji.

Zakon je predvideo javno glasanje pri izboru univerzitetskih nastavnika, što će, po mišljenju Čolakovića, učiniti „kraj onim žalosnim pojavama na nekim fakultetima kada referent hvali kandidata, jer ne može drukčije, ali glasa protiv, jer su mu preči koterijaški ili neki drugi interesi nego interes fakulteta". U svakom slučaju, „javno glasanje doprineće raščišćavanju atmosfere na našim fakultetima, uneti u nju više principijelnosti, onemogućiti razne kombinatore koji se ne rukovode savešću nastavnika i građanina, nego ličnim, koterijaškim ili drugim interesima koji nemaju ničeg zajedničkog s naukom i nastavom". Posmatrano sa distance od sedam decenija, možemo konstatovati da je javno glasanje ostalo dominantan način izjašnjavanja o kandidatima, s tim što su se tokom vremena pojedini fakulteti opredelili za tajno glasanje, što su kasniji propisi omogućili. Čolaković nije naveo za SKJ važan argument u prilog javnom glasanju – preventivan uticaj na one profesore koji bi mogli da glasaju protiv „partijske linije", niti je uzeo u obzir moguće glasanje po osnovu nezameranja u prilog nekom od kandidata spornih kvaliteta. „Koterijaštvo" se, naime, može pojaviti i u uslovima kada se javno glasa; ta pojava je odraz opšteg stanja u akademskoj zajednici i, posebno, nivoa odgovornosti i čestitosti referenata, a ne zavisi od načina kako se glasa.

Važnu novinu Opšteg zakona o univerzitetima činile su odredbe o statutima fakulteta, kojima bi se uređivali organizacija fakulteta, njegovi organi, nastavni plan, pravila studija i slično. Statut bi potvrđivala republička narodna skupština, čime se takođe obezbeđivalo da „društveno upravljanje" ne preraste u „autonomiju bez kontrole".

Čolaković je ekspoze zaključio rečima: „Naša univerzitetska i šira javnost s nestrpljenjem očekuje donošenje ovog zakona, u nadi da će on poslužiti kao solidna osnova za sređivanje prilika na našim univerzitetima (...) na kojima se školuje naša socijalistička inteligencija."[48]

List *Borba* je u nedelju, 13. juna 1954. godine, doneo vest: „Savezno veće, u nastavku rada, usvojilo je juče Opšti zakon o univerzitetima. Izveštaj

48 *Univerzitetski vesnik – list Udruženja univerzitetskih nastavnika*, god. V, br. 97, 24. jun 1954, str. 1, 4.

Odbora za prosvetu podnela je Ljubinka Milosavljević. Prilikom pretresa ovoga zakonskog predloga govorio je Rodoljub Čolaković, potpredsednik Saveznog izvršnog veća."[49] Nema pomena da je vođena rasprava.

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Propisi

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2. Odluka o utvrđivanju broja članova Univerzitetskog saveta i fakultetskih saveta Univerziteta u Beogradu, *Službeni glasnik NR Srbije*, br. 56/54.
3. Opšti zakon o univerzitetima, *Službeni list FNRJ*, br. 27/54.

49 *https://istorijskenovine.unilib.rs/view/index.html#panel:pp|issue:UB_00064_19540613|page:3*, 23. 2. 2025.

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GENERAL UNIVERSITIES ACT 1954: THE FIRST POST-WAR LAW ON HIGHER EDUCATION IN YUGOSLAVIA AND ITS LONG-TERM EFFECTS

Part One

Dejan Popović

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ABSTRACT

After the break with the USSR, the Yugoslav communists began to build a different model of socialism, in which higher education was given a certain autonomy, while the Party preserved its monopoly of power. From 1952 to 1954, a broad debate (including both communist politicians and professors) was held about the issues of new organization of universities and faculties, State's influence on managing these institutions, the election of professors, etc. In 1954, the Federal People's Assembly passed the General Universities Act. With this law, universities and faculties were given the status of legal entities and the right to adopt their statutes. They were governed by a council (in which professors and the state /with students/ each had 50% of the votes), a rector/dean and a university/faculty management. The influence of this law is still felt in the successor states of ex-Yugoslavia, and in Serbia, Croatia and North Macedonia faculties still have the status of legal entities.

Key words: General Universities Act, Legal entity status, University Council, Rector, University Management, Dean, University professors, Students, League of Communists of Yugoslavia.

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ORIGINAL SCIENTIFIC ARTICLE

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REFORMS WITHOUT REFORMING: TRENDS IN LOCAL AND REGIONAL GOVERNANCE AND DECENTRALIZATION IN CROATIA

Abstract: *The paper presents, analyzes, and discusses changes in the Croatian local self-government system and assesses their drivers, whether these changes can be considered real reforms, and why certain changes occur and others do not. The paper covers a 30-year time span of local self-government development – from the early 1990s, when Croatia introduced a modern local self-government, through the 2000s when Croatia transitioned to the system based on political decentralization, to recent reform activities. The paper shows that there have been several "real" reforms that have raised and addressed very important issues, while other "reforms" can mostly be described as partial changes that occur when there is significant political will for them or under strong external pressure. Political actors and their role of veto players, together with path dependency, remain crucial explanatory factors of local self-government development in the past three decades in Croatia.*

Key words: Local Self-Government Reform, Decentralization, Local and Regional Self-Government in Croatia, Development Trends in Local and Regional Government.

1. Introduction: Research Objective and Methodology

The main research objective of the paper is to determine the circumstances under which local self-government reforms in Croatia take place, and especially which issues are being dealt with as the major reform issues. The paper explores the changes in the local self-government system

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from the early 1990s until today, and determine their motivational lines, trends, and real effects on the local self-government system in Croatia.

Public administration and local self-government, as its vital part, are constantly exposed to changes and adjustments of the social, political, technological, and other circumstances. These changes can sometimes be mistaken for reforms, however, it is important to be aware that reform "should not be confused with change resulting from incremental adjustments to environmental pressures, which cumulatively may be substantial."[1] The basic research question is to assess changes in the Croatian local self-government and to determine whether these changes might be considered real systemic changes, i.e., reforms if yes – what are their drivers, and if not – why and particularly why do some changes in local self-government occur and others do not? What is the basic approach of political actors to local self-government and what have trends in the development of the entire system of local and regional self-government and decentralization led to? Paradoxically, the system of local and regional self-government is constantly being "reformed" mainly through changes of legislations that regulate different issues. Almost every change is presented as a reform, despite it being obvious that that these changes are often minor and have almost no long-term effects on the functioning of the system. Nevertheless, these changes often lead to the system remaining more or less unchanged.

The reasons for such a starting point lie in the fact that none of the implemented reforms tackle issues that are considered problematic from a political point of view. The political and public discourse in Croatia regarding local self-government revolves around the argument that structural changes of this system are unpopular and will lead to the political actors who implement them losing the next elections. This is why only marginal changes, which do not touch upon the main features of the system, are being implemented. However, this paper argues that structural changes of the local self-government system are possible when successfully implemented, which is corroborated by at least two major and several minor reforms of the local self-government system in Croatia. Nevertheless, political actors very often block the opening and implementation of significant reforms related to the most important issues of local and regional self-government.

This analysis is based on a mixture of theoretical and doctrinal insights, including an institutional theory approach, in particular historical institu-

1 Halligan, J., Public Management Reform, in: Schedler, K., (ed.), 2022, *Elgar Encyclopedia of Public Management*, Cheltenham, Edward Elgar Publishing, p. 283.

tionalism and "path dependency",[2] which shows that the current state of institutional development of local self-government in Croatia is largely the result of conditions created by previous choices and the setting of the outline of the system from the early 1990s. This is particularly the case with the territorial division of the country, which is one of the crucial elements in the inefficiency of the entire local self-government system. Also, the concept of "muddling through"[3] and the incrementalism which followed from it, show the significance of piecemeal changes. In the Croatian case, these decisions, which were often made based on different external pressures and current needs, did not result in any real changes in the long run, eventually outlining the system in a certain direction while the local self-government basically remained the same. The concept of "veto players"[4] is important for understanding the motivation of the undertaken reforms and which issues that will be publicly raised and whose resolution is the objective of the changes to the legislative framework. Finally, inter-governmental relations demonstrate the importance of the interplay between the different governance levels. However, the central government is constantly dominant and the local self-government actors accept this predominance. Thus, with the distinction of being centralized, conflicted, and multi-layered policy processes,[5] the Croatian experience leads to a hypothesis about the dominance of a centralized approach to decentralization policy.

This paper analyzes the major changes in the local self-government system, covering the period from the early 1990s, when the new system of local self-government was introduced, to the present. The time span of the research is thirty years, with the main focus of analysis being on the changes in the past several years. The analysis provides grounds for defining several trends of the overall development of the local self-government system, regarding decentralization and intergovernmental relations. These trends are identified, analyzed and discussed toward the end of the paper.

2. Only "Reform" is Constant

After Croatia changed its sociopolitical system in 1990 and moved from self-managing socialism (*samoupravni socijalizam*) to a democratic

2 Peters, B. G., 2019, *Institutional Theory in Political Science: The New institutionalism*, 4th edition, Cheltenham, Edward Elgar Publishing.

3 Lindblom, C. E., 1979, Still muddling, not yet through, *Public Administration Review*, Vol. 39, No. 6, pp. 517–526.

4 Tsebelis, G., 2012, *Veto Players: How Political Institutions Work*, Princeton, Princeton University Press.

5 Kuhlmann, S. *et al.*, 2024, *New Perspectives on Intergovernmental Relations – Crisis and Reform*, Cham, Palgrave MacMillan, pp. 3–6.

capitalism, several phases in the development of the local self-government system followed.[6] [7] At least two major and several smaller-scale local self-government reforms can be noted in the researched period. The first major reform took place in 1993, when the new system was established, followed by the second in 2000/2001, when the constitutional changes took effect and the general position of the local self-government was conceptually redefined. Several smaller-scale changes can also be traced over the years, mainly related to particular issues for which there was political resolve and which resulted in legislative changes.

The first law regulating general local self-government issues (Local Self-Government and Administration Act) was passed in 1992. It was subsequently amended and supplemented four times (twice in 1993, and again in 1997 and 1999). This law was replaced by the current Local and Regional Self-Government Act (LRSA),[8] which was passed in 2001 and has since been amended ten times, with the latest amendments being adopted on 15 December 2020. Furthermore, it is important to mention

6 This part of the article is an updated and modified version of a part of the chapter published in Croatian in Đulabić, V., Teritorijalna samouprava i politika regionalnog razvoja u Hrvatskoj: Nužna kohabitacija ili poželjna sinergija? (Territorial self-government and regional development policy in Croatia: Necessary cohabitation or desirable synergy), in: Jurlina Alibegović, D., Markić Boban, A., Fiesinger, K., (eds.), 2022, *Prilika ili prijetnja? Reforma lokalne i regionalne samouprave u Hrvatskoj*, Zagreb, Hanns-Seidel-Stiftung & Ekonomski institut, pp. 46–51.

7 Koprić distinguishes four stages in the development of the local self-government system in Croatia. These are: multipartyism in the old institutional framework (1990–1993), centralization and etatization (1993–2001), administrative decentralization (2001–2013), and Europeanization (from 2013 onwards) (Koprić, I., Suvremeni trendovi u razvoju lokalne samouprave i hrvatska lokalna i regionalna samouprava, in: Koprić, I., (ed.), 2018, *Europeizacija hrvatske lokalne samouprave*, Zagreb, Institut za javnu upravu, p. 31). Development of local self-government in Croatia has been additionally described and analyzed in detail by numerous domestic authors, see Blažević, R., Dobrić Jambrović, D., Menger, M., 2021, *Lokalna samouprava* (Local self-government), Rijeka, Pravni fakultet; Đulabić, V., Lokalna samouprava i lokalna demokracija u Hrvatskoj: koliko prostora za demokratske inovacije? (Local self-government and local democracy in Croatia: how much space for democratic innovations?), in: Čepo, D., (ed.), 2020, *European values and the challenges of EU membership*, Zagreb, Centar za demokraciju i pravo Miko Tripalo, pp. 143–170; Koprić, I., Dvadeset godina lokalne i područne (regionalne) samouprave u Hrvatskoj: razvoj, stanje i perspektive (Twenty years of local and regional self-government in Croatia: development, status and perspectives), in: Đulabić, V., (ed.), 2013, *Lokalna samouprava i lokalni izbori* (Local self-government and local elections), Zagreb, Institut za javnu upravu, pp. 6–63; Kregar, J., Decentralizacija, in: Kregar, J. *et al*., 2011, *Decentralizacija*, Zagreb, Centar za demokraciju i pravo Miko Tripalo, pp. 1–33.

8 Local and Regional Self-Government Act of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, Nos. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20.

several other laws that regulate general issues of local self-government, such as the Areas of Counties, Cities and Municipalities Act,[9] Local Elections Act,[10] Local Taxes Act[11], Act on Civil Servants and Employees in Local and Regional Self-government Units,[12] and numerous sectoral legislations that regulate various administrative areas and the affairs and powers of local self-governments in those areas.

The ratification of the European Charter of Local Self-Government (ECLS), took place in several steps. First, the Croatian Parliament (*Hrvatski sabor*) adopted the Conclusion on the acceptance and respect of the principles and institutions (provisions) of the ECLS on 28 December 1992. This was a political declaration that the principles and fundamental provisions of the ECLS would be taken into account when regulating local self-government by national legislation. However, the Charter itself was ratified in late 1997 and a minimum number of its provisions entered into force at the beginning of 1998. The full adoption of the provisions of the Charter took place in 2008.

The development of territorial self-government since Croatia's independence can be outlined through several key points elaborated in the further sections.

2.1. THE FIRST PHASE: LOCAL SELF-GOVERNMENT AND ADMINISTRATION

The Croatian local self-government and administration system, established in 1992/1993, was based on the concept of administrative decentralization, according to which local self-government was perceived as an extended arm of the central state, and not as an instrument of a division of power along the vertical dimension. The model was inspired by the French centralistic model of state organization (prior to the decentralization reforms in 1982), resulting in extensive fragmentation of the territorial organization, massive nationalization, and intensive, almost hierarchical state supervision and intervention in the local self-government system.[13]

9 The first law regulating this issue was passed in late 1992, followed by several amendments and additions. The law currently in force was passed in 2006, and has been amended eight times to date.

10 Local Elections Act, *Official Gazette of the Republic of Croatia*, Nos. 125/06, 16/07, 95/08, 46/10, 145/10, 37/13, 44/13, 45/13, 110/15.

11 Local Taxes Act, *Official Gazette of the Republic of Croatia*, Nos. 115/16, 101/17, 114/22, 114/23, 152/24.

12 Civil Servants and Employees in Local and Regional Self-government Units Act, *Official Gazette of the Republic of Croatia*, Nos. 86/08, 61/11, 04/18, 112/19.

13 Koprić, I., Local Government Development in Croatia. Problems and Value Mix, in: Baldersheim, H., Illner, M., Wollmann, H., (eds.), 2003, *Local Democracy in Post-Communist Europe*, Wiesbaden, Springer Fachmedien, pp. 181–210.

The major features of the first decade of Croatian local self-government development were fragmentation and reduction of the number of basic local units (towns and municipalities). Several moments during this period that had significant consequences for territorial self-government should be highlighted, with the years 1993 and 1997 standing out in particular. First, the adoption of a set of laws regulating local self-government resulted in the initial increase in the number of basic local units. The former 102 municipalities from the socialist period were replaced in 1993 with 21 counties, 2 districts (Knin and Glina),[14] 70 towns, and 419 municipalities, i.e., a total of 489 basic units. This initial period saw the largest increase in the number of basic local self-government units by 43.90 percent. Second, the next big increase in the number of municipalities and towns occurred in 1997, when many municipalities were transformed into towns, resulting in a 42 percent increase in the number of towns (from 70 to 122). New municipalities were also established during that period, resulting in 416 municipalities. All this resulted in a total of 538 basic units. It is obvious that the number of basic units ultimately arose as a result of mere coincidence and political bargaining, because "in the preparation of the law at that time [...] it was said [...] that the territorial division would be based on the existence of 16 cities and approximately 190 municipalities."[15]

During the first half of the 1990s, a large number of local self-government functions, employees and civil servants were taken over by the central state, leaving local units with limited, predominantly insignificant, portion of public tasks.[16] Furthermore, the central government developed a very extensive network of its own administrative bodies, which represented a parallel administrative system throughout the country. The oversight of the local self-government was intensive and was not limited only to the supervision of legality, but often also to the supervision of expediency. The county mayor (*župan*) had a dominant role in hierarchization of the system, playing a dual role as the central government representative and holder of the executive power in the counties. Although the county mayor was formally elected by the county assembly, they had to be confirmed by the President of the Republic. The central government could dismiss elected local political officials at the local and county levels, for reasons that were not in accordance with the standards contained in the ECLS and the position of local self-government in the modern democratic state.[17]

14 These two districts never actually came to fruition due to the state of war.

15 Kregar, J., 2011, p. 11, translated by authors.

16 Koprić, I., 2003, p. 194; Koprić, I., 2018, p. 32.

17 Koprić, I., 2000, Proširenje lokalnog samoupravnog djelokruga i sužavanje nadzora središnjih državnih organa (Expansion of the scope of competence of local self-government and narrowing of the supervision of central state authorities), *Hrvatska*

2.2. THE SECOND PHASE: LOCAL AND REGIONAL SELF-GOVERNMENT

The constitutional changes in 2000 introduced a transition from the semi-presidential to a parliamentary system of government which was reflected on the entire organization of the state. The previous concept of administrative decentralization was replaced by the concept of political decentralization and the principle of subsidiarity. The local self-government units were positioned as an instrument of vertical division of power in the overall constitutional and political system of the country (Art. 4 of the Constitution). The constitutional amendments defined the division of the state and local administrative structures by defining counties as units of territorial (regional) self-government and introduced a general clause determining local competences.

The constitutional changes were followed by the adoption of a new law on local and regional self-government in 2001, which represented a major change of the system after the initial change in the early 1990s. This was followed by the beginning of the decentralization process in four policy areas in 2001, namely healthcare, social care, education, and firefighting.[18] However, the territorial organization of the country did not change, but continued to grow during this period, albeit only slightly.

2.2.1. Political Discourse on Local Self-Government System and Decentralization

After the constitutional changes and the initial decentralization measures in 2001, political support for decentralization subsided and there have been no new visions or suggestions of its future course. The 2000/2001 constitutional and legal changes represented a step toward the general democratization of society after a decade of rule and dominance by a single party (Croatian Democratic Union – HDZ). The proclaimed general goal of decentralization and transformation of local self-government was only partially accomplished. Regionalization and rationalization of the territorial structure were not achieved, although they were proclaimed important

javna uprava, Vol. 2, No. 3, pp. 391–437; Koprić, I., 2001, Uloga županija u hrvatskom sustavu lokalne samouprave i uprave 1990-ih i perspektive regionalizacije nakon promjena Ustava iz 2000. godine (The role of counties in the Croatian system of local self-government and administration in the 1990s and the perspective of regionalization after the changes to the 2000 Constitution), *Hrvatska javna uprava*, Vol. 3, No. 1, pp. 63–87.

18 Koprić, I., Đulabić, V., Evaluation of the Decentralisation Programme in Croatia, in: Koprić, I., Wollmann, H., Marcou, G., (eds.), 2018, *Evaluating Reforms of Local Public and Social Services in Europe*, Cham, Palgrave Macmillan, pp. 243–260.

reform goals by Government in 2000. After four years, the HDZ returned to power in late 2003 and has been governing Croatia continuously since then, with one four-year break (during Zoran Milanović's government, 2012–2015). The decentralization and strengthening of the local self-government system were left to the mercy of changing political tides.[19]

The establishment of commissions for decentralization and territorial reorganization under different names, with different compositions and with different goals, has occurred several times, namely in 2004, 2010, 2012, and 2021. Although the establishment of these commissions was supposed to additionally boost the initiated decentralization process, and even propose a new territorial organization, this did not happen. The role of these commissions was mainly declarative, and perhaps even decorative in nature. They rarely adopted and published strategic documents on decentralization, and their work was not evaluated. Certainly, the most visible work in this direction was done by the Commission for Decentralization and Territorial Reorganization in 2010, which produced a document entitled Guidelines and Principles for Functional Decentralization and Territorial Reorganization. The document was adopted by the Government on 8 July 2010.[20] This was the first time after the 2000/2001 reform that the Government adopted a strategic document that explicitly identified territorial reorganization as one of the fundamental reform tasks. Nevertheless, due to the short life of that cabinet, serious steps toward its implementation were never taken.

Local self-government reform was the subject of intense political debate during 2014 and 2015. First, toward the end of his first term, President Ivo Josipović launched a project to draft a new Constitution with which he sought to win a second term. In that draft, the local self-government reform, decentralization and regionalization of Croatia were very important parts. However, since he did not win a second presidential term, by a small margin, this reform project fell into oblivion. Also, before and after the 2016 parliamentary elections, it was publicly emphasized that the implementation of the local self-government reform (including the reduction of the number of counties) was a prerequisite for forming a coalition government between the two center-right parties (HDZ and Most). This did not suit the powerful political structures in the counties, who had invested a great deal of political and public effort to demonstrate the justification of the county system.[21]

19 Koprić, I., 2003, pp. 204–205.

20 Koprić, I., 2010, Prijedlozi za reformu lokalne i regionalne samouprave u Hrvatskoj (Proposals for the reform of local and regional self-government in Croatia), *Hrvatska javna uprava*, Vol. 10, No. 4, p. 944.

21 Such a position is clearly illustrated by one of the many public statements in 2016, by Goran Pauk, the then president of the Croatian Association of Counties: "We have

At the time the Most political party assumed responsibility for the ministry of public administration, with the mandate to implement a more serious reform. Some initial steps were taken in that direction, but the reform was never implemented due to subsequent political turmoil. The coalition broke up soon after, the parliamentary majority was rearranged, and the reforms were stopped. After that, the local self-government reform was not the subject of such intense political discourse in the parliamentary or presidential elections.

The current ruling parliamentary parties have a kind of "tacit consensus" on maintaining the existing territorial division of the country. The exception is the biggest opposition party, which reopened this issue in late 2021, but this did not elicit much public response.[22] Also, there are several smaller centrist and liberal parliamentary parties, with only one or two MPs, which have been continuously advocate territorial restructuring (e.g., Glas, Centar, DOSiP).

Over the years, local self-government became part of several strategic documents on the development of public administration. This first happened in 2015 when the Croatian Parliament adopted the Strategy for the Development of Public Administration for the 2015–2020 Period.[23] This document addressed local self-government as an essential component of the public administration strategic development for the first time. However, the actual implementation of this document was very poor. Local self-government also found its place in the currently valid National Development Strategy of the Republic of Croatia until 2030, which was adopted by the Croatian Parliament in February 2021.[24] Within the

23 years of practice of such regional and local self-government, and I believe that counties are the most justified structure of the entire state sector: without scandals, and with little financial resources, we have done a lot of good things. However, we need better cooperation with state and European authorities on development visions. Territorial organization is less important, and public administration reform is much more important, that is our position." Varošanec, S., Filipović Grčić, A. M., 2016, Javna uprava treba se vratiti pod skute županije, na to smo odmah spremni (Public administration should return to the control of counties, we are ready for that immediately), *Poslovni.hr*, 28 March, (https://www.poslovni.hr/poduzetnik/javna-uprava-treba-se-vratiti-pod-skute-zupanije-na-to-smo-odmah-spremni-310808, 29. 4. 2025), translated by authors.

22 In late 2021, the SDP published a document entitled Polazne točke za reorganizaciju lokalne i regionalne samouprave u Republici Hrvatskoj (Starting points for the reorganization of local and regional self-government in the Republic of Croatia), which is available at: http://www.sdp.hr/wp/wp-content/uploads/2022/01/Polazne_tocke_za_reorganizaciju_lokalne_i_regionalne_samouprave_u_RH3.pdf.

23 Strategy for the Development of Public Administration for the 2015–2020 Period, *Official Gazette of the Republic of Croatia*, No. 70/15.

24 National Development Strategy of the Republic of Croatia until 2030, *Official Gazette of the Republic of Croatia*, No. 13/21.

framework of strategic objective 3 entitled "Efficient and effective judiciary, public administration and state asset management", one of the document's five priorities related to public administration is "improving the functionality and sustainability of regional and local self-government." One of the main mechanisms for optimizing the local self-government system is to encourage functional and possibly actual mergers of local units. The National Recovery and Resilience Plan for the 2021–2026 Period was adopted in the meantime. In it the Government of the Republic of Croatia defined that one of the goals of the Plan is a functional and sustainable local self-government, setting an ambitious goal of a 20% of the local units (111 of them) actually merging by the end of 2026, and 40% of them (222) becoming functionally merged.[25] However, after several years of implementation, data shows that there is very little interest in functional mergers and there is practically no interest in the actual merger of local units. The set goal will be very difficult to achieve by 2026.

2.2.2. Territorial Organization, Staff, and Administration

After 2000 the number of basic units continued to grow slightly and it is currently stabilized at 556 basic units, or 128 towns (including the City of Zagreb) and 428 municipalities.[26] Unlike the number of basic units, which grew from the initial 70 towns and 419 municipalities to today's number, the number of counties has been stable at 20 from the beginning. The introduction of so-called "big towns", as a special subcategory of local self-government units, took place in 2005. The limit for big towns was set at 35,000 inhabitants, which was far too low, and the county seat towns that do not meet this population criterion were elevated to them. These big towns were granted insignificant additional functions (issuing of building permits, spatial planning, and maintenance of public roads) compared to ordinary towns. However, even though they are legally defined as promotors of development of the surrounding area, some "big towns" lack the capacity to develop functions that are necessary to take on the significant development momentum and serve as development engines of their wider areas.[27]

25 Jurlina Alibegović, D., 2023, Interes općina i gradova za dobrovoljno spajanje (Interest of municipalities and cities in voluntary merger), *Informator*, Nos. 6786–6787, pp. 1–4.

26 The last change in the number of basic units occurred in 2013, when the municipality of Popovača was granted town status.

27 Đulabić, V., Regionalni razvoj i županije u Hrvatskoj (Regional development and counties in Croatia), in: Barbić, J., (ed.), 2015, *Nova upravno-teritorijalna organizacija Hrvatske*, Zagreb, Hrvatska akademija znanosti i umjetnosti, pp. 139–159.

The results of the 2021 population census were also reflected in the general indicators of the local self-government system. Namely, according to the 2021 census, Croatia has 3,888,529 inhabitants, which is 396,360 inhabitants fewer than in the 2011 when it had 4,284,889 inhabitants. Thus, Pannonian Croatia, which includes eight counties, has 1,025,221 inhabitants, Adriatic Croatia, which includes seven counties, has 1,303,428 inhabitants, the City of Zagreb has 769,944 inhabitants, and Northern Croatia, which includes five counties, has 789,936 inhabitants.[28] In terms of territorial self-government, the results of the 2021 census led to a decrease in several average indicators shedding new light on the overall local and regional self-government. Thus, due to the decrease in the number of inhabitants, the average size of a local unit decreased from 7,706 inhabitants to 6,994 inhabitants, which is a decrease of about 700 inhabitants per unit.

Table 1: Change in the number of local units and population (1993–2021)

	No. of local units		**Average no. of inhabitants**		**Total (local units)**	
Year	*Towns*	*Municipalities*	*Towns*	*Municipalities*	*No. of units*	*Average no. of inhabitants*
1991	–	102	–	–	102	46,904
1993	70	419	28,124	4,700	489	9,784
2011	127	429	18,500	3,194	556	7,707
2021	128	428	15,899	2,568	556	6,993

Source: authors, based on Census 1991, 2011, 2021.

Table 1 shows that the data are even more alarming at the level of the individual types of local units. Thus, the average municipality has fallen to just 2,568 inhabitants, and the average city to 15,899 inhabitants. This is an average municipality size reduction of 45 percent, and an average city size reduction of 43 percent. Nevertheless, Croatia has not changed the number of its basic local self-government units in the past ten years, so it is classified as a country with averagely small local units and is one of 11 European countries that did not change the number of their territorial

28 Since the beginning of 2021, Croatia has been divided into the four 2nd level statistical regions (so-called NUTS II). Before that, since 2013, it was divided into two NUTS II regions (Continental and Adriatic Croatia), and before that, since 2007, it was divided into three NUTS II regions (Northwestern, Central and Eastern (Pannonian) and Adriatic Croatia.

self-government units between 2012 and 2021.[29] Recent studies of the correlation between the size and efficiency of local government units in Croatia, which are based on economies of scale, show that the vast majority of local units have a suboptimal population. Namely, 388 local units (69.8 percent of the total number of local units) have fewer inhabitants than the optimum.[30]

Table 2: Local administration and staff

Year	Municipalities	Towns	Counties	City of Zagreb	Total	Increase
1995	2,131	5,422	944	2,564	11,061	– (100%)
2002	2,285	7,170	1,237	2,564	13,238	2,177 (19.7%)
2012	4,317	9,024	2,061	2,753	18,155	4,917 (37.1%)
2022	6,502	11,013	4,118	3,198	24,831	6,676 (36.8%)

Source: authors, based on Ministry of Finance, Report on the Execution of Local Budgets

The data in Table 2 shows that the number of employees in the local administration has been constantly increasing, despite the fact that general indicators such as the average number of inhabitants have been decreasing. The growth is partially due to decentralization measures, which included transfer of state civil servants to local civil servants. However, the number of employees in the municipalities that did not gain new competences in the decentralization process has also grown significantly (50% between 2012 and 2022). Also, deeper examination of the growth of the number of civil servants in big towns shows that in some towns decentralization measures were used for additional, nontransparent and needless employment.[31] The data on the number of local and county administration offices shows that there were 1,175 offices in total in 2018: 191 county offices, 509 town offices, 22 offices of the City of Zagreb, and 453

29 The latest data on changes in the territorial structure of European countries can be found on the website of the Council of European Municipalities and Regions (CEMR), which has conducted an analysis of territorial changes in 40 European countries, (https://terri.cemr.eu/en/, 27. 5. 2025).

30 Buljan, A., Deskar-Škrbić, M., Švaljek, S., 2021, In Search of an Optimal Size for Local Government: An Assessment of Economies of Scale in Local Government in Croatia, *Croatian National Bank Working Papers*, No. W-62, p. 23.

31 Marčetić, G., Lopižić, I., 2017, Utjecaj procesa decentralizacije na jačanje personalnih kapaciteta hrvatske lokalne i područne (regionalne) samouprave (The influence of the decentralization process on personnel capacity strengthening in Croatian units of local and regional self-government), *Hrvatska i komparativna javna uprava*, Vol. 17, No. 3, p. 429.

municipal offices.[32] While the number of county administration offices grew over the following period (reaching 203 offices in 2023),[33] the City of Zagreb reduced number of its offices to 12.

2.2.3. Reforms and "Reforms"

After the constitutional changes in 2000 and the decentralization in 2001, the changes in the local self-government system can be grouped around democratization (introduction of the direct elections of mayors in 2007), decentralization (abolition of first-instance state administration bodies in 2019), and rationalization (reduction of the number of local councilors in 2020). Additionally, in the past several years, Croatia has witnessed the implementation of recentralization measures in different administrative areas.

The direct election of mayors was introduced in 2007 and implemented in local elections in 2009, with the promise and expectation of greater democratization, efficiency, and strengthening the developmental potential of local self-government.[34] However, the evaluation of this innovation showed that most of the goals have not been met.[35] The additional strengthening of the role of mayors was introduced through the adoption of the so-called "lex sheriff" in 2017. This 2017 amendment of the LRSA was particularly problematic because "this is an example of a bad law, whose conceptual idea deviates from the basic idea and purpose of local self-government, and instead of strengthening democracy, it supports an authoritarian model of government. At a time when the democratic deficit around the world, and especially in Europe, threatens the institutions of representative, liberal democracy, such a legal project should be analyzed with special attention. In the long term, it will certainly reduce the

32 Dadasović, B., Načelo samostalnosti lokalnih jedinica pri određivanju vlastitog unutarnjeg ustrojstva (The principle of autonomy of local units in determining their own internal organization), in: Koprić, I., (ed.), 2018, *Europeizacija hrvatske lokalne samouprave* (Europeanization of Croatian local self-government), Zagreb, Institut za javnu upravu, p. 534.

33 Lopižić, I., Manojlović Toman, R., 2023, Institutional and Performance Effects of Administrative Decentralization in Croatian Territorial Governance Setting, *Studia Iuridica Lublinensia*, Vol. 32, No. 5, p. 202.

34 Koprić, I., 2005, O neposrednom izboru gradonačelnika i općinskih načelnika (On the direct election of mayors), *Informator*, Vol. 53, No. 5399, p. 9.

35 Koprić, I., Škarica, M., Evaluacija neposrednog izbora načelnika i župana u Hrvatskoj nakon dva mandata: korak naprijed, dva nazad (Evaluation of direct elections of mayors and county prefects in Croatia after two terms: one step forward, two back), in: Gongeta, S., Smoljić, M., (eds.), 2017, *Zbornik radova 7. međunarodne konferencije Razvoj javne uprave*, Vukovar, Veleučilište Lavoslav Ružička, pp. 156–172.

citizens' trust in the institutions of local democracy and contaminate the very idea of decentralization, i.e., strengthening local self-government, as an institution for achieving vertical division of power."[36]

The abolition of county state administration offices (CSAOs), as first-instance central administrative bodies in the counties, and the transfer of their tasks to the county self-government (within the "delegated scope of competences") took place in 2019. This reform measure represents one of the more significant decentralization activities since the decentralization in 2001, because the counties took over more than 60 administrative tasks from the central level. This was considered a serious reform aimed at "decentralization and rationalization of state administration". However, it seems that the real motive behind this decentralization was the additional strengthening of the position of the counties and the county mayors and securing the existing territorial division of the country.[37]

The reduction in the number of local councilors in representative bodies by approximately 10 percent, and several other technical improvements in the operation of local self-government, took place in 2020. Although this is labelled as a reform aimed at the rationalization of public expenditures, these changes cannot be considered a significant and necessary reform, because the adopted legal "amendments do not solve any strategic issue of the Croatian local and regional self-government, because the basic model of local self-government, characterized by territorial fragmentation and high centralization, remains unchanged."[38]

Recentralization has been observed in different policy areas during and after the COVID pandemic. Namely, this has been observed in preschool education, earthquake reconstruction, waste management, and water supply. Furthermore, recentralization even occurred in policy areas that were decentralized in 2001, such as firefighting, social care services, education, and healthcare. The recentralization was incited by inadequate local self-government capacities to provide services in complex settings arising from multifaceted crises. This was justified by the necessity for

36 Koprić, I., 2017, Novela Zakona o lokalnoj i područnoj (regionalnoj) samoupravi iz 2017. (Amendment to the Act on Local and Regional Self-Government from 2017), *Hrvatska i komparativna javna uprava*, Vol. 17, No. 4 special issue, p. 59, translated by authors.

37 Manojlović Toman, R., 2019, Prethodna evaluacija ukidanja ureda državne uprave u županijama (Preliminary evaluation of the abolition of state administration offices in counties), *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 59, Nos. 5–6, pp. 835–870.

38 Đulabić, V., 2021, Mogu li se nove izmjene propisa o lokalnoj i područnoj (regionalnoj) samoupravi smatrati reformom? (Can the new changes of the regulation on local and regional self-government be considered a reform?), *Informator*, No. 6662, p. 2, translated by authors.

greater efficiency, uniformity, and cost savings in service provision.[39] For example, the new Social Welfare Act, which entered into force in February 2022, significantly centralized this sector as local units lost control over social welfare centers, which were merged into a single Croatian Institute for Social Work, controlled by the central government.[40] Centralization was also implemented in healthcare, with hospitals being taken away from counties and the City of Zagreb and placed under the control of the central government. This resulted in some counties (Krapina-Zagorje, Međimurje, and the City of Zagreb) seeking a review of the constitutionality of the legal amendments before the Constitutional Court.[41]

3. Trends in Local and Regional Self-Government Institutional Development

The above analysis shows that there have been quite a few reform efforts, of greater or lesser significance and intensity, since Croatia became independent. However, the question remains what effect these efforts have had and how thought-out, scientifically– and professionally-founded they have been. Based on the presented data, the review and analysis of the development of local and regional self-government in Croatia, several trends that have marked this development can be identified. These trends revolve around several key dimensions of territorial self-government, and it is possible to label them as "5C trends": conservation, capacity, competence, confusion, and control.

3.1. CONSERVATION

The first trend is the conservation of inadequate territorial organization, at both the local and county levels. As previously elaborated, Croatia

39 Đulabić, V., Škarica, M., Lopižić, I., 2023, *Analysis of centralization as a response to polycrises: evidence from local self-government in Croatia*, paper presented at scientific conference steering European Union through Poly-Crises Storms: The Role of Public Administration.

40 For evaluation of this reorganization see Džinić, J., Lopižić, I., Manojlović Toman, R., Reorganizacija sustava socijalne skrbi: priprema, provedba i perspektive (Reorganization of the Social Care System: Preparation, Implementation and Perspectives), in: Barbić, J., (ed.), 2025, *Priprema i provedba reformi u javnoj upravi i pravosuđu Republike Hrvatske* (Preparation and implementation of reforms in the public administration and judiciary of the Republic of Croatia), Zagreb, Hrvatska akademija znanosti i umjetnosti, pp. 65–87.

41 Đulabić, V., 2024, *"Silent capture": Undemocratic tendencies in Croatia*, Zagreb, Friedrich Ebert Stiftung.

initially increased the number of its basic units by almost five times in 1993. This number grew further over the years and finally became stable in 2013. However, this was not the result of systematic thinking, but rather of chaotic development and a somewhat romantic notion of the role of local self-government in a young, independent state. Although the number of counties has not changed since 1993, it has been irrational and excessive from the beginning. Counties do not represent natural regional entities, but are artificially created units with a low degree of population identification.[42] Despite the growing awareness of the irrationality of the territorial division, which is further intensified by the decrease in the population in Croatia and the consequential decrease of the average size of local and regional units, the governing political parties is not taking any action to rationalize the territorial division.

The public debate on territorial organization has taken on different intensities at different times. The academic and professional community continuously advocates rationalization of the territorial organization, but political structures refuse to address the issue and make serious efforts in this direction. They assume the role of strong "veto players" regarding this issue. The public debate on territorial reorganization was at its peak between 2014 and 2016, but due to political turbulence in the new ruling coalition at the time – nothing was done, and it subsequently simply died down. Instead of amalgamating local units, the central government is trying to achieve some results by encouraging functional mergers and hoping to achieve voluntary actual mergers, but the results of these efforts have been quite modest.

3.2. CAPACITY

Another noticeable trend concerns the differentiated capacity of different types of territorial units to perform public tasks at a satisfactory level. The legal difference between municipalities and towns is not essential, given the almost identical scope of tasks that is assigned to them by the Constitution and sectoral legislation. However, the real differences between municipalities and towns are quite large, as can be seen from the average number of inhabitants in each type, which then has a significant impact on the capacity to perform public tasks. This especially refers to the possibility of expanding the range of the self-government scope of affairs, where the capacity is far greater in the average town than in the average municipality.

42 For the recent analysis of regional and regional self-government in the countries of former Yugoslavia see Đulabić, V., (ed.), 2024a, *Regionalism and Regional Self-Government in South-East Europe*, Cham, Springer.

Additionally, low local capacities are the greatest factor leading to the unwillingness of local units to take on new decentralized functions.[43] By introducing the category of "big towns" and "county seat towns", which are equated with big towns, an attempt was made to create space for an asymmetrical approach to decentralization. However, even these two categories are not completely equal, given that there are as many as eight county seat towns that are below the legal population threshold of 35,000, and some of the county seat towns have population that are even below 10,000, which is the legal criterion for obtaining town status under regular circumstances. The analysis of the financial expenditure that the central state assigns to local units to perform decentralized functions indicates great discrepancies between local units in efficiency and economy while performing decentralized functions.[44]

The capacity issue is especially notable in municipalities whose average size after the 2021 census dropped to about 2,500 inhabitants. This is negatively reflected in the capacity for conducting the local affairs and providing public services. There is, however, the possibility that small municipalities, together with other local units from their surroundings, can participate in a very small proportion of only a few percent in the ownership of joint utility companies. They can also partake in the establishment of joint kindergartens and libraries, and the organization of joint municipal police (*komunalno redarstvo*) or other similar utilities.[45] This condition is clearly illustrated by the fact that 148 municipalities, i.e., 34.6 percent of all municipalities, currently have no "budget users".[46] This practically means that these municipalities have only a directly elected

43 Đulabić, V., 2018a, *Lokalna samouprava i decentralizacija u Hrvatskoj* (Local self-government and decentralization in Croatia), Zagreb, Friedrich Ebert Stiftung, p. 8.

44 Jambrač, J., 2015, Funkcionalna decentralizacija u Hrvatskoj: petnaest godina poslije (Functional decentralization in Croatia: fifteen years later), *Hrvatska i komparativna javna uprava*, Vol. 17, No. 2, pp. 189–216.

45 The trend of functional mergers has been notable in the past several years as a result of the central government's policy stimulating such functional connections. For example, in 2023, as many as 243 municipalities (57 percent of the total number) were without any budget users. However, in 2024, that number decreased to 186, which is 43.5 percent of all municipalities, with 38 of them using financial incentives provided by the Government for functional mergers and establishing joint utility companies or other joint institutions (Jurlina Alibegović, D., 2025).

46 Term "budget user" in local self-government is an institution whose exclusive founder is the local or regional self-government unit, whose payroll expenses and/or material expenditure are provided for in the budget and/or who generate revenues from the budget and/or on the basis of public powers, laws and other regulations, and these revenues are 50 percent or more of the total revenues or which is a source of income budget of local and regional self –government units in the amount of 50 percent or more (see Pravilnik o načinu vođenja registra proračunskih i izvanproračunskih ko-

mayor, who, as a rule, receives a full salary – and several people employed in the municipal administration (which is formally established as a "single administrative office").

The biggest winners of such situations are the counties that have established themselves as a solution for the weak capacity of the municipalities, providing local public services instead of those municipalities. The counties have a significant capacity that allows them to provide local services in their area despite the fact that there are too many counties. However, there are also great differences between the counties themselves regarding their size, budget, organization, and development index.[47] A direct consequence of this is the difference in the scope, quality and standard of public services provided to the citizens. An analysis of the performance of decentralized social services at the county level indicates great disparity among the inhabitants of different counties due to the significant differences in their capacities.[48]

3.3. CONFUSION

The next tendency in the development of local self-government in Croatia is confusion regarding decentralization. The evaluation of the decentralization process launched in 2001 showed that it was "confusing decentralization because goals, responsibilities, resources, local capacities, monitoring and evaluation mechanisms were neither coherently designed nor well connected. Its effects have not been systematically evaluated, sometimes not even registered, by the respective authorities."[49] The abolition of the CSAOs in 2019 cannot be considered genuine decentralization since the counties perform these decentralized functions as the extended arm of state. These functions are performed as *transferred competences* and not as *self-governing competences*. This further leads to the diminishing of the political role of the counites and strengthening their administrative role.[50]

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risnika (Rulebook on the manner of keeping the register of budget and extrabudgetary users), *Official Gazette of the Republic of Croatia,* No. 150/2024, Art. 2/1/1).

47 Đulabić, V., Harmonizacija regionalne samouprave u Europi i regionalno pitanje u Hrvatskoj (Harmonization of regional self-government in Europe and regional question in Croatia), in: Koprić, I., (ed.), 2018b, *Europeizacija hrvatske lokalne samouprave* (Europeanization of Croatian local self-government), Zagreb, Institut za javnu upravu, p. 460.

48 Babić, Z., 2018, Decentralizacija socijalne skrbi i socijalne nejednakosti: slučaj Hrvatske (Decentralization of social care system and social inequalities: the case of Croatia), *Revija za socijalnu politiku*, Vol. 25, No. 1, pp. 25–48.

49 Koprić, I., Đulabić, V., 2018, p. 253.

50 Lopižić, I., Manojlović Toman, R., 2023.

Moreover, some previously decentralized sectors (e.g., healthcare) are now witnessing centralization processes, while other sectors (e.g., state property management) are experiencing decentralization. This is happening without any clear decentralization strategy on the part of the central level, which further supports the confusion tendency notion. The wave of recentralization in recent years also shows different facets; it occurs in different forms and on different scales with no clear rationale and with questionable results.[51] These and other examples show that there is no coherent and well-thought-out decentralization policy, but rather a chaotic process that depends on the political circumstances. On the other hand, significant decentralization is also not possible given the weak capacities of numerous local units and the inadequate territorial structure that generates them.

3.4. COMPETENCES

Local and regional self-government competences are blurred, overlapping, narrow and incomplete. The analysis of sectoral legislation shows that Croatian local units are autonomous only in communal affairs, while other competences are sporadically and unsystematically assigned to local government units. In the areas of education, healthcare, social services, and firefighting, the powers of local units are mostly administrative, technical, and auxiliary to the powers of central state administration bodies. To exercise their functions, local units often need approval from central bodies, which diminishes their capacity for strategic planning and the creation of public policies. The "general clause" prescribed in the Constitution has been turned into the detailed and exhaustive enumeration of affairs in sectoral legislation, seriously limiting local autonomy.[52]

Regarding the functional relations between counties and local units, the Croatian legislator took different positions by assigning to counties public affairs that are constitutionally guaranteed as local unit affairs (e.g., primary healthcare, education, and social services, plus environmental protection), or by giving counties and local units overlapping functions (e.g., in fire-fighting protection, civil protection, traffic, pre-school care and education, culture), or by limiting the local unit's autonomy by giving counties

51 Đulabić, V., Škarica, M., Lopižić, I., 2023.

52 Škarica, M., Lokalni djelokrug u svjetlu novih funkcija i uloga lokalne samouprave (Local scope of competence in the light of new functions and roles of local self-government), in: Koprić, I., (ed.), 2013, *Reforma lokalne i regionalne samouprave u Republici Hrvatskoj* (Reform of local and regional self-government in the Republic of Croatia), Zagreb, Suvremena javna uprava, pp. 55–98.

coordinative or almost hierarchical powers over local units (e.g., environmental protection, pre-school care and education, libraries, waste disposal).[53] The ECLS monitoring reports on Croatia, by the Council of Europe Congress of Local Regional Authorities, consistently warn about the aforementioned problems regarding the powers of local and regional units.[54]

3.5. CONTROL

Lastly, control of the local self-government units is very complex, weak, and situationally driven. The overview of control mechanisms for the local self-government shows that there are almost 30 different types of control procedures, bodies, and mechanisms, ranging from judicial and administrative, to control by civic and independent bodies. However, control is rather inefficient, featuring a predominantly legal approach and random application of control standards. This is mostly the result of the overall politicization of the system and weak central state capacity to perform control of all 576 local self-government units.[55]

The abolition of the CSAOs additionally weakened the central state control capacity since general local acts are now supervised directly by line ministries instead of the previous CSAOs, as the first instance control bodies.[56] On the other hand, local and regional units initiated several proceedings before the Constitutional Court in order to assess the constitutionality of adopted laws (e.g., in the field of healthcare, water supply, etc.) which encroach on the right to local self-government. The Constitutional Court frequently does not decide on these requests within the legally prescribed period, thereby further undermining the position of the local self-government.

53 Škarica, M., Funkcionalni odnos lokalne i područne (regionalne) samouprave u Hrvatskoj u svjetlu odredaba Europske povelje o lokalnoj samoupravi (The functional relationship between local and regional self-government in Croatia in light of the provisions of the European Charter on Local Self-Government), in: Koprić, I., (ed.), 2018, *Europeizacija hrvatske lokalne samouprave* (Europeanization of Croatian local self-government), Zagreb, Institut za javnu upravu, pp. 493–519.

54 See the most recent CoE report, Congress of Local and Regional Authorities, 2024, Monitoring of the application of the European Charter of Local Self-Government in Croatia, co-rapporteurs: Gobnait NI MHUIMNEACAIN, Irland (L, ILDG) and Cecilia DALMAN EEK, Sweden (R, SOC/G/PD), CG(2024)46-18, 28 March, (https://search.coe.int/cm?i=0900001680aecea2, 23. 4. 2025).

55 Koprić, I., Crnković, M., Lopižić, I., Control of local governments in Croatia: Many components, still weak control, in: Max-Geis, E., Guérard, S., Volmerange, X., (eds.), 2018, *A threat to autonomy? Control and supervision of local and regional government activities*, Paris, Institut Universitaire Varenne, pp. 91–112.

56 Lopižić, I., Manojlović Toman, R., 2023.

4. Conclusion

The paper shows that since the establishment of modern local self-government, there have been several real local self-government reforms that have opened up and addressed very important issues. Other changes can mostly be described as partial attempts that did not lead to significant changes in terms of the main fundamental characteristics of local self-government in Croatia. The main reasons for this situation are certainly the institutional structures that emerged in the early 1990s and have managed to survive to this day in an almost unchanged form. This confirms the conclusions based on the historical institutionalism,[57] which shows that institutions have the ability to survive despite the formal changes that have occurred in the meantime. Path dependency has emerged as a constant in the institutional development of local and regional self-government in Croatia over the past 30 years.

It has been confirmed that the ruling political actors are proving to be exceptionally strong veto players. The analysis of the institutional development of local and regional self-government in the past three decades shows that, despite the given institutional path, some significant changes still occur when there is sufficient political will for it. In addition, incentives and pressures from the environment are effective only when they are in line with the attitudes and orientation of the ruling political elite. Other demands for reform coming from the environment, such as academia, the media and the general public, are systematically ignored and removed from the policy agenda. Political actors have proven to be unresponsive to the demands by the general public, media and academic community for the reform of the territorial organization as one the main and pressing issue of local self-government. This reform, along with capacity strengthening, local competences and finances, is one of the fundamental issues that have to be addressed in order to increase the functionality of the entire local and regional self-government in Croatia.[58]

57 Peters, B. G., 2019.

58 This is because "the territorial administrative system in our country has a network of identical spatial administrative units with equal political powers, regardless of the huge differences in power, size and position in relation to others. This equality is in many ways reminiscent of the well-known political equalization of forces and functions, like in some utopian world where there is a uniformity in the distribution of wealth, size, power, and rights. In practice, such a system slows down rather than encourages development, is more in line with the central state authority than with the people in the local community, emphasizes social and solidarity attributes more than active productive tendencies, and supports the success of some sort of decentralized centralism more than democracy, which is otherwise extremely emphasized".

The issue of territorial organization is inextricably linked to the possibility of implementing a significant decentralization policy and strengthening the overall capacity of local and regional self-government. It is confirmed that the decentralization policy – if such a systematic policy even exists in Croatia – is completely centralized and often confusedly led by the central government, with excessive control and narrowing of the self-governing scope of the competences of the local and regional units. Its evolution and eventual transition from a "centralized model of decentralization policy" to a "multi-layered decentralization policy process"[59] requires addressing the fundamental issues, directed toward strengthening the local and regional self-government outlined in this paper.

The fundamental contemporary roles of local self-government [60] have not been sufficiently taken into account in its development to date. If viewed through the amendments to the basic law governing local and regional self-government, previous reform activities mainly aimed to change some, often unimportant, political elements of local and regional self-government. In addition, elements that are crucial for the realization of the contemporary roles of local self-government appear only sporadically and separately from the systemic regulation of local and regional self-government.

Overall, the current local self-government, and especially its territorial structure, does not serve economic and societal development. It remains an open question to what extent it fulfills other roles of modern local and regional self-government, especially those related to the EU's Structural and Investment Funds,[61] and whether it meets the requirements of modern local self-government, which should also have the right to manage a significant share of public affairs.

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59 Kuhlmann, S. *et al.*, 2024, pp. 3–6.

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61 Đulabić, V., Lokalna i regionalna samouprava i korištenje sredstava iz fondova Europske unije, in: Boban, M., Vukušić, I., (eds.), *Zbornik radova Pametna lokalna samouprava*, 2017, Novalja, Split, Zagreb, Grad Novalja.

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REFORME BEZ REFORMIRANJA: TRENDOVI LOKALNE I REGIONALNE SAMOUPRAVE I DECENTRALIZACIJE U HRVATSKOJ

Vedran Đulabić

Iva Lopižić

APSTRAKT

Cilj rada je prikazati, analizirati i raspraviti promjene u hrvatskom sustavu lokalne samouprave te procijeniti koji su njihovi pokretači, mogu li se te promjene smatrati pravim reformama te zašto do nekih promjena, a do drugih ne. Članak pokriva 30-godišnji raspon razvoja hrvatske lokalne samouprave – od ranih 1990-ih, kada je uvedena moderna lokalna samoupravu, do 2000-ih, kada je Hrvatska prešla na sustav temeljen na političkoj decentralizaciji te nedavne reforme. Pokazuje se da je bilo nekoliko pravih reformi lokalne samouprave koje su otvorile i riješile vrlo važna pitanja, dok se ostale „reforme" uglavnom mogu opisati kao djelomične promjene koje se događaju kada za to postoji značajna politička volja ili pod jakim vanjskim pritiscima. Politički akteri i njihova uloga veto igrača (*veto players*) zajedno s ovisnošću o prijeđenom putu (*path dependency*) ostaju ključni doktrinarno-teorijski čimbenici koji objašnjavaju razvoj lokalne samouprave u posljednja tri desetljeća u Hrvatskoj.

Ključne riječi: reforme lokalne samouprave, decentralizacija, lokalna i regionalna samouprava u Hrvatskoj, trendovi razvoja lokalne i regionalne samouprave.

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REVIEW ARTICLE

*Sofija Nikolić Popadić**

THE IMPACT OF CLIMATE CHANGE ON HUMAN HEALTH: DOES LEGISLATION IN SERBIA ADEQUATELY RESPOND TO THE CHALLENGES?

Abstract: *The effects of climate change are numerous: from extreme weather events with enormous amount of precipitation, to extreme droughts in parts of the planet where this was previously uncommon. They can significantly affect the physical and mental health of the human population. This paper will focus firstly on recognizing the increasingly intense consequences of climate change in Serbia and their impact on human health. After that, it will answer the question whether the threat of climate change to human health is recognized in the strategies and legal regulations in Serbia, and if so, whether legislation in Serbia adequately responds to those challenges. The research results show that the connection between the climate change and human health is not recognized in all relevant legislation. Recommendations for appropriate legislative changes are provided.*

Key words: Climate Change, Human Health, Health Law, Climate Change Law, Strategies.

1. Introduction

Climate change has many consequences, from extreme events such as weather disasters with large amounts of precipitation, to extreme droughts lasting for months in parts of the planet where this was uncommon in previous decades. According to the United Nations Intergovernmental Panel on Climate Change (IPCC), global surface temperatures increased by 1.1°C in the 2011–2020 period compared to 1850–1900.[1]

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1 IPCC, Summary for Policymakers, in: Lee, H., Romero, J., (eds.), 2023, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the*

Global warming is affecting people around the world. It is estimated that approximately 3.6 billion people live in areas that are highly vulnerable to consequences of climate change.[2]

The effects of climate change have significant influence on the physical and mental health[3] of the population.[4] Extreme weather events, especially heat waves, wildfires,[5] and floods, have resulted in human morbidity and mortality.[6] Consequences of climate change have contributed to the increase in the number of people with respiratory diseases, cardiovascular diseases, "vector-borne illnesses, food-borne and water-borne diseases,"[7] maternal and fetal health harms, mental health issues, etc.[8]

The situation regarding the impact of climate change on human health in Serbia has become cause for concern in recent years. Therefore, this paper will first focus on recognizing the increasing consequences of climate change in Serbia and their impact on population health. After that, the paper seeks to answer the question whether the threat of climate change to human health is recognized in the strategies and legal regulations in Serbia, and if so – whether the legislation adequately responds to those challenges. Recommendations are provided for appropriate changes in legislation for the challenges of the negative consequences of climate change on human health.

Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva, IPCC, p. 4.

2 *Ibid.*, p. 5.

3 Cosh, S. *et al.*, 2024, The relationship between climate change and mental health: a systematic review of the association between eco-anxiety, psychological distress, and symptoms of major affective disorders, *BMC Psychiatry*, No. 24, pp. 2, 16.

4 IPCC, Sections, in: Lee, H., Romero, J., (eds.), 2023, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, IPCC, p. 50.

5 Chen, G. *et al.*, 2024, Continuous wildfires threaten public and ecosystem health under climate change across continents, *Frontiers of Environmental Science & Engineering*, Vol. 18, No. 10, pp. 4–6.

6 Sovacool, B. K. *et al.*, 2024, Critically examining research funding patterns for climate change and human health, *npj Climate Action*, Vol. 64, No. 3, p. 2; Stewart, S., 2024, *Heart Disease and Climate Change*, Cham, Springer, p. 4.

7 *Ibid.*

8 *Ibid.*; Peters, E. *et al.*, 2022, Evidence-based recommendations for communicating the impacts of climate change on health, *Translational Behavioral Medicine*, Vol. 12, No. 4, p. 543; Yenew, C. *et al.*, 2025, Scoping review on assessing climate-sensitive health risks, *BMC Public Health*, Vol. 25, No. 1, pp. 3–7; Figueiredo, T. *et al.*, 2024, The interplay between climate change and ageing: A systematic review of health indicators, *PLoS ONE*, Vol. 19, No. 4, p. 2; Johansen, B. E., 2017, Climate Change: An Encyclopedia of Science, Society, and Solutions, *Volume III: Human impact and primary documents, Human health*, Santa Barbara, ABC-CLIO, pp. 37–45.

2. Consequences of Climate Change in Serbia and Their Impact on Human Health

The consequences of climate change in Serbia have become increasingly visible in the past several decades. Studies have shown that compared to the 1961–1990 period, the increase in average temperature in Serbia for the 2011–2020 period was 1.8°C, and during the summer 2.6°C.[9] That temperature raise is significantly higher than the increase in global average temperature of 1.1°C.[10] Official statistics shows that the summer of 2024 was the warmest summer in Serbia since 1951, i.e., since official measurement began.[11] The minimum seasonal temperatures in 2024 in most parts of the country were the highest in the history of measurement.[12] The consequences of climate change are also visible through higher number of heat waves and severe weather conditions, ranging from intense droughts to floods. Changes have also occurred in terms of the amount and distribution of precipitation over the years. In the past ten years, the number of days with very heavy precipitation has increased 1–2 times on average, and in some parts of the country up to 5 times.[13]

Climate change, especially extreme events, have significant influence on population health. The diseases that "are expected to be most affected by climate change are: asthma, respiratory allergies and diseases; malignant diseases; vascular diseases; nutrition and diseases caused by nutrition; diseases and mortality caused by heat stress; mental health disorders, disorders caused by stress; neurological disorders; vector and zootomic diseases; diseases transmitted by water; diseases and mortality caused by weather conditions."[14]

9 Serbian Ministry of the Environment, 2024, Third Communication of the Republic of Serbia to the United Nations Framework Convention on Climate Change, p. 7, (https://www.ekologija.gov.rs/sites/default/files/2024-02/treci_izveshtaj_republike_srbije_prema_ okvirnoj_konvenciji_ujedinenikh_nacija_o_promeni_klime.pdf, 24. 2. 2025).

10 *Ibid.*; Serbian Government Climate Change Adaptation Program for the 2023–2030 Period, *Official Gazette of the RS*, No. 119/2023.

11 Republic Hydrometeorological Service of Serbia, 2024, Seasonal bulletin for Serbia, Summer 2024, p. 1, (https://www.hidmet.gov.rs/data/klimatologija/latin/leto.pdf, 18. 1. 2025).

12 *Ibid*.

13 Đurđević, V., Vuković, A., Vujadinović Mandić, M., 2018, Climate changes observed in Serbia and future climate projections based on different scenarios of future emissions, United Nations Development Programme, p. 13.

14 Sekulić, G. *et al.*, 2012, *Climate Vulnerability Assessment – Serbia*, Belgrade, World Wide Fund for Nature, Environmental Improvement Centre, p. 33; see Portier, C. J. *et al.*, 2010, *A Human Health Perspective on Climate Change: A Report Outlining*

Heat waves, which are becoming increasingly frequent in Serbia, pose significant threat to human health. According to data, there was a significant increase in the mortality rate in Belgrade during a heat wave in July 2007. The highest mortality was recorded among persons suffering from cardiovascular and malignant neoplasms, while "the highest relative increase in the mortality rate is related to diabetes (286%), chronic kidney diseases (200%), respiratory system diseases (73%), and nervous system diseases (67%). The mortality rate among women was over twice higher than the mortality rate among men."[15] The research results from summer 2022 show that the number of heat-related deaths in Serbia was 574, which is 81 person per million, affecting more the female population than the male.[16]

Consequences of climate change are also visible in terms of the number of days with extreme precipitation, which led to floods in Serbia in 2014, in which 51 persons lost their lives.[17] Floods also pose a threat to health[18] and they can contribute to the spread of different diseases.

Changed climate conditions affect the spread of diseases, introducing some that were previously not present in the territory of Serbia. One example is the West Nile virus. Namely, since the infection was officially registered in the human population in Serbia for the first time in 2012, the number of patients has been increasing, reaching 415 infected persons in 2018. At that time, Serbia was in second place in Europe in terms of the number of cases, but during the following years the number of patients decreased. According to data from the Institute of Public Health of Serbia, during the 2012–2021 period, the deaths of 101 persons were linked to the West Nile virus.[19] Higher air temperatures, as a consequence of climate

the Research Needs on the Human Health Effects of Climate Change, Research Triangle Park, Environmental Health Perspectives/the National Institute of Environmental Health Sciences.

15 United Nations Development Programme Country Office in Serbia, 2016, *Climate Change and Health*, p. 2.

16 Ballester, J. *et al.*, 2023, Heat-related mortality in Europe during the summer of 2022, *Nature Medicine*, Vol. 29, p. 1861.

17 Nikolić Popadić, S., 2021, Flood prevention in Serbia and legal challenges in obtaining the land for flood risk management, *Environmental Science and Policy*, Vol. 116, pp. 213–214; Nikolić Popadić, S., 2020, Pravni aspekti upravljanja rizicima od poplava, *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 59, No. 86, p. 202.

18 Appuhamilage, G. P., Barbir, J., Lloveras, X. R., Analysis of Existing Disaster Risk Reduction Programs and Enhancement of Capacity Development for Health Risks from Floods in Western Balkan, in: Filho, W. L., Trbić, G., Filipovic, D., (eds.), 2018, *Climate Change Adaptation in Eastern Europe, Managing Risks and Building Resilience to Climate Change*, Cham, Springer, pp. 347–348.

19 "Dr Milan Jovanović Batut" Institute of Public Health of Serbia, 2022, Information on the current epidemiological situation of West Nile fever in the territory of the Republic of Serbia, (https://www.batut.org.rs/index.php?content=2401, 24. 1. 2025).

change, favor the reproduction of disease-carrying mosquitoes, affecting the vector population growth and increasing transmission efficiency.[20]

According to estimates provided in the Climate Change Adaptation Program for the 2023–2030 period, the population of Serbia is "highly vulnerable to the impacts of climate change," which negatively affect its health and which will be more pronounced in the coming decades. It is estimated that 45% to 55% of the population in Serbia is at high risk – they are "very likely to suffer the consequences of climate change that will threaten their health and living conditions", while "20% to 30% is at extremely high risk (they will certainly suffer the consequences of climate change that will endanger their health and living conditions)."[21] The population that is particularly vulnerable are elderly (people over 65 years of age), the poor, the rural population (due to poor access to health system services, outdoor work, and generally lower access to information), outdoor workers (over 3 million people), children, pregnant women, people with disabilities, people with chronic diseases (especially respiratory diseases, cardiovascular diseases, malignant diseases).[22]

Based on the previous analysis, we can conclude that the consequences of climate change in Serbia are very significant and a large part of the population is exposed to negative impacts, the effects of which will become increasingly pronounced in the coming years. The question that arises is whether the threat of climate change to human health has been recognized in Serbian strategies and regulations and, if so, whether the legislation in Serbia adequately responds to those challenges. The following sections will be dedicated to finding answers to those questions.

3. Is the Threat of Climate Change to Human Health Recognized in the Strategies and Legal Regulations in Serbia?

For decades, there have been attempts at the global level to set goals and directions for countries to take actions to reduce climate change. Serbia has been part of these global efforts: the United Nations Framework Convention on Climate Change was ratified in 1997 at the level of the Federal Republic of Yugoslavia; the Kyoto protocol was ratified by Serbia

20 Wang, H. R. *et al.*, 2024, Impact of climate change on the global circulation of West Nile virus and adaptation responses: a scoping review, *Infectious Diseases of Poverty*, Vol. 13, No. 38, p. 8.

21 Serbian Government, Climate Change Adaptation Program for the 2023–2030 period.

22 *Ibid*.

in 2007; the Doha Amendment to the Kyoto Protocol was ratified in 2017; and the Paris Agreement was ratified on 25 July 2017.[23] These international agreements oblige Serbia to implement activities to reduce its contribution to climate change, and also to implement adaptation measures. The realization of activities and measures involves and affects various sectors, including the field of public health.

Climate-related health problems can be addressed in various ways. One of them is to adequately recognize the risks that climate change poses to human health – within the framework of health regulations, but also in regulations that govern climate change issues – and to direct activities towards minimizing the negative effects of climate change on health, as well as to reduce the contribution of human activities to climate change. Bearing in mind the close connection between health and climate change, we analyzed the strategies and legislation in Serbia in order to answer the question: is the threat of climate change to human health adequately recognized in Serbia?

The analysis of the strategies and laws is conducted in chronological order, according to the years of their adoption, with a division between strategies and legislation in the field of health and in the field of climate change. We analyzed the health and climate regulations that are in force in Serbia, with the latest amendments in March 2025. Specifically, in the field of health we analyzed the Patient Rights Act, the Public Health Law, the Public Health Strategy of the Republic of Serbia for the 2018–2026 Period, and the Law on Healthcare. We selected these laws and strategy as they cover health risks, and climate change represents one of the health risks. So, the logical conclusion would be that climate change should be recognized as one of the health risks in the aforementioned legislation and consequently should be regulated. Regarding the field of climate change, we analyzed the main legislation and strategies that are currently in force.

3.1. HEALTH

The Serbian Patient Rights Act from 2013 is one of the laws in the field of health which deals with health risks in one part. Namely, it is stated in the law that "health institution has the obligation to implement

23 For more details see: Mihajlov, A., Aleksić, D., Komparativna analiza Klimatskog pakta Evropske unije i implementacije relevantnih od Srbije potpisanih i ratifikovanih međunarodnih ugovora, in: Nikolić Popadić, S., Milenković, M., (eds.), 2023, *Klimatske promene – pravni i društveni izazovi*, Belgrade, Institute of Social Sciences, pp. 36–37; Todić, D., Princip zajedničke ali diferencirane odgovornosti i Pariski sporazum o klimi, in: Nikolić Popadić, S., Milenković, M., (eds.), 2023, *Klimatske promene – pravni i društveni izazovi*, Belgrade, Institute of Social Sciences, pp. 17–18; Todić, D., 2019, Gde su granice prava klimatskih promena?, *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 83, pp. 47–52.

preventive measures in order to exercise the patient's right to appropriate health services for the purpose of preserving and improving health, prevention, suppression and early detection of diseases and other health disorders, by raising people's awareness and providing health services at appropriate intervals, for population groups that are exposed to an increased risk of illness."[24] The law does not specify the health risks or the specific sources of health risks. As we concluded in the previous section, the consequences of climate change represent a health risk, so this provision should also be applicable in the case of health risks stemming from the effects of climate change. It is especially important that health institutions have to also act preventatively and to raise awareness, which should in practice also include measures and actions related to the climate change risks that can affect human health. "The health institution is also obliged to ensure safety in the provision of healthcare, as well as to continuously monitor risk factors and take measures to reduce them, in accordance with the regulations governing quality in healthcare. The patient must not suffer damage caused by inadequate functioning of the health service."[25] Although climate change as such is not mentioned specifically in the Patient Rights Act, its provisions should be interpreted in a way that also includes risk factors stemming from the consequences of climate change.

Since we have concluded that the consequences of climate change represent one of the risks to public health, it would be logical for this risk to be recognized within the Public Health Law (PHL). This is important as PHL from 2016 is the basic law for regulating planning and implementation of activities related to the "preservation and improvement of the health of the population". Health is defined in the PHL in a same way as in the Constitution of the World Health Organization, as "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."[26] According to the PHL, "public health is a set of knowledge, skills and activities aimed at improving health, preventing and suppressing diseases, prolonging and improving the quality of life through organized measures of society."[27] Some of the main public health tasks listed in this law are "monitoring and response to health hazards and emergency situations, health protection, including the safety of the environment and working environment, food and others; health promotion," as well as "prevention and suppression

24 Patient Rights Act, *Official Gazette of the RS*, No. 45/2013, 25/2019, Art. 8, translated by author.

25 *Ibid.*, Art. 10.

26 Public Health Law, *Official Gazette of the RS*, No. 15/2016, Art. 2; Constitution of the World Health Organization, *Off. Rec. Wld Hlth Org., 2, 100*, p. 1.

27 Public Health Law, Art. 2, translated by author.

of infectious and non-infectious diseases."[28] From the definition of public health and its main tasks we can conclude that the risks and consequences of climate change should find a place within them. Namely, as we saw in the sections 1 and 2 of this paper, the effects of climate change to human health and wellbeing are numerous, therefore monitoring and prevention should also include climate change-related health issues. One of the areas for public health action within this law is the environment and population health, which includes, among other activities, "1) monitoring and analysis of the state of the environment, i.e., analysis of water [...], air, soil, noise, vibrations, ionizing radiation, non-ionizing radiation, wastewater and waste; [...] 7) assessment of the risk to the health of the population based on the register of sources of pollution; 8) monitoring and analysis of the health status of the population and assessment of health risks related to environmental influences, including the assessment of the epidemiological situation; 9) spreading knowledge and involving the population in actions to improve the state of the environment."[29] It is important to introduce changes in this part, so that it would also include the issue of climate change. Assessment of the health risks related to the effects of climate change should be added. Also, the provision related to the spread of knowledge and involvement of the population should be expanded to include actions related to climate change adaptation and mitigation measures. The spread of knowledge and information is also stipulated within the provisions dedicated to social care for public health at the level of the province and local self-government units. The competent state authorities and the public have to be informed about all risks and other public health problems that may have negative consequences for the health of the population.[30] This should also include information about the risks that climate change and its consequences (may) have on the health of the population. The law stipulates that the institute for public health, independently or in cooperation with other participants in the public health system, proposes public health programs to the local self-government unit, which include the collection and analysis of public health data, interpretation of public health information and its use in the process of decision-making and development of public health activities.[31] We suggest that these programs and proposals for the creation of activities also cover the risks associated with climate change, taking into account their negative impact on health. The PHL defines who the participants in the field of public health as "bodies

28 *Ibid*.

29 *Ibid.*, Art. 8.

30 *Ibid.*, Art. 14.

31 *Ibid.*, Art. 22.

of the Republic of Serbia, autonomous provinces, local self-government units, health service, health insurance organizations, social protection system, health councils at local self-government units, educational and other institutions, media, economic companies, public companies, entrepreneurs, humanitarian, religious, sports and other organizations and associations, families and citizens."[32] As we can see, public health permeates and applies to almost all subjects in society. Given that the consequences of climate change also apply to and affect the vast majority of subjects, it is very important that climate change is recognized as a health risk and that the activities of various subjects are adapted to the goal of reducing the risk of climate change and adapting to climate change, aiming to reduce the negative consequences to the health of the population.

The connection between climate change and health is recognized in the Public Health Strategy of the Republic of Serbia for the 2018–2026 Period, but only in a very general way, as one of the objectives of the Strategy. Namely, within the general goal of improving the environment and the working environment, one specific objective is foreseen related to climate change: "improving the state of the environment and responding to climate change."[33] The Strategy envisages activities that should lead to the achievement of the stated goal. Those are reduction of emissions of harmful gases from industry, domestic combustion plants and motor vehicles by 20%, compared to emissions in 2015; continuous improvement of the control of the application of plant protection products and mineral fertilizers in order to preserve soil quality and achieve food safety; development of strategic noise maps, action plans for noise protection and acoustic zoning of cities; development of action plans for responding to climate change in cities; adoption and implementation of action plans for improving energy efficiency.[34] Dedicating part of the Public Health Strategy to the issue of climate change is an important step in linking climate change and health, but for specific changes strategy is not enough. Adopting action plans and implementing them in practice is essential in order to achieve change.

The law in the field of health that recognizes climate change is the 2019 Law on Healthcare (LHC). Unfortunately, this law does not regulate in detail the issue of the effects of climate change on human health and potential measures that could be applied. Climate change is mentioned only at one place; namely, it states that social care for health at the level of the country include the adoption of a national program in the field of

32 *Ibid.*

33 Public Health Strategy of the Republic of Serbia for the 2018–2026 Period, *Official Gazette of the RS*, No. 61/2018, section 4.2.

34 *Ibid.*, section 4.2.5.

health protection from the effects of factors in the living and working environment that can adversely affect health: harmful and dangerous substances in the "air, water and soil, disposal of waste materials, dangerous chemicals, sources of ionizing and non-ionizing radiation, noise and vibrations".[35] The program should contain climate change adaptation measures, based on the analysis of the risks to the health of the population of Serbia. The program should be adopted by both the minister responsible for health and the minister responsible for environmental protection.[36] To the author's knowledge, this program has not yet been adopted. The LHC also prescribes social care for health at the provincial level and at the level of the local self-government unit, which includes, among other things, "planning and implementation of a program for the preservation and protection of health" from environmental pollution by harmful and hazardous substances.[37] We suggest that these provisions be expanded to include the preservation and protection of health from the effects of climate change at the provincial and local levels. According to LHC, the citizen has "the right to information that is necessary for the preservation and improvement of health and the acquisition of healthy lifestyle habits, as well as to information on factors of the living and working environment," which may affect health.[38] We suggest that this provision can also be expanded so to include information regarding climate change, especially information regarding effects of climate change on health and information on measures that should be taken in order to preserve health in environment which is affected by climate change. The Institute of Public Health also has an important role in informing population. One of its duties is "to monitor and analyze the health status of the population, [...] and risk factors from the environment that may adversely affect people's health, and to report this to the competent authorities and the public, [...] inform and educate the population about ways of preserving and improving the state of the environment, as well as preventing the harmful effects of environmental risk factors."[39] We suggest that these provisions be expanded in a way that includes climate change risk factors. Although the law does not mention climate change in this provision regarding the role of Institute of Public Health in informing the population, the website of the "Dr Milan Jovanović Batut" Institute of Public Health of Serbia includes a special

35 Law on Healthcare, *Official Gazette of the RS*, No. 25/2019, 92/2023, Art. 10, translated by author.

36 *Ibid*.

37 *Ibid.*, Arts. 12, 13.

38 *Ibid.*, Art. 16.

39 *Ibid.*, Art. 101.

section called climate and health, which provides biometeorological forecast, and recommendations for extremely hot and cold weather.[40] Although those recommendations are very general, they can be useful to the public. It should be noted that the website was latest updated in 2019, even though weather situation and circumstances changing every year. This information should be updated more regularly, especially having in mind the consequences of climate change and the fact that the summer 2024 was the warmest summer in Serbia since 1951.

3.2. CLIMATE CHANGE

The first Law on Climate Change (LCC) in Serbia was enacted in 2021. Unfortunately, the connection between human health and climate change is not specifically recognized and regulated in this law. One of the goals of the LCC is "to establish a system to reduce greenhouse gas (GHG) emissions in a cost-effective and economically efficient manner, thus contributing to reaching the scientifically necessary levels of GHG emissions, in order to avoid dangerous global climate changes and the adverse impacts of climate change."[41] By analyzing and interpreting this provision, we can conclude that this goal also includes reducing the negative impact on human health, given that avoiding the adverse impacts of climate change certainly includes health. This interpretation is confirmed by further analysis of the law. Namely, in determining the meaning of the terms used in the law, Article 5 states that "adverse impacts of climate change mean changes in the physical environment or 'biota', due to climate change, which have significant adverse consequences on the composition, recovery or productivity capacity of natural and managed ecosystems, or on the functioning of socio-economic systems or human health and wellbeing."[42] Therefore, the activities envisaged in this law should also contribute to reducing the negative influence of climate change on health. However, given the significant risk to health, the legislator could have focused more on the connection between climate change and health. Following the adoption of the LCC, we hoped that the strategies and programs whose adoption was prescribed by that law would pay more attention to this issue. The following analysis of the strategies and programs will show whether this was done.

40 "Dr Milan Jovanović Batut" Institute of Public Health of Serbia, website, (https://www.batut.org.rs, 22. 2. 2025).

41 Law on Climate Change, *Official Gazette of the RS*, No. 26/2021, Art. 3, translated by author.

42 *Ibid.*, Art. 5 (19).

In June 2023, the Government adopted Low Carbon Development Strategy of the Republic of Serbia for the 2023–2030 Period with Projections Until 2050. The risk that climate change poses to the health is recognized already at the beginning. The Strategy states that "the effects of climate change are already a threat, while future risks could jeopardize, among else [...] public health."[43] There is also connection between health benefits and implementation of certain measures within the strategy, which prescribes that measures related to the reduction of PM2.5 emissions should contribute to the decrease of PM2.5 emissions by 7% in 2030, with a 28.7% decrease by 2050, which should also "contribute to cleaner air and to the reduction of health problems associated with air pollution."[44] Although, apart from air pollution, strategy does not specify which consequences of climate change and in which way can have negative effects on human health, it is very important that the threat posed by climate change to public health is recognized.

According to the LCC, the Government is obliged to adopt a climate change adaptation program, which was done in December 2023. The connection between climate change and population health is recognized within the Climate Change Adaptation Program for the 2023–2030 Period (CCAP).[45] There is special section dedicated to human health and safety, stating that "climate change affects the physical, mental and emotional health of individuals and society."[46] Unfortunately, there is no systematical vulnerability and risk assessment for the effects of climate change on public health sector at the national level, but there is a list of groups of climate hazards within the CCAP, which are currently known to have or may have an important impact on human health and safety. Four groups of climate hazards have been identified. The first hazard is excessively warm weather, which can cause heatstroke and exhaustion, "increased risk of diseases, allergies and chronic illnesses."[47] Excessively warm weather can also lead to reduced availability of food and drinking water, and it can increase the risk of fire, causing air pollution. The second hazard is excessively wet weather, which can also increase "risk of diseases and other health prob-

43 Low Carbon Development Strategy of the Republic of Serbia for the 2023–2030 Period with Projections Until 2050, *Official Gazette of the RS*, No. 46/2023, pp. 1, 6, translated by author.

44 *Ibid.*, p. 26.

45 It is stated that climate change increases climate hazards including "climate and weather conditions that can directly or indirectly cause damage to nature, property, and human safety and health". Serbian Government Climate Change Adaptation Program for the 2023–2030 Period, 3.3.1.

46 *Ibid.*, 5.1.

47 *Ibid.*, 5.1. table 3, translated by author.

lems."[48] Wet weather can lead to the occurrence of floods and flash floods which can lead to "infectious diseases outbreaks due to deteriorated hygiene conditions, reduced availability of drinking water and reduced capacity to provide emergency medical assistance"[49] in the event of flooding. The third hazard is excessively dry weather, which can also influence reduction in "the availability of drinking water and water needed for hygiene." Dry weather can also have an impact the quality and availability of food. The last hazard identified in the CCAP are storms. It is stated that the impact of storms can be through "increased risk of injuries, deteriorated living conditions, and reduction in ability to provide emergency medical care."[50] The consequences of all four hazards are the same according to the CCAP: "worsening of health conditions, premature deaths; deteriorated living conditions; healthcare system overload due to climate hazards and inadequate public healthcare and rescue services overload; reduced functionality of emergency health services."[51] As it is already explained in the Section 2, more than half of the population in Serbia is at high risk to suffer consequences of climate change.[52] One of conclusions within the CCAP is that there is a "high confidence that risks from climate change in the public health sector will increase in the future."[53] Therefore, the CCAP provides a recommendation of "measures that need to be implemented to increase the Serbian population's resilience to climate change." Some of them are to "increase population preparedness for extreme weather conditions and other climate hazards," which should be done through "timely public sharing of information on extreme weather events, providing guidelines on behavior and ways to reduce risks to health, organizing timely risk reduction activities at the local level,"[54] etc. Other measures whose implementation is recommended are: "increasing the intervention capacities of emergency services and healthcare institutions; strengthening the capacities of other emergency response services; protecting outdoor workers; improving disease and infections monitoring and preventing disease spreading or implementing early interventions; improving monitoring of food and water quality; strengthening education and raising awareness among children and youths; expanding knowledge

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 *Ibid.*

52 See section 2. Consequences of climate change in Serbia and their impact on the health of the population.

53 Serbian Government Climate Change Adaptation Program for the 2023–2030 Period, 5.1, translated by author.

54 *Ibid.*, 5.1. table 5.

about vulnerability and risks to human health and safety."[55] There are also implementation methods for the measures recommended in the CCAP. Among them, there is a suggestion to "develop an analysis of the spatial distribution of climate change vulnerability and risks to human health and safety for the whole country, taking into account the distribution of vulnerable population groups, age distribution, gender differences, identify risk types and levels, as well as to develop guidelines for measures that would increase the population resilience to climate change,"[56] which would be highly important for the adaptation to changing climatic conditions and health protection. Changes brought about by the CCAP are very important, as finally, an official document recognizes in greater detail the inextricable connection between climate change and human health. It is also significant that the measures that need to be taken have been identified, as have the methods for their implementation. However, for concrete changes, further development of measures, elaboration and final implementation in practice are all necessary in order to achieve the intended results.

4. Conclusion

The consequences of climate change are becoming pronounced in Serbia and have an increasingly significant influence on population health. Based on the analysis, we can conclude that it is necessary to recognize the connection between climate change and health, both within strategic documents and in legal regulations, and to anticipate measures that would reduce negative influence on health and adapt to new climate conditions.

The results of our research show that climate change is not recognized as a risk to human health in the Public Health Law and Patient Rights Act of Serbia. The Serbian Law on Healthcare recognize this risk, but only in one place and not in a detailed manner. The connection between climate change and human health is recognized in the Public Health Strategy, but only in a very general manner. We can conclude that the existing legal provisions are insufficient. The research results show that there is a necessity to change legislation, to recognize climate change as one of the threats to human health. In Section 3.1 we suggested which articles of the laws should be amended in order to include climate change.

After analyzing climate change legislation and strategies, we can conclude the following. The connection between human health and climate

55 *Ibid.*, translated by author.

56 *Ibid.*

change is not specifically recognized and regulated in Serbia's LCC, but it is mentioned indirectly. Since one of the goals is to reduce GHG emissions, that should also contribute to the reduction of the negative impacts on human health. The risk that climate change poses to human health is recognized in the Low Carbon Development Strategy, and in the CCAP. We can conclude that the CCAP is the first document in which the connection between the effects of climate change and human health is clearly stated, with a classification of four groups of climate hazards, and their impact and consequences on human health and safety. The population groups that are vulnerable to climate change and their characteristics have been identified. The program recommends "measures that need to be implemented in order to increase the Serbian population's resilience to climate change, measures to reduce vulnerability to future climate conditions and consequently reduce risks, and measures to increase the speed of recovery."[57] Given that specific measures and activities have been provided in the program, further steps towards their implementation are the responsibility of the Ministry of Health and the Ministry of Environmental Protection.

It is also of the utmost importance to raise public awareness both about the negative influence of climate change on health and the negative effects of human activities on the climate, together with specific measures that must be implemented in order to reduce negative consequences. Providing timely and accurate information to the public, especially regarding the concrete measures that should be applied in the case of higher risks, is crucial, as lack of information can also lead to negative consequences. People need to know how they should act in certain situations and to be informed about the risks that consequences of climate change pose to health, and how to prevent or mitigate them. This is the field that requires improvement in Serbia. It should be noted that some of the measures within the CCAP, which we have analyzed, include increasing awareness, "improving knowledge and understanding of the impact of climate change and its consequences, ensuring timely information to the public about extreme weather events,"[58] etc. so we hope that we will see some changes in the coming years.

In general, we can conclude that the connection between the impact of climate change and human health is not recognized in all relevant legislation. The laws and strategies where that recognize the connection do not do so in an adequate way (as explained in the Section 3), considering the high risk that the consequences of climate change pose to human health.

57 *Ibid.*, 5.1.

58 *Ibid.*

Our evaluation was based on various principles. One of them is the principle of integration, which requires the alignment of policies across different sectors. It originates from the Treaty Establishing the European Community according to which "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities."[59] This principle can also be applied in Serbian policies in different sectors. From the results of our research, we can conclude that environmental considerations are implemented to the certain extent in health legislation (as explained in the Section 3.1), but this is unfortunately not the case for climate change issues and objectives. The principle of integration should also be applied to climate change. One of the examples of principle of integration can be found in the European Climate Law which states that "policies on adaptation in the Union and in Member States [...] work towards better integration of adaptation to climate change in a consistent manner in all policy areas, including relevant socioeconomic and environmental policies and actions, where appropriate, as well as in the Union's external action. They shall focus, in particular, on the most vulnerable and impacted populations and sectors, and identify shortcomings in this regard in consultation with civil society."[60] Therefore, health and climate change policies and legislation should be compiled, and climate change objectives should be integrated into relevant policies and legislation (especially in the field of health – the European Climate Law emphasizes the necessity to "address the growing climate-related risks to health").[61] The Serbian Law on Climate Change also prescribes that "public policy documents in the sectors most affected by climate change, as well as planning documents of autonomous provinces and local self-government units," should be based on climate change adaptation goals.[62] As can be concluded from the research results, the Public Health Strategy recognizes climate change issue, but that is only the first step. The CCAP has brought about improvement, but legislation is still lacking an integrative approach towards the issue of the impact of climate change on human health.

Taking "precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects," as stated in

59 Consolidated version of the Treaty Establishing the European Community, *Official Journal of the European Communities*, C 325/33, 24. 12. 2002, Art. 6.

60 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC), No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), *Official Journal of the European Union*, L 243/1, 9. 7. 2021, Art. 5.

61 European Climate Law, (5).

62 Law on Climate Change, Art. 15.

the United Nations Framework Convention on Climate Change,[63] should be also applied in the health sector. The precautionary principle "enables decision-makers to adopt precautionary measures when scientific evidence about an environmental or human health hazard is uncertain and the stakes are high."[64] Therefore, the decision-makers should follow this principle when changing the legislation in the field of health and climate change. Our research shows that precautionary/preventive measures, which are concretely and specifically related to negative effects and risks of climate change on the health of the population, are not provided in Serbia's health regulations.[65] It is necessary to integrate climate change risks into health legislation in a more detail way. Binding obligations that can contribute to the prevention and mitigation of the negative effects of climate change on human health should be incorporated into health legislation. It is crucial to go further than mere general statements which are hardly being implemented in practice. Introducing concrete measures into legislation – which would be binding for the institutions, but also implementable in practice – is one of the ways to achieve integration and alignment between the areas of climate change and health. Another possible approach is to provide a legal basis in health legislation for prescribing concrete measures in bylaws. Leaving the burden of such important issues to strategies and programs, which is currently the case, has not yielded the necessary results that would protect human health from the effects of climate change. The legislation should be also improved by integrating cross-sector coordination, which is significant for addressing the complex issue of the impact and consequences of climate change on population health. Cross-sector coordination would be in line with the Health in All Policies approach[66] which is also prescribed by the Serbian PHL.[67]

63 United Nations, 1992, United Nations Framework Convention on Climate Change, Art. 3, (https://unfccc.int/resource/docs/convkp/conveng.pdf, 19. 5. 2025).

64 Bourguignon, D., 2015, *The precautionary principle: Definitions, applications and governance*, European Union, European Parliamentary Research Service, (https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA(2015)573876_EN.pdf, 4. 3. 2025).

65 As mentioned in Section 3, the LHC refers to the national program in the field of health protection from the effects of factors in the living and working environment that can adversely affect health, which should also include climate change adaptation measures, based on the analysis of risks to the health of the citizens of Serbia. Consequently, the concrete measures are left to the program.

66 Formally legitimated as a European Union (EU) approach in 2006, according to Koivusalo, M., 2010, The state of Health in All policies (HiAP) in the European Union: potential and pitfalls, *Journal of Epidemiology and Community Health*, Vol. 64, No. 6, p. 500.

67 Public Health Law, Arts. 2, 3.

Therefore, based on the results of our research we can conclude that changes are necessary. The only good example that we found is the CCAP, as explained above, but having a plan is not enough – we have to see how implementation will work in practice in the coming years.

We hope that this paper will contribute to filling the literature gap, as to the author's knowledge there is no similar literature in Serbia dedicated to the analysis of strategies and legislation in the field of health and climate change. We also hope that this paper will be helpful to policy makers in their future decisions, as we identified which legislation has the potential for changes, as a way of responding to the challenges that climate change poses to human health.

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UTICAJ KLIMATSKIH PROMENA NA ZDRAVLJE LJUDI: DA LI ZAKONODAVSTVO U SRBIJI NA ADEKVATAN NAČIN ODGOVARA NA IZAZOVE?

Sofija Nikolić Popadić

APSTRAKT

Posledice klimatskih promena su brojne: od ekstremnih događaja, kao što su vremenske nepogode sa velikom količinom padavina, do ekstremnih suša, koje traju nekoliko meseci u delovima planete gde to nije bilo uobičajeno u ranijim decenijama. Efekti klimatskih promena imaju značajan uticaj na fizičko i mentalno zdravlje stanovništva. U radu smo se fokusirali pre svega na prepoznavanje sve intenzivnijih posledica klimatskih promena u Srbiji i njihovog uticaja na zdravlje ljudi. Nakon toga smo rad posvetili analizi i traženju odgovora na pitanje da li je opasnost od klimatskih promena po zdravlje ljudi prepoznata u strategijama i zakonodavstvu u Srbiji, i ako jeste, da li propisi u Srbiji na adekvatan način odgovara na te izazove. Rezultati istraživanja pokazuju da veza između uticaja klimatskih promena i zdravlja ljudi nije prepoznata u svim relevantnim zakonima. Postoji potreba za poboljšanjem u ovim oblastima, zbog čega smo u radu dali preporuke za izmene zakona.

Ključne reči: klimatske promene, ljudsko zdravlje, zdravstveni zakoni, zakon o klimatskim promenama, strategije.

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SYMPOSIUM ON MENSTRUAL JUSTICE IN MOTION

When I received the invitation to the workshop "What Stands for Menstrual (In)Justice" in Belgrade, I was intrigued. I have been following the global menstrual movement for years, but admittedly Serbia had not been on my radar. I should not have been surprised – the menstrual movement is gaining strength across the world. I have been able to connect with inspiring menstrual justice activists from Colombia, Fiji, the Philippines, Taiwan, Turkey, and many other places. While some early menstrual hubs were in South Asia and East Africa,[1] we are now witnessing the emergence of a global movement.

The networks, feminist collectives and groups are too numerous to list, and it is impossible to do their work justice, but I want to highlight a few. In Latin America, the Escuelas Menstruales and Emancipadas have been focusing on menstrual literacy by conducting workshops, trainings, and convenings geared towards raising self-awareness, body literacy and wellbeing. They understand body literacy as powerful and political and connect it to the notions of sovereignty, autonomy, and dignity, including decoloniality and resistance to Western hegemonic ideas and conceptions of menstruation. In India, the Safai Karmachari Andolan, the movement of manual scavengers and Dalit feminists among them, has been mobilizing around menstrual justice. They have built a platform involving Dalit and non-Dalit women across more than ten Indian states, which is convened by women in the communities. While menstruation has long been silenced and stigmatized, across these communities, women were not only willing but eager to reflect on their menstrual experiences in

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1 Bobel, C., 2019, *The Managed Body: Developing Girls and Menstrual Health in the Global South*, Cham, Springer International Publishing.

a patriarchal and casteist society. In these and many other contexts, the conversations then flowed naturally to related issues including pregnancy, delivery, breastfeeding, (in)fertility, menopause, relationships, consent, bodily autonomy, experiences of violence and abuse, early marriage, and others. They often extend to gender roles, experiences of discrimination, relationships with spouses, parents and in-laws, providing women with the opportunity to reflect on and transform these relationships. These are instances where we see the transformative potential of menstrual justice.

Looking at the movement more broadly, in its recent report on menstrual justice, *Scarlet Murmurations*, Irise International understands menstrual justice as a "rights-based, intersectional approach that seeks to dismantle structural inequities related to menstruation and the menstrual cycle."[2] This highlights three key notions of menstrual justice that are present in evolving mobilization efforts.

Menstrual activists see menstrual justice as linked to a broader social justice and gender justice agenda. They stress that the stigma surrounding menstruation is rooted in gender discrimination and systems of oppression that put women in an inferior position and deny them their agency and autonomy over their bodies. Moving forward, the movement would benefit from strengthening connections with other strands of gender justice and creating alliances with groups working on reproductive justice, gender-based violence, labor rights and gender disparities, and environmental justice, among others. The symposium in Belgrade featured human rights activists from Serbia and Croatia facilitating such embeddedness in broader justice movements.

To align menstrual justice with gender justice, many activists also demand explicit focus on intersectionality that takes into account broader systems of oppression and discrimination such as caste, race, ethnicity, age, disability, gender identity, socioeconomic status, living and/or working in conditions of informality, among other factors. The mobilization among the Safai Karmachari women powerfully demonstrates that their lived experiences can only be understood through compounded stigma and discrimination of menstruation, gender, and caste. In Belgrade, the symposium stressed that the experiences of trans and non-binary people must be reflected in the menstrual movement.

Ultimately, the framing of menstrual justice stresses the notion of accountability and the need to address structural and systemic issues.

2 Lynch, I., Solomons, A., 2024, *Scarlet Murmurations: Advancing Global Menstrual Justice*, Sheffield: Irise International & Global Menstrual Collective, (https://www.irise.org.uk/global-menstrual-justice, 22. 4. 2025).

Activists highlight that menstrual justice is about transformative, societal change aimed at achieving a world where no one is disadvantaged because they menstruate.

To be sure, not all groups working on menstruation seek to bring about transformative change. Some ongoing work remains superficial and focused solely on the provision of menstrual products to facilitate the management of bleeding rather than addressing the underlying structural causes and societal dynamics that put people who menstruate at a disadvantage. The rapid growth of menstrual activism also bears risks – risks of being a mere moment rather than a sustained movement, risks of being a "sexy" but empty topic, and risks of human rights being instrumentalized and reduced to a slogan.[3] That being said, I have had the privilege of engaging with movements that have staying power and seek to bring about transformative change.

In a world where we see sexual and reproductive health, rights and justice increasingly under pressure and witness an unprecedented backlash against gender justice, the menstrual movement offers hope. Menstrual stigma is insidious, deeply entrenched in societies and difficult to dismantle[4] but we are beginning to see change across the world. Young people in the United Kingdom and elsewhere are increasingly comfortable talking about menstruation openly and expressing their needs.[5] In Nairobi, Kenya, large billboards raise awareness of period shaming[6] and activists confirm that menstruation has become much more visible in everyday life. In Taipei, Taiwan, activists established the Red House Period Museum which seeks to give menstruation visibility and get people to talk about their menstrual experiences.[7] The contributions in this volume further promote our understanding on how to transform everyday injustices into menstrual justice.

3 Winkler, I. T., 2021, Menstruation and Human Rights: Can We Move Beyond Instrumentalization, Tokenism, and Reductionism?, *Columbia Journal of Gender and Law*, Vol. 41, No. 1, pp. 244–251.

4 Olson, M. M. *et al.*, 2022, The persistent power of stigma: A critical review of policy initiatives to break the menstrual silence and advance menstrual literacy, *PLOS Global Public Health*, Vol. 2, No. 7, pp. 1–23.

5 Tomlinson, M. K., 2025, *The Menstrual Movement in the Media: Reducing stigma and tackling social inequalities*, Cham, Springer Nature.

6 Simiyu, M., 2023, Senator Gloria Orwoba erects 'period shaming' billboard in Nairobi, *Nairobi News*, February 20, (https://nairobinews.nation.africa/senator-gloria-orwoba-erects-period-shaming-billboard-in-nairobi/, 22. 4. 2025).

7 Cheung, H., 2022, Talking about the period, *Taipei Times*, 5 July, (https://www.taipeitimes.com/News/feat/archives/2022/07/05/2003781159, 22. 4. 2025).

The international workshop at the Union University Law School Belgrade entitled "What Stands for Menstrual (In)justice" was held in Belgrade, Serbia, on 22 November 2024. The Belgrade workshop revisited human rights, social justice, law, and menstruation in relation to women's health, public health, tax law and policy, labor rights, LGBTQIA+ rights, psychology, sociology, health, and feminism. The symposium articles offered in the Journal cover some of the most interesting topics presented at the Belgrade workshop.

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SYMPOSIUM: MENSTRUAL JUSTICE IN MOTION /
SIMPOZIJUM: MENSTRUALNA PRAVDA U POKRETU

ORIGINAL SCIENTIFIC ARTICLE

Articles / Članci

*Judit Sándor**

THE BIOPOLITICS OF MENSTRUATION IN HUNGARY: THEN AND NOW

Abstract: *This article focuses on postwar Hungary, including the transition from state socialism to peripheral capitalism. This era is especially important as during the decades of cold war one of the main claims was that social and welfare rights – including the right to healthcare – were exemplary in state socialism and much more advanced than in the capitalisms of the West. This article argues, however, that even though social welfare rights were advanced in certain jurisdictions and fields, they did not eradicate patriarchal views. Neglecting women during their period also shows that protecting motherhood did not automatically increase women's rights. While women's welfare rights have been underdeveloped, there have been some significant achievements in the fields of maternal care and childcare.*

Key words: Menstruation, Stigma, Discrimination, Tampon, Clinical Trials, Cold War, Healthcare, State Socialism, Hungary.

1. Introduction

Menstruation has been a continual source of discrimination against women throughout the history of humankind – and even justification for misogyny across all cultures. For a long time, false beliefs and superstitions dominated the attitudes towards menstruating women and later it was ignored or misunderstood by science. Many believed that menstruation was a "curse", and it took centuries for even scientists to understand the process of menstruation. It was often considered as a sign of female

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imperfection or an emotional sorrow for not being pregnant. The "weeping of a disappointed womb"[1] and its related "physiological emergencies" were used for justifying the exclusion of women from certain professions. In addition, dangerous myths and prejudices also interfered with science. Wrong ideas and biases about menstruation were often a major source of discrimination. All this resulted in the stigmatization of menstruating women, which also led to making menstruation a taboo. Menstruation still plays a very important element in estimating the start of the pregnancy. Menstruation always played an important role in the assessment of the duration of pregnancy. Furthermore, when genetic tests did not exist, even in paternity cases the time of the last menstruation served as evidence (the expected birth is usually 280 days from the first day of the preceding menstruation).

During the time of state socialism in Hungary an entirely different approach emerged. While women had jobs – they had to work – and were not excluded (at least de jure) from any profession, their healthcare needs were still often neglected. This also included access to menstrual products that were available to women in the West.

This article predominantly focusses on postwar Hungary, including the transition from state socialism to peripheral capitalism. During the Cold War, one of the main arguments for the self-claimed superiority of state socialism was based on the protection of social and welfare rights, including the right to healthcare.[2] This article argues that regardless of the development of social rights, the patriarchal views of the society remained dominant.[3] The protection of mothers and children had significant results and was more important than promoting the rights of women, even in the field of healthcare. As a result, because of their role in social reproduction, as mothers, women were supported by a wide range of social welfare measures. Menstruation was regarded as a taboo, and this led to women being neglected during their period. Silencing women's needs also shows the differentiation between mother and child protection and women's rights.

The introduction of childcare allowance (with the Hungarian Acronym: GYES) in 1967, for example, was central to this view of women. It was adopted by Government Decree 3/1967. (I. 29.), and its implemen-

1 Yager, S., 2013, Weeping of a Disappointed Womb Themes in Mythology about the Female Reproductive System, *The Atlantic*, October 2, (https://www.theatlantic.com/health/archive/2013/10/weeping-of-a-disappointed-womb/280166/, 12. 5. 2025).

2 *Ibid*.

3 Varju, M., Sándor, J., 2024, Needs Over Rights: The Right to Health in State Socialist Hungary and Its Implementation, *Pravni zapisi*, Vol. 15, No. 1, pp. 191–218.

tation rules by Decree 3/1967. (II. 26.) of the Ministry of Education. This childcare allowance was paid for all children born on or after January 1, 1967. At the time of its introduction, the Hungarian GYES was new and most generous childcare allowance in the world. The favorable conditions of this allowance could be explained by the prevailing strong pronatalist views and the high abortion rate in Hungary. While childcare and maternity care were important issues, menstruation and women's needs were not even mentioned in public debates.

Access to menstrual products was not part of the recognized right to health. Issues related to menstruation were discussed in the context of sport and physical education.[4] Sex education also included some basic information about menstruation, but since it was usually medical doctors who provided this information – the emphasis was on avoiding unwanted pregnancy.

2. The Slow Science of the Female Body and Human Reproduction

The history of biomedical research is full of tragic and scandalous episodes for women. Research into women's biology, healthcare needs and anatomy has been plagued by several erroneous scientific paradigms over time. In almost every field, knowledge about women has come much later than similar scientific discoveries about men. Until the Age of Enlightenment, women were thought to exhibit the male genitals turned inside out. The scientific approach to women's reproductive role also followed the wrong path for a remarkably long time. While the sperm cell was seen through a microscope by Antonie van Leeuwenhoek as early as 1677,[5] the egg cell was described and its role in human reproduction discovered only much later. Although Karl Ernst von Baer discovered the mammalian egg cell as early as 1826, the human egg cell was only first described in a scientific journal by Edgar Allen in 1928.[6]

Women were systematically underrepresented and even excluded from clinical trials until the last decades of the 20th century. The argument for this exclusionary position was often based on concerns about the

4 E. L., 1964, Lehet-e sportolni a menstruáció alatt? (Can one do sports during menstruation?), *Sport és tudomány*, Vol. 8, No. 1–12, pp. 392–394.

5 Howards, S. S., 1997, Antoine van Leeuwenhoek and the discovery of sperm, *Fertility and Sterility*, Vol. 67, No. 1, pp. 16–17.

6 Cleghorn, E., 2021, *Unwell Women: A Journey Through Medicine and Myth in a Man-Made World*, London: Weidenfeld & Nicolson, pp. 250–251.

risk to pregnant women. Menstruation was a taboo or described by myths and as a result, scientific knowledge about menstruation developed very slowly. In 1912, Sir Almroth Wright, the immunologist who developed a typhoid vaccine, wrote a letter to *The Times* of London stating: "No doctor can ever lose sight of the fact that the mind of woman is always threatened with danger from the reverberations of her physiological emergencies."[7]

Lack of menstrual products and secrecy were connected by shame. Mary Putnam Jacobi,[8] who was the first woman allowed to study medicine at the University of Paris and the first woman to earn a degree from pharmacology in the United States, rightly pointed out that in the absence of proper sanitary items necessary for menstruation, women are forced to handle their periods secretly. Menstrual etiquette governed workplaces, schools and even family homes. Jacobi challenged the "overpathologized" view on menstruation.[9] Jacobi sought proof, so she monitored women's energy levels and vital signs throughout their whole cycle and found that women were not, in fact, incapacitated each month. This important discovery helped release women from the society-imposed prison of their own bodies.[10] The complex code of secrecy and female behavior intended to spare others from inconvenience did not cultivate any discourse on periods. Research into women's health has been delayed and underfunded for a long time. The delay was significant even in case of serious diseases, yet hesitancy can be observed even today in regard to issues related to wellbeing, sexual and reproductive health. Systematic dismissal of women's pain and discomfort is based on "being seen as unreliable, irrational or exaggerating their pain."[11]

2.1. THE BIRTH OF THE MENSTRUATION TAMPONS

Before tampons were used for menstruation, they had other purposes, such as applying medication against gynecological infections. They were also used as contraception. Tampons with strings only became available

7 Wright, A., 1912, Militant Hysteria, Letter to the Editor, *The Times*, London.

8 Mary Putnam Jacobi (1842–1906) was a physician, teacher, scientist, writer, and suffragist.

9 Putnam Jacobi, M., 1878, *The Question of Rest for Women During Menstruation*, London: Smith, Elder and Co., cited in Cleghorn, E., 2021, p. 150.

10 Some rituals to isolate menstruating women from the rest of society remained even in the late 20th century. See Gagoshashvili, M., 2006, *Law and Tradition: Women's Reproductive Decisions in Urban and Rural Georgia – Case Studies of Tbilisi and Svaneti*, MA thesis, Budapest, Central European University.

11 Ballantyne, A., Women in Research: Historical Exclusion, Current Challenges and Future Trends, in: Rogers, W. A. *et al.*, (eds.), 2023, *The Routledge Handbook of Feminist Bioethics*, New York: Routledge, pp. 256–270.

in the 20th century. In 1931 Earle Haas (1888–1981), a physician, developed the cardboard applicator for tampons designed to absorb menstrual blood.[12] The tampon was made of a thick strip of cotton attached to a string for easy removal. In 1933, Haas patented his invention and sold it to Gertrude Tendrich, who later established her own tampon brand. In 1945, Judith Esser-Mittag, a German gynacologist, designed a tampon that did not require an applicator, known as the "digital tampon".[13] Such tampons later became very popular, because of their small size and easy use. They have also provided women more control over their own bodies. Tampons opened new possibilities to do work and sport and also helped overcoming some taboos related to understanding and touching[14] the female body.

No wonder that the popularity of tampons began to increase in the 1960s and 1970s in the developed countries. This trend and the evolution of menstrual products show that while secrecy slows down technological progress, speaking openly about the needs enhances the technology and choices. In many countries special activism was needed to break through the menstrual taboo. In the Netherlands for instance, Elly Brink advocated breaking the menstrual secrecy.[15]

2.2. ACCESS TO SANITARY ITEMS IN THE STATE-SOCIALIST HUNGARY

Openness about menstruation was in sharp contrast with the life of many women during the state socialism period. Although in Hungary everyone was a financially slightly better off than in the 1960s, and in the 1970s many people had tiny holiday homes or cars and there were maternity benefits – what women hid in their underpants every month remained (literally) a closely guarded secret. Yet at that time this physical vulnerability was a burden for all women, because everyone went to work early in the morning; some to the factory, some behind a counter, some to teach children, but the state leaders did not even consider spending foreign currency on imports that would have eased the suffering of millions of women – because no one talked about it and on the outside everything seemed fine. In other words, all Hungarian women lived in

12 Weissfeld, A. S., 2010, The History of Tampons: From Ancient Times to an FDA-Regulated Medical Device, *Clinical Microbiology Newsletter*, Vol. 32, No. 10, pp. 73–76.

13 Only one finger (or digit) is needed to insert the tampon.

14 Needless to say, that masturbation and female pleasure were also taboos.

15 Knoop, D., 2024, Ode aan Elly Brink: Het menstruatietaboe doorbreken (in English: Ode to Elly Brink: Breaking the menstrual taboo), (https://www.amsterdammuseum.nl/topic/vrouwen-van-amsterdam/bijdrage/108220-het-menstruatietaboe-doorbreken, 28. 4. 2025).

enforced menstrual poverty and, because of our isolation from the West, we did not know what we were missing. The situation was not any better in other former socialist countries and others have written about it.[16] Yet mass production of tampons and Tampax was already widespread in the West in the 1960s and 1970s.

A gynecology textbook for medical students published in Hungary in 1957 analyzed the physiological processes of menstruation at length. It also mentioned the hygienic aspects and recommended a good absorbent, soft, freshly boiled gauze pad or gauze. It also mentioned that in some countries, tampons were used for menstruation. All this shows that Hungarian gynecologists were already familiar with tampons, even if Hungarian women did not have access to them at the time.[17]

In the 1970s Hungary, similarly as in other state-socialist countries, the ruling party was very proud of the social and welfare rights, including also to the right to health. These rights were often contrasted with the situation in the West. Mother and childcare were given special attention partially because of pronatalist sentiments[18] developed already after the First World War and reinforced by the socialist states after the Second World War. The quantitative nature of welfare rights and the ignorance of the qualitative needs of women could be well demonstrated by the story of the access to tampons. Non-reproductive issues, such as period, sexual health or pleasure, were not part of the established right framework. Hungarian women did not have access to sanitary pads and tampons until the 1980s. The Iron Curtain made it impossible to buy these products or even to have information about them. Women suffered silently and discreetly and there were no significant changes until the political transition.

The idea of producing menstrual tampons for women in Hungary appeared already in the 1970s. However, the process of developing production indicated hesitation: clinical trials and tests were slow, the start of production was delayed, and this can be explained by the prevalent medical paternalism and some patriarchal fears that women could gain more control of their bodies. Paternalism at the levels of the state and the medical profession suggested that the state and the doctors know best. Women's needs were also often trivialized or neglected in other relevant areas.[19]

16 See Sitar, P., 2018, Female Trouble: Menstrual Hygiene, Shame, and Socialism, *Journal of Gender Studies*, Vol. 27, No. 7, pp. 771–787.

17 Árvay, S. *et al*., *Nőgyógyászat*, 1957, Budapest, Medicina, p. 45.

18 Sándor, J., Demographic Influences on the Regulation of the Female Body in Hungary, in: Feuillet-Liger, B., Orfali, K., Callus, T., (eds.), 2013, *The Female Body: A Journey Through Law, Culture and Medicine*, Brussels, Bruylant, pp. 115–131.

19 Sándor, J., Lászlófi, V., 2023, Women Facing the Committee: Decision-Making on Abortion in Postwar Hungary, *Hungarian Historical Review*, Vol. 12, No. 3, pp. 493–523.

2.3. THE HISTORY OF THE HUNGARIAN TAMPON

The company that produced the first tampons in Hungary had a long history. It was the RICO Wound Dressing Company which was founded in 1908 as a Budapest subsidiary of the Czech cotton company Richter & Co. (this is where the name of the factory RICO comes from). From 1919 RICO, as a state-owned company, was under the jurisdiction of the then Ministry of Public Welfare. Until 1948 it operated as the National Health Materials Warehouse – RICO Hungarian Wound Dressing Company Ltd. From 1950, it continued its activities under the name RICO Wound Dressing Company. As the country's only bandage factory, its main task was to supply the country's population, hospitals, and dispensaries with cotton wool, bandages, wound suture materials, and various equipment.[20]

Until the 1990s, Hungarian women used household cotton wool, which they also applied for other cleaning purposes in the home. It could be bought in large nylon bags, which they then tore into suitable pieces and made small packages that they covered with paper and carried around in their purses. Since the cotton balls were not secured with anything, they often slipped and blood would seep through their clothes, and it was difficult to walk with the cotton balls, so the women went to work with small steps, walking like penguins – of course, not telling even their family members about these difficulties. Because of the Iron Curtain, women were unaware of other options for managing their periods: there were no advertisements, no foreign TV channels, not even magazines to inform them about their options.

A gradual change began when the head of the RICO company initiated a change in this miserable situation. In October 1975, László Kántor, the CEO of the RICO Company sent a letter to the Ministry for Health in which he stated that RICO agrees to introduce the production of menstruation tampons in Hungary.[21] He stated that the company had conducted preliminary market research, and the chief engineer and chief technical manager had been on a study tour to Switzerland and West Germany. The production, however, required investment in machinery, for which the company needed a loan. Kántor requested financial assistance so that RICO could start this project.

The Ministry responded that it had no objection to the production of tampons in Hungary, however it referred to the population policy goals

20 RICO, Kötszerművek 60 éve az egészségügy szolgálatában, 1973, *Egészségügyi Dolgozó*, Vol. 17, No. 1–12. p. 10.

21 Hungarian National Archives (Magyar Nemzeti Levéltár) HU-MNL-OL-XIX-C-2-d Anya-, csecsemő-és gyermekvédelmi főosztály, 1952–1983.

where there were more important goals than producing tampons, stating that those goals should have priority.[22]

In 1977, 1,000 tampons were produced for testing. The Ministry of Health requested the expert opinion from the National Institute for Obstetrics and Gynecology.[23] The subsequent clinical trial had many different elements. Mucosal irritation was tested in albino rabbits. Tests were also conducted for toxicological and hemolytic effects. On December 20, 1977, the Ministry of Health sent a letter to RICO stating that "[g]iven that the menstrual tampon represents a significant improvement in the personal hygiene of the female population, our department does not raise any objections regarding its marketing."[24]

Scientific discourse about women' health, body, and especially sexual and reproductive functions are often distorted, delayed, or challenged by the masculine and paternalistic norms within society. This is partly due to the fact that there are significantly less women in the field of science, and until the mid-20th century women scientists were so rare that their views and research interests could not be adequately represented.

During the 1980s one of the biggest challenges in the use of menstrual products was the occurrence of toxic shock syndrome. The US Centers for Disease Control (CDC) released shocking figures regarding the number of menstrual-related cases of toxic shock syndrome.[25]

The worldwide fear of the toxic shock syndrome fell at the time as the conclusion of the clinical trials of the menstrual tampons.[26] These cases, occurring during the Hungarian clinical trials of the menstruation tampons, led to the Ministry and doctors developing cautious attitudes towards tampons.

In 1977, the Hungarian tests were conducted on tampons made from 100% cotton.[27] However, in 1981, further research was necessary because the plan changed to containing up to 50% viscose.[28] In 1982, it was finally time to create detailed instructions for use. The instructions also described in detail the signs of toxic syndrome and stated that one should

22 *Ibid.*, Ministry for Health, 14 October 1976.

23 *Supra* fn. 14.

24 Translated by author.

25 Up to 100 cases were reported in a single year, with significant outbreaks in Denver, Colorado. Wroblewski, S. S., 1981, Toxic Shock Syndrome, *The American Journal of Nursing*, Vol. 81, No. 1, pp. 82–85.

26 Although the 1980s was a chaotic time for the tampon industry, in 1983 tampons went to space for the first time, with American astronaut Sally Ride.

27 Hungarian National Archives (Magyar Nemzeti Levéltár) HU-MNL-OL-XIX-C-2-d Anya-, csecsemő-és gyermekvédelmi főosztály, 1952–1983.

28 *Ibid.*

immediately consult a doctor in the event of fever, weakness, dizziness, vomiting, or rashes.[29] In January 1983 the standards for the RICO tampon were finally approved, and the decision came into force in July. [30]

2.4. MEDICATION FOR MENSTRUAL CRAMPS

While menstrual needs were not met during the state-socialist period, because of the lack of adequate hygiene products, pain management nevertheless was available in the form of cheap and available medication. From the late 1960s almost all girls and women carried No-Spa tablets in their purses. This Hungarian medication, with drotaverine as the active ingredient, was developed by two Hungarian chemical engineers, Zoltán Mészáros and Péter Szentmiklósi.[31] Their innovation immediately drew widespread attention in the scientific and social life of Hungary because of its unique mechanism. Drotaverine acts in a different way than the active ingredients in traditional painkillers. Its special feature is that it directly eliminates smooth muscle spasms that cause pain, while painkillers typically only relieve the sensation of pain.

Drotaverine was introduced in Hungary in 1962 under the brand name No-Spa. In the 1970s it became increasingly successful even in the international markets. It remains a significant export item produced by the Hungarian pharmaceutical industry. No-Spa became Chinoin's most widely sold original drug as it was also used for various pains, in addition to menstrual cramps. No-Spa production increased from an initial 1 ton in 1964, to 110 tons in 1981 and 160 tons in 1987, due to significant exports to the Soviet Union.[32]

In 1981 the *Hungarian Journal of Gynecology* published an article on the treatment of dysmenorrhea. According to the authors "painful, crampy menstrual bleeding occurs in approximately 30–50% of women of childbearing age, a significant number of whom also require treatment. According to literature data, one in ten women becomes partially or completely unable to work for one or two days per month due to the symptoms accompanying menstruation. (A significant proportion of teenage

29 Safety is a main concern in the laws of different countries that regulate this field, e.g., the Tampon Safety and Research Act of 1999, H. R. 890, U.S.A.

30 *Supra* fn. 14.

31 Zoltán Mészáros (1930–1986) was a chemical engineer, medicinal chemist, university professor. He won the state prize in 1970 and held a doctorate in chemistry. Péter Szentmiklósi (1926–2010) was a pharmacist and chemical engineer and held several patents for his inventions.

32 Sipos, A. *et al.*, 1996, *Egy mindig megújuló vállalat: A Chinoin története (1910–1995)*, Budapest, Chinoin, p. 50.

girls' school absences are also caused by dysmenorrhea). In addition to the subjective complaints, the economic significance of the issue cannot be neglected."[33] As a result, No-Spa became the main medication for menstrual pain. While menstrual products were still absent, No-Spa was relatively cheap and available.

Menstruation was described in school materials as the result of an incomplete or "failed" reproductive cycle. Sex education was usually offered in gender segregation, meaning that girls and boys received information separately, which further enhanced the secrecy surrounding menstrual problems. While menstruation is often considered as a hygienic issue, the emotional elements and the change in body image were almost totally neglected.[34]

Hungarian newspapers and journals sometimes published short answers to letters from female readers concerned mainly with irregularities in their cycle, such as in 1968 where a short response was given to a woman (from Komárom) who was worried about her perimenopause symptoms. The short response was only to reassure her that her health condition was normal.[35]

The silence surrounding menstruation can be traced back by checking the archives on daily newspapers and magazines. While in Hungary professional journals usually mention the issue of menstruation, often in the context of sport, in Vojvodina,[36] for instance, the Hungarian language newspaper *Magyar Szó* had several articles on menstruation in Hungarian language already in the 1970s. For example, a doctor, Sándor Varga wrote several articles on menstruation,[37] even including teenage dysmenorrhea.[38]

Based on a search of Arcanum,[39] Hungarian daily newspapers and magazines that are available for the large public, not only to professionals, hardly even mentioned menstruation in the 1980s. The topic appeared

33 Gardó, S., Orosz, A., 1981, A naproxen (Naprosyn) szerepe a primer dysmenorrhea terápiájában, *Magyar Nőorvosok Lapja* (The role of naproxen (Naprosyn) in the treatment of primary dysmenorrhea), Vol. 44, pp. 541–543. The title translated by Judit Sándor.

34 Brown, L. M., Gilligan, C., 1992, *Meeting at the Crossroads: Women's Psychology and Girls' Development*, Cambridge MA, Harvard University Press.

35 *Nő*, 1968, Vol. 17, No. 1–52, 1968-08-02 / 31. p. 527. Answer to a letter from a reader.

36 At the time Vojvodina was part of Serbia and Yugoslavia, now it is part of Serbia.

37 Varga, S., 1973, Az iskolai oktatás szerepe a nemi nevelésben, *Magyar Szó*, Vol. 30, No. 89–103. p. 8.

38 Varga, S., 1973, *supra*.

39 Arcanum is an online publisher that provides structured databases of digitized newspapers and magazines.

mainly in the context of sport and health education, dealing with the questions whether girls can do sport during their menstruation.

2.5. THE ROLE OF ADVERTISEMENT

The repressive burden of mandatory secrecy was lifted from the shoulders of women by the first commercial advertisements. The first advertisement showed the image of the Teddy bear splashing in a blue liquid, yet the napkins led to many families asking questions. Of course, blood could only be represented as a blue liquid, but even so, it was such a surprise that we blushed and felt relieved at the same time. Today, female initiation is a ceremony supported by commerce, as teenage girls are greeted with a special small menstrual box. Although the first commercials, which appeared just prior to the regime change, helped greatly to attract more attention to these women's problems, the commercials still only focused on the product and did not show that the person who applies them every month was actually feels unwell.

Before the 1980s advertisements conveyed only very simple messages, like "Toys from the Toyshop".[40] Since tampons were not previously available, the first commercials also contributed to a more open discussion on menstruation. Western companies appeared in the market and tried to find access to the consumers. To advertise Tampax, "in the Soviet Union Femtech decided to rely on celebrities".[41] The commercial team first considered "asking a Soviet female astronaut (likely Valentina Tereshkova, whose 1963 mission captured international attention) [but when] the astronaut proved uninterested, the team discussed alternatives, including British Prime Minister Margaret Thatcher."[42]

One of the first commercial advertisements in Hungary was for tampons and watching these advertisements on the television was often a shock or at least a surprise to many. Still, the gradually appearing menstrual devices have helped to understand the health needs of women. The situation is still not resolved; for example, there is a lack of social security support for menstrual products and the VAT is high. Furthermore, menstruation related pain and discomfort are not recognized at schools and in workplaces. In the case of menstrual irregularities, such as in the

40 Advertisement from 1957. Translated by author.

41 Røstvik, C. M., Tambrands Incorporated: Femtech and the Development of Soviet Tampax, in: Røstvik, C. M., 2022, *Cash Flow: The Businesses of Menstruation*, London, UCL Press, pp. 81–103.

42 Even though she did not formally participate in an advertisement, she was interested in the issue and she inquired about what Soviet women used. *Ibid.*, p. 87; *Supra* 31.

perimenopausal phase, the discourse has only just started. Although menstrual devices are becoming more and more sophisticated, and they include also discreet and environmentally friendly ones, commercial advertisements often assume that girls and women would be inclined to ride a motorcycle or skydive in the midst of feeling lightheaded, judging by the suggestions of advertisements.[43]

The sense of shame attached to menstruation is reflected in advertisements that emphasized discretion: girls have to learn how to hide their cramps, and their health needs, and they must keep menstruation invisible. Segregated sex education also serves the purposes to teach girls certain activities during their periods, to spare others the inconvenience. While there were no tampons and pads available until the 1980s, by the end of the decade, different types of products were available as foreign products appeared on the market. Menstrual pads were called "pads with the wings" and were the subject of jokes.[44] Later the term health pads was adopted.

2.6. AVAILABLE BUT NOT AFFORDABLE?

In state-socialist Hungary the menstrual products market was for a long-time dominated by scarcity, and then after the political transition – by variety and high prices. In the meantime, Hungary has become an exporter of menstrual products. For example, women in South Africa often buy sanitary pads and tampons manufactured in Hungary.[45] Hungary is also significant in worldwide as an exporter of sanitary pads and products.[46] The factory, which exports to five continents, produces many different versions of menstrual products. Tampax products are produced exclusively in Csömör[47] for Europe and are shipped around the globe.

Women face "widespread social, cultural, political, and structural threats to their sexual health and well-being. Women's sexual health is often controlled by patriarchal societies. Without the option to make critical

43 Winkler, T. I., Bobel, C., 2021, "Bizarre" and "Backward": Saviorism and Modernity in Representations of Menstrual Beliefs and Practices in the Popular Media, *Feminist Formations*, Vol. 33, No. 2, p. 313.

44 Testing Health Pads, 2000, *Teszt Magazin*, Vol. 9, No. 2, pp. 63–64.

45 Asmaljee, S. S., 2019, *An Examination of Tampon Tax and How It Affects the Social, Health and Economical Aspects of Countries, including a Comparative Analysis of How Some Countries Have Dealt with Tampon Tax*, MA thesis, Master of Commerce specializing in taxation, University of the Witwatersrand, Johannesburg.

46 World Integrated Trade Solutions, 2024, Sanitary towels and tampons, napkins and napkin exports by country in 2023, https://wits.worldbank.org/trade/comtrade/en/country/ALL/year/2023/tradeflow/Exports/partner/WLD/product/481840, 16 5. 2025).

47 Csömör is a suburb to the northeast of Budapest.

choices about their bodies, women's prosperity, well-being, and potential in society are restricted and gender inequality is therefore perpetuated."[48] Feminist economist Heidi I. Hartmann argued a society according to Hartmann could undergo transition from capitalism to socialism, but still remain patriarchal.[49]

The situation of the Hungarian women was not unique. In the other Central and Eastern European countries women faced the same problems. Even in Yugoslavia for a long time proper menstrual products were not available and when they were later accessible, still in many countries, such as in Bulgaria and in Poland, women were lacking these basic hygienic products. About this Slavenka Drakulić states "I sprinkled Eastern Europe with tampons on my travels: I had already left one package of tampons and some napkins, ironically called 'New Freedom', in Warsaw (plus Bayer aspirin and antibiotics), another package in Prague (plus Anaïs perfume), and now here in Sofia [...] After all these years, communism has not been able to produce a simple sanitary napkin, a bare necessity for women. So much for its economy and its so-called emancipation, too."[50]

Looking at Western countries, New York City was one of the first to pass a law mandating that every school offer free period products, in 2016. Although this law paved the way for other legislators to pass similar laws, there were many complaints about the implementation.[51] Now 28 states in the USA and the District of Columbia have laws regarding free period products at schools.[52] Scotland has become the first in the world to make period products free for all. There is even an expressed legal duty for local authorities to provide free items such as tampons and sanitary pads to "anyone who needs them".[53] On 28 May 2023, the Minister for Women and Gender Equality and Youth and Parliamentary Secretary in Canada issued the following statement: "Period poverty is a worldwide sad reality,

48 Mlambo-Ngcuka, P., 2017, Sexual health and women's rights, *Harvard International Review*, Vol. 38, No. 3, pp. 48–53.

49 Hartmann, H., 1979, The Unhappy Marriage of Marxism and Feminism, *Capital and Class*, Vol. 3, No. 2, pp. 1–33.

50 Drakulić, S., 1992, *How We Survived Communism and Even Laughed*, New York: W.W. Norton & Company, p. 30.

51 Elsen-Rooney, M., 2025, Almost 10 years later, NYC remains in 'flagrant' violation of school menstrual products law: lawsuit, (https://www.chalkbeat.org/newyork/2025/03/17/menstrual-products-missing-school-bathrooms-lawsuit-alleges/, 5. 5. 2025).

52 Gupta, A. L., 2025, The Fight for Free Tampons in Schools Lands in Court, *The New York Times*, 24 March, (https://www.nytimes.com/2025/03/19/well/live/pads-tampons-free-schools.html, 4. 5. 2025).

53 The Period Products (Free Provision) (Scotland) Bill passed by a vote of 121 for, 0 against and 0 abstentions. The Bill became an Act on 12 January 2021.

where many women, girls, non-binary individuals, and transgender people struggle with the financial burden to afford menstrual supplies. Menstrual equity aims to provide fair and inclusive access to menstrual products and education on reproductive health, but there is still a long way to go."[54]

Today there are many different products available in Hungary and there are no shortages in the shops; menstrual cups (HUF 4,000 or about EUR 10), tampons, pads, period slips (HUF 5,000 or EUR 12.50) are available in all drugstores. According to the Hungarian Central Statistical Office, in 2024 the average net salary in Hungary was HUF 430,120 (or a bit less than EUR 1,100).[55] The current price of a box of normal o.b. tampons (32 pieces) is HUF 2,500 Forints or EUR 6.20. Interestingly, the Polish 100% cotton tampon is much cheaper, with a similar packaging at around HUF 2,000 or EUR 5. While women with an average income can easily afford menstrual products, there is no systemic support for students, the poor, or the homeless. Workplaces are also not required to provide menstrual products. So, while there is no secrecy anymore, there is still no menstrual justice. Vulnerable groups receive only sporadic help and mainly from the civil society. The Red Cross has also launched a program, called Girl-to-Woman.[56] "In 2021 alone, about 24,000 students in 500 schools received free period products through the project."[57] One of the initiatives by social workers was called "Not a Luxury Bag". It was a nationwide campaign that collected donations from women every December, consisting of bags filled with hygiene products like soap, toilet paper and pads. In 2019, they collected 12,000 bags in just a few weeks. Within this project the collected bags are distributed to schools, homeless institutions and poverty-stricken villages.[58]

Some studies also indicate that menstrual poverty is an issue for students and in rural areas. While menstruation is no longer a taboo in Hungary, menstrual poverty still is.[59] It is an invisible poverty as shame and stigma still prevent the adequate treatment of this problem.

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54 Statement by Minister Marci Ien and Parliamentary Secretary Jenna Sudds on Menstrual Hygiene Day, (https://www.canada.ca/en/women-gender-equality/news/2023/05/statement-by-minister-marci-ien-and-parliamentary-secretary-jenna-sudds-on-menstrual-hygiene-day.html, 28. 4. 2025).

55 Központi Statisztikai Hivatal (Hungarian Central Statistical Office, 2025, Development of real wages, (https://www.ksh.hu/stadat_files/mun/hu/mun0191.html, 11. 5. 2025).

56 Red Cross EU Office, n.d., Activities: Girl-to-Woman, (https://redcross.eu/projects/girl-to-woman, 16. 5. 2025).

57 *Ibid.*

58 Makeshift products and missing school: period poverty in Hungary, (https://lazywomen.com/desk/missing-school-period-poverty-in-hungary, 11. 5. 2025).

59 Rucska, A., Perge, A., 2021, Old-New Challenges? Poverty and Menstruation: Young Girls and Women in the Mirror of Disadvantaged Situation, *European Journal of Marketing and Economics*, Vol. 4, No. 2, pp. 113–126.

3. International Initiatives and the Relevance of the Language of Rights

In the biopolitics of menstruation, duties and secrecy were for a long time the key terms that described what women were supposed to do during their period. Using the language of rights is therefore a crucial step in shaping policies on menstruation. The human rights framing, however, is not evident. The status of sexual and reproductive rights is still contested in many places around the world, and it is even being questioned again in places where it had once been accepted. Moreover, rights related to menstruation are often not recognized as strictly speaking reproductive or sexual rights. The biopolitics of menstruation are inherently connected to several other basic rights: from respect to human dignity, to the right not to be discriminated, to the right to health, etc. According to the United Nations Population Fund (UNFPA), the concept of menstrual rights encompasses sociocultural, economic, political, environmental and health aspects, as well[60]. Menstruation is related to several human rights, including human dignity of women, as well as to their sexual and reproductive rights, the right to make informed and autonomous decisions, the right not be discriminated, etc.

In 2021, the European Parliament's Resolution on the situation of sexual and reproductive health and rights in the EU "calls on Member States to ensure comprehensive and scientifically accurate education about menstruation, to raise awareness and to launch major information campaigns on endometriosis targeting the public, healthcare professionals and legislators; calls on the Member States to ensure access to period education programmes for all children, so that menstruators can make informed choices about their periods and bodies; calls on the Member States to urgently tackle menstrual poverty by ensuring that free period products are available to anyone who needs them."[61] The resolution also urged Member States "to encourage the widespread availability of toxin-free and reusable menstrual products."[62]

Initiatives to also improve the care for women on the international level started very late. The World Health Organization (WHO) admitted

60 UNFPA, 2024, 5 reasons why menstruation support is critical in a humanitarian crisis, *UNFPA*, 28 May, (https://www.unfpa.org/news/5-reasons-why-menstruation-support-critical-humanitarian-crisis, 12. 5. 2025).

61 European Parliament Resolution on the situation of sexual and reproductive health and rights in the EU, *Texts Adopted – Sexual and Reproductive Health and Rights in the EU, in the Frame of Women's Health*, (2020/2215(INI)), 24 June 2021, OJ C 81, 18. 2. 2022, pp. 43–62.

62 *Ibid.*, Arts. 24–25.

this delay during the 50th session of the Human Rights Council Panel discussion on menstrual hygiene management, human rights and gender equality. As a result, in 2022, the WHO called for menstrual health to be recognized, framed and addressed as a health and human rights issue, not a hygiene issue.[63] In 2024, the WHO stated that "menstrual health is a fundamental human right."[64]

Secrecy and pathologization of menstruation may lead also to the violations of basic rights or at least does not help to recognize its human rights aspects. The human rights language revealed that menstruation is inherently connected to several human rights, such as human dignity, right to privacy, right to health, right to work etc. Menstruation-related exclusion and shame also violate the principle of human dignity. The person is dehumanized and excluded from certain activities based on menstruation.

The right to health is one the most important rights related to menstruation. Women and girls may experience serious health consequences if they do not have access to facilities to manage their menstrual health. The right to health includes not only access to medical care, medication and adequate pain management, but also access to the health information that is necessary to protect health. Menstrual etiquette often leaves no choice for how to manage menstrual issues, therefore menstruating people should have the choice of how they wish to manage their periods and may be able to decide other aspects related to menstruation. As we have seen, menstrual taboos and secrecy can be traced back to the 1980s[65] by looking at the daily newspapers and magazines that were available to the general public and which only sporadically mentioned menstruation.

The stigma associated with menstruation can also prevent women and girls from seeking medical treatment for menstruation-related disorders. The lack of adequate pain management may also adversely affect the enjoyment of the "highest attainable standard of health and well-being."[66] The right to privacy and the right to control information are also

63 Winkler, T. I., 2021, Menstruation and Human Rights: Can We Move Beyond Instrumentalization, Tokenism, and Reductionism?, *Columbia Journal of Gender and Law*, Vol. 41, No. 1, pp. 244–251.

64 WHO, 2024, Menstrual health is a fundamental human right, *WHO*, (https://www.who.int/europe/news/item/15-08-2024-menstrual-health-is-a-fundamental-human-right, 12. 5. 2025).

65 Kádár era in Hungary refers to the period between 1957 and 1989.

66 Committee on Economic, Social and Cultural Rights, General Comment No. 14. The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2000/4 (2000).

important elements of menstrual rights. Safe places are as important as the access to information about menstrual hygiene and health. As shows by the Hungarian example of state socialism, due to the lack of information women could not stand up for their rights to demand access to proper hygienic products. When schoolgirls are unable to adequately manage menstruation at school, their academic performance suffer.

When menstruation was pathologized, women's capacity to work during menstruation was also brought into question. The right to work therefore also needs to be assessed in the context of menstruation, because the lack of access to safe means of managing menstrual hygiene and pain also limits job opportunities.

Discrimination can occur based on gender, but women may also face workplace discrimination related to menstruation taboos. The right to nondiscrimination and gender equality constitute the core elements of menstrual justice. Stigmas and expectations related to menstruation may also contribute to discrimination. Discrimination may occur also in the field of sport. The right to water and sanitation, access to water and sanitation facilities, such as bathing facilities, that are private, safe and culturally acceptable, along with a sufficient, safe and affordable water supply, are basic prerequisites for managing menstrual health management.

Needless to say, focusing exclusively on the hygienic needs would not be a satisfactory approach. Menstrual movement requires a much broader approach and menstrual justice in general that accesses various aspects of gender equality.

Today menstruation is still a source of stigma in different societies and even in different phases of women's lives.[67] Menarche menstruation is shrouded in silence and many girls are unprepared for the difficulties. And even if physical changes and the use of hygienic products are explained to them by someone, almost nothing is said about the emotional changes that they have to deal with. The bodily changes also affect the girls' body image. Strangely, the stigma remains even in the peri– and postmenopausal phases.[68] Social attitudes to menstruation are full of contradictions. Privacy and learning to control over body is generally progressive but in

67 International Women's Day – 8 March 2019: Women's Menstrual Health Should No Longer Be a Taboo, United Nations Human Rights Office of the High Commissioner (March 5, 2019), (https://www.ohchr.org/en/news/2019/03/international-womens-day-8-march-2019?LangID=E&NewsID=24256, 12. 5. 2025).

68 Premenopause, Perimenopause, and Menopause, (https://www.healthline.com/health/menopause/difference-perimenopause#premenopause-vs-perimenopause, 12. 5. 2025).

relation to menstruation it reinforces secrecy and even shame.[69] Keeping menstruation private is often burdensome when pain and suffering must be hidden at school or in the workplace. When women enter the menopausal phase, one may logically assume that the stigma related to menstruation will be stopped and women can fully enjoy their presence in public life. But this is not the case, in this phase women are often considered no longer desirable, no longer sexual, and even no longer in demand in the labor market. Menstruation stigma is simply replaced by the stigma of missing reproductive capacity. The symptoms and treatment of menopause are also understudied. The physical burden of reproductive capacity and the lack of reproductive capacity are still largely ignored and therefore constitute the basis of various kinds of discrimination (gender-, sex-, ethnicity-, age-based, etc.)

While patients with milder symptoms are eligible for sick leave, since menstruation is regarded as natural, in most countries it is not being regarded as a lawful basis for short-term menstruation leave. Nevertheless, there are good examples: Japan introduced menstrual leave in its labor law as early as in 1947. Under Article 68, the law prescribed that "the employer must not make her work on a day of her menstrual period."[70] A similar policy was introduced in Indonesia in 1948, and subsequently modified in 2003.[71] According to this, female workers experiencing menstrual pain are not obliged to work on the first two days of their cycle. South Korea,[72] Taiwan, and Vietnam have also introduced menstrual leave. Europe has only recently started to move in this direction. For instance, Spain introduced menstrual leave from three up to five days.[73] In Hungary there is no national law on this matter, but some local municipalities, such as Teréz-

69 Nussbaum, M. C., 2004, *Hiding from Humanity*, Princeton, Princeton University Press.

70 Article 68 of Japan's Labor Standards Act, which remains in force, states: "If a woman who finds it to be extremely difficult to work on a day of her menstrual period requests leave, the employer must not make her work on a day of her menstrual period." Japanese Labor Standards Act, 1947, Act No. 49 of April 7, translation by Japanese Law Translation, Article 68, (https://www.japaneselawtranslation.go.jp/en/laws/view/3567/en, 17. 5. 2025).

71 In the Indonesian labor law, two days of paid leave are given to women every month (Law Number 13 of 2003 concerning Manpower and Law Number 36 of 2009 on Health).

72 In 2001, South Korea ratified Article 73 of the Labor Standards Act, which provides for one day of unpaid leave per month, awarded at the employee's request. All female employees are entitled to the benefit, irrespective of their job status or how long they have worked for the company. Employers who violate the law could face up to two years in prison or a fine of up to 10 million won (around EUR 7,500).

73 From 1 June 2023, when the policy came into effect, to 24 April 2023, the average leave taken spanned 3.03 days.

város in Budapest, allow one day per month for women who suffer from dysmenorrhea, but these are infrequent cases.[74]

4. Conclusions

The rights to menstrual health and wellbeing are a telling example of how women's rights were and are still neglected when their wellbeing does not directly serve reproductive purposes. Even international organizations were silent on this issue for a long time. Inequality still persists in many forms, but I that believe the Cold war era was a special example in Europe. While state-socialist countries – and especially Hungary – emphasized their commitment to welfare rights, including mother's rights and family care, girls' and women's monthly difficulties were not addressed properly. Sanitary pads and tampons were not available, and even information about alternative means were missing. Discomfort and pain were discussed mainly in the context of sport, while the secrecy surrounding menstruation made it impossible for women to demand better care. The story of socialist women's silent suffering because of the lack of sources shows the superficiality and patriarchal nature of social welfare rights.

Biopolitical control over women's bodies has not diminished significantly in the transition from state socialism to peripheral capitalism; it has only changed its form in the aftermath of the political and economic transition in the early 1990s.

Perhaps the legacy of this past is that while a huge variety of sanitary means are available, the VAT policy does not take into account the high prices women have to pay every month. NGOs and local initiatives attempt to help women who cannot afford to buy menstrual products. For a long time, the shame surrounding the issue made it difficult for women to assert their rights. Paternalistic medical practices focused primarily on medical considerations.

The case of Hungarian women's menstrual needs during state socialism shows that the development of social welfare rights does not necessarily involve the development of women's rights. Social welfare regimes often focus on reproduction while disregarding the overall welfare and wellbeing of the individual. This indicates a reductionist vision of human rights, the consequences of which can still be seen in menstrual injustice. Despite the significant development of reproductive rights, the emancipation process was disrupted, and the current conservative turn is once again setting different priorities.

74 https://www.egeszsegkalauz.hu/betegsegek/menstruacios-szabadsag-igy-lehet-igenybe-venni-szeptembertol/fnrz0j7, 5. 5. 2025.

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BIOPOLITIKA MENSTRUACIJE U MAĐARSKOJ: NEKAD I SAD

Judit Sándor

APSTRAKT

Ovaj članak se fokusira na posleratnu Mađarsku, uključujući prelazak iz državnog socijalizma u rani kapitalizam. Ovo je posebno važna era jer je tokom decenija hladnog rata jedna od glavnih tvrdnji bila da su socijalna prava i blagostanje, uključujući pravo na zdravstvenu zaštitu, bili primereni u državnom socijalizmu i mnogo napredniji nego u državama zapadnog sveta. Međutim, ovaj članak tvrdi da iako su u određenim jurisdikcijama i oblastima prava na socijalnu zaštitu bila unapređena, ona nisu iskorenila patrijarhalne stavove. Zanemarivanje žena tokom njihovog ciklusa takođe pokazuje da zaštita majčinstva nije automatski uticala na adekvatnu zaštitu prava žena. Ipak, iako su prava žena na socijalnu i ekonomsku zaštitu bila nerazvijena, postignuta su neka značajna dostignuća u oblastima zaštite materinstva i brige o deci.

Ključne reči: menstruacija, stigma, diskriminacija, tampon, klinička ispitivanja, hladni rat, zdravstvena zaštita, državni socijalizam, Mađarska.

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ORIGINAL SCIENTIFIC ARTICLE

*Mila Petrović**

MENSTRUATION AT WORK SHOULD NOT BE A PROBLEM – PERIOD!

Abstract: *Even though menstruation is a normal part of female biology, it still represents a taboo, a source of stigma, prejudice and practices that create further rifts in already heavily divided society. Not only is such a situation unjust and offensive, but it also creates problems in the work environment. The mere fact that a woman is menstruating puts her at risk of being perceived as incompetent, creates potential hygienic and logistical issues, and, in certain cases, fairly aggravates the possibility of female employees performing at work. Such a situation calls for policies that can accommodate the needs of menstruating employees, as well as for their protection from any unwanted behavior that could weaponize an individual's innate biological feature. Hence, the purpose of this paper is to analyze the position of menstruating employees at work, as well as possible policies that can be introduced by the employer in order to facilitate their position.*

Key words: Menstruation, Work environment, Period Policies, Menstrual Health, Menstrual Leave.

1. Introduction

Menstruation is a natural part of the female biology. It is medically defined as the periodic shedding of the lining of a woman's uterus, and as one of the phases of the menstrual cycle.[1] Most notably, it is accompanied by bleeding.

On every given day, according to the data provided by the World Bank Group, more than 300 million women worldwide are menstruating.[2] By definition, a significant portion of that number is attributed to women who menstruate at work.

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1 Idoko, L. *et al.*, 2022, Knowledge and Practice of Menstrual Health and Hygiene among Young People in Jos, Plateau State, Nigeria, *Open Journal of Obstetrics and Gynecology*, Vol. 12, No. 4, p. 293.

2 World Bank Group, 2022, Menstrual Health and Hygiene, Brief, 12 May, (https://www.worldbank.org/en/topic/water/brief/menstrual-health-and-hygiene, 3. 3. 2025).

However, even though menstruation is a normal, natural process, it comes with great stigma, the level of which depends considerably the given society, culture and religion.[3] Hence, alongside the questionable practices, as well as the cultural perception of this process as something that makes women unhygienic and polluting, resulting in the need to be managed in order to prevent odor and staining,[4] comes the feeling of personal shame and the need to hide evidence of its occurrence.[5]

However, menstruation is an amazing process which, from a biological standpoint, empowers women, as they are the only ones that are able to bring life into this world, in a form of a newborn child. This is also one of the reasons why Gloria Steinem makes an interesting remark that if things were other way around, i.e., if men were the ones menstruating, menstruation would become an enviable masculine event, one which would call for bragging about its duration and volume.[6]

It is therefore mind-boggling that in the present day and age menstruation is still an issue. This statement is equally true in the working environment, as it is in any other setting. Not only does the stigma and taboo of menstruation follow women throughout their lives – including their professional ones – but the workplace also allows for some other work-related issues to appear. It is therefore important to be aware that menstruation can be a tool to discriminate against menstruating workers or to violate their dignity in other inappropriate ways, while also creating some logistical and hygienic issues that one would not face in the comfort of their own home. For that reason, the purpose of this study is to focus on possible policies (period policies) that could normalize and facilitate menstruation-related experiences of women at work.[7] The starting hypotheses is that the

3 The practice of exiling menstruating women and girls from their homes into huts in Nepal is one of the blatant examples. Parker, S., Standing, K., 2019, Nepal's menstrual huts: What can be done about the practice of confining women to cow sheds?, *Independent*, 28 January, (https://www.independent.co.uk/news/health/nepal-menstrual-huts-cow-sheds-women-chhaupadi-india-a8744766.html, 3. 3. 2025).

4 Roberts, T. *et al.*, 2002, "Feminine Protection": The Effects of Menstruation on Attitudes Towards Women, *Psychology of Women Quarterly*, Vol. 26, No. 2, p. 132.

5 A practice referred to as the "menstrual closet". For more on this topic, see McHugh, M., Menstrual Shame: Exploring the Role of 'Menstrual Moaning', in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 412–413.

6 Steinem, G., If Men Could Menstruate, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 353–354.

7 Leahy, S., 2021, Benefits and Challenges to "Period Policies" – Menstruating Individuals Are Empowered Through Inclusive Dialogue and Advocacy, *Columbia Journal of Gender and Law*, Vol. 41, No. 1, pp. 1–5.

menstrual wellbeing of female workers primarily depends on the destigmatization and normalization of menstruation as a process, principally done through simple policies such as is the possibility to address menstruation in a hygienic way without fear of repercussions, rather than on more complex and controversial ones, such as menstrual leave policy.

This paper will therefore first and foremost present the problems attributed to menstruation at work. Later, it will present possible policies that can be introduced in the working environment, with particular attention being given to the period leave policy as an especially controversial one. The conclusion includes the research findings.

2. The "Plight" of Menstruation at Work

Menstruation represents a source of various stereotypes, which ultimately form prejudice towards women and their capabilities. The fact that such treatment has also been scientifically proven speaks volumes.

Namely, a psychological study has proven in a rather interesting way that women whose menstrual status is revealed are viewed as less competent.[8] The observations were conducted on the basis of different treatment of a female who, to all appearances, accidently dropped either a tampon or a hair clip from her handbag. As expected, the object that was accidentally dropped created completely different perceptions of the female in question, the tampon being a reason of viewing her as less competent and less likeable.[9] Therefore, it is very possible that a female's coworkers and superiors are going to think lesser of her, solely because she made it known that it is "that time of the month".

Such a distorted perception of menstruating women is, at least in part, likely the result of negative messages conveyed by the media, which have (apparently successfully) constructed a stereotype of menstruating and pre-menstruating women as irrational and emotionally labile beings, while simultaneously playing on women's fear of their stigmatized menstruation being discovered.[10] In that sense, some practices such as the practice of forcing female workers to wear period bracelets or red signs at work, for the purpose of excusing them in order to use toilet more frequently,[11] are being less than helpful, and can be the cause of serious distress.

8 Roberts, T. *et al.*, 2002.

9 *Ibid.*, pp. 131–139.

10 Johnston-Robledo, I., Chrisler, J., 2011, The Menstrual Mark: Menstruation as Social Stigma, *Sex Roles*, Vol. 68, No. 1, p. 3.

11 Mahon, T., House, S., Cavill, S., 2012, *Menstrual Hygiene Matters: A Resource for Improving Menstrual Hygiene Around the World*, London, WaterAid, p. 175. In practice,

Therefore, not only are some female workers having to deal with the shame of having their period, but in some cases, they also have to deal with a lack of privacy as well as possibilities to manage their menses with dignity. Furthermore, blue collar workers are also facing a greater threat of not having access to clean toilet facilities.[12]

Menstruation is often accompanied by period pain (dysmenorrhea)[13] which, when severe, can make normal functioning difficult – not to mention the person's capability to perform at their job. Such a plight, combined with the general feeling of shame, can be the cause of workplace absenteeism,[14] as well as an even higher degree of presenteeism.[15]

In the United States of America, Alicia Coleman was fired for soiling workplace property after sudden onsets of menstruation on two separate occasions (one which resulted in a stained chair and the other in a stained carpet),[16] while Alicia Adams faced unjust dismissal when she disclosed to her employer that she had menorrhagia.[17] Moreover, in another case, a person found herself a victim of hostile sexist comments and menstrual jokes at work, which got to the point of being serious enough to qualify as harassment.[18]

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frequent usage of restroom facilities has also been viewed as an issue by some employers in the case of pregnant employees. For more on the topic of discrimination of pregnant employees, see Misailović, J., 2020, Posebna radnopravna zaštita materinstva, *Zbornik radova pravnog fakulteta u Nišu*, Vol. 56, No. 86, pp. 240–243.

12 Belliappa, J., 2018, Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organizations, *The Indian Journal of Industrial Relations*, Vol. 53, No. 4, p. 611; The ETU National survey reveals disgraceful standards and access to amenities for blue-collar workers ETU, 2022, National survey reveals disgraceful standards and access to amenities for blue-collar workers, *ETU*, 14 December, (https://www.etunational.asn.au/2022/12/14/etu-national-survey-reveals-disgraceful-standards-and-access-to-amenities-for-blue-collar-workers/, 28. 3. 2025); Rutter, S., Needham, C., 2024, Where can care workers go to the toilet? The right to working conditions that "respect health, safety and dignity", *Perspectives in Public Health*, (https://eprints.whiterose.ac.uk/216023/, 28. 3. 2025).

13 According to one study, up to 91% of women who menstruate experience dysmenorrhea to some extent, while 29% experience severe pain. Ju, H., Jones, M., Mishra, G., 2014, The Prevalence and Risk Factors of Dysmenorrhea, *Epidemiologic Reviews*, Vol. 36, No. 1, p. 107.

14 For more on this issue, see Ichino, A., Moretti, E., 2009, Biological Gender Differences, Absenteeism, and the Earnings Gap, *American Economic Journal: Applied Economics*, Vol. 1, No. 1, pp. 183–218.

15 Schoep, M. *et al.*, 2019, Productivity Loss Due to Menstruation-related Symptoms: A Nationwide Cross-sectional Survey Among 32 748 Women, *BMJ Open*, Vol. 9, No. 6.

16 For more on this case, see Karin, M., 2022, Addressing Periods at Work, *Harvard Law & Policy Review*, Vol. 16, No. 2, pp. 492–493.

17 Johnson, M., 2019, Menstrual Justice, *U C Davis Law Review*, Vol. 53, No. 1, pp. 35–36.

18 *Ibid.*, pp. 33–34.

In a world where the equality should be the norm, such a position is impermissible and it calls for action.

3. Menstruation in Light of the Right to Decent Work

The right to work is a basic human right, enshrined in several international instruments, such as the Universal Declaration on Human Rights[19] and the International Covenant on Economic, Social and Cultural Rights[20] and, as such, is guaranteed to everyone, regardless of their sex. Without equality between sexes, such a right could not be realized properly.[21]

It is also, to that point, important to note that, even though ambiguous, the concept of decent work undoubtedly embraces fundamental rights of workers, such as the right to be protected from discrimination at work and the right to occupational safety and health.[22] Therefore, as Colussi, Hill and Baird note "if the right to work is to be properly 'engendered', then menstruation and menopause must be acknowledged as important processes."[23]

Hence, supporters of the principle of substantive equality advocate for the need to accommodate biological differences between sexes in the working environment, rather than to require from the members of the female out-group to conform to the dominant masculine norm.[24] Although a truly noble act in principle, if brought to an extreme, catering to the out-groups could have a negative effect on an environment as a whole, because

19 UN GA, Resolution 217A (III), Universal Declaration of Human Rights, UN doc. A/RES/217(III) (10 December 1948), Arts. 23–24.

20 UN GA, International Covenant on Economic, Social and Cultural Rights, Treaty Series, Vol. 993, p. 3 (16 December 1966), Arts. 6–7.

21 It is therefore no surprise that discrimination, as defined in ILO Convention No. 111, includes any distinction, exclusion or preference made on the basis of sex which can have an effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111) (25 Jun 1958), Art. 1.

22 For more on the concept of decent work and its indicators, see Ghai, D., 2003, Decent Work: Concept and Indicators, *International Labour Review*, Vol. 142, No. 2, pp. 113–145.

23 Colussi, S., Hill, E., Baird, M., 2023, Engendering the Right to Work in International Law: Recognising Menstruation and Menopause in Paid Work, *University of Oxford Human Rights Hub Journal*, Vol. 5, p. 4.

24 Fredman, S., 2016, Substantive Equality Revisited, *International Journal of Constitutional Law*, Vol. 14. No. 3, pp. 733–734.

it has the potential of being discriminatory to the rest of the collective.[25] However, if applied properly, through some accommodations that could help menstruating women deal with this biologically inherently female issue, such a practice would be more than welcome. To behave otherwise could cause such a policy to be qualified as discriminatory in nature, since discrimination as a concept implies not only situations of unequal treatment of the equals, but also situations of equal treatment of unequals.[26]

An adequate period policy could be as simple as allowing employees to take time to address their period without fear of repercussions,[27] or providing access to female-friendly toilets that are hygienic and equipped with soap, water, menstrual products, and disposal options.[28] At the end of the day, it is job of the employer to ensure safety and health at work,[29] and menstrual health[30] at work should also be viewed as part of that duty. Under the same logic, such an obligation of the employer should also include not only the duty to ensure that employees are not being discriminated against, but also that they are protected from harassment and mobbing. Namely, not only are such behaviors deeply disturbing and morally questionable, but they can also be the cause of unwanted consequences to both the physical and mental health of a person.[31]

Harassment represents a special form of discrimination that is established by repeated behavior, motivated by the employee's innate or acquired personal characteristics (traits, beliefs or status), which thus

25 A blatant example of negative effects of these policies could be seen recently in sports. Schlott, R., 2024, Volleyball player 'fights for truth' after being severely injured by trans opponent: 'If only my rights had been more important than a man's feelings', *New York Post*, 17 December, (https://nypost.com/2024/12/17/us-news/female-athlete-permanently-hurt-by-trans-athlete-speaks-out/, 6. 3. 2025).

26 Brković, R., Urdarević, B., 2023, *Radno pravo sa elementima socijalnog prava*, Belgrade, Službeni glasnik, p. 73.

27 Sparks, I., 2010, Boss orders female staff to wear red bracelets when they are on their periods, *MailOnline*, 30 November, (https://www.dailymail.co.uk/news/article-1334400/Female-staff-Norway-ordered-wear-red-bracelets-period.html, 6. 3. 2025).

28 Schmitt, M. *et al.*, 2018, Making the Case for a Female-Friendly Toilet, *Water*, Vol. 10, No. 9.

29 For more on this subject, see Petrović, M., 2023, Employer's Liability in Serbia for Damage Caused by Work Injury: The Case of Professional Athletes, *Pravni zapisi*, Vol. 14, No. 1, pp. 100–106.

30 For more on the definition of the concept of menstrual health, see Hennegan, J. *et al.*, 2021, Menstrual Health: A Definition for Policy, Practice, and Research, *Sexual and Reproductive Health Matters*, Vol. 29, No. 1, pp. 31–38.

31 For more on the consequences of mobbing and discriminatory harassment, see Einarsen, S., 2000, Harassment and Bullying at Work: A Review of the Scandinavian Approach, *Aggression and Violent Behavior*, Vol. 5, No. 4, pp. 386–388.

fundamentally violates the dignity of an employee.[32] In the case at hand, the underlying motive would primarily be the sex of an individual, due to the fact that menstruation is an innate trait of a particular sex, and behaviors such as inappropriate comments with a menstrual connotation could just be the tip of the iceberg. However, such comments and inappropriate menstruation-related behaviors could also be motivated by other innate or acquired traits of a person such as political or sexual orientation, and not the sex of the individual.

On the other hand, repeated menstruation-related comments and inappropriate behaviors do not always have to constitute an act of discriminatory harassment. Namely, repeated behaviors that violate dignity of an employee can also represent simple acts of malice, not motivated by reasons related to the innate or acquired trait of a person. Therefore, such behaviors would not be perceived as acts of discriminatory harassment but could be qualified as mobbing.[33] This due to the fact that, in the case of work-related mobbing, the mobber is guided by the intention to harm another person at work, and this intention to harm is the dominant motive of the unwanted behavior.[34]

All of these behaviors however – regardless of the motive and their legal qualification – are to be deemed impermissible, and should be adequately addressed as such by the employer. If they would fail to do so, they would not only be as culpable as the perpetrator but even more so, because they carry the burden of ensuring the safety of their employees at work and in relation to their work.[35]

32 Kovačević, Lj., 2013, *Pravna subordinacija u radnom odnosu i njene granice*, Belgrade, Pravni fakultet Univerziteta u Beogradu – Centar za izdavaštvo i informisanje, p. 420.

33 Regarding the phenomenon of mobbing, there is some term overlapping. The term *bullying* is used to describe the same phenomenon in Australia, Great Britain and other countries with Anglo-Saxon law, while the term *mobbing* is being used in Scandinavian countries, as well as in German-speaking countries. Lippel, K., 2018, Conceptualising Violence at Work Through a Gender Lens: Regulation and Strategies for Prevention and Redress, *University of Oxford Human Rights Hub Journal*, Vol. 1, p. 146. However, there are legal systems, such as is Canadian legal system, where the term *harassment* or *workplace harassment* is used to denote what would otherwise be called *mobbing* or *bullying*. Lippel, K., 2010. The Law of Workplace Bullying: An International Overview, *Comparative Labor Law & Policy Journal*, Vol. 32, No. 1, p. 5. A similar observation can be made in Belgium and France, where the term *harcèlement moral* is used to denote the same phenomenon. Lippel, K., 2018, p. 146. To avoid confusion between *discriminatory harassment* and *mobbing*, in this paper such a phenomenon will be referred to as *mobbing*.

34 Reljanović, M., Petrović, A., 2011, Šikanozno vršenje prava, diskriminacija i zlostavljanje na radu – zakonska regulativa i praksa, *Pravni zapisi*, Vol. 2, No. 1, p. 188.

35 Under Serbian legislation, in the case of mobbing, they would also be the only one legally liable. The Law on Prevention of Harassment at Work, *Official Gazette of the RS*, No. 36/2010, Art. 9.

As it happens, in the beginning even menstrual leave was considered as an occupational health policy, with explicit purpose being to protect the fertility of working women.[36] Nowadays, however, it is mainly seen as a benefit for those who experience serious pain or other severe menstrual symptoms.[37] Nonetheless, even in these cases, critics of such period policies question the rationale and efficiency of staying at home in severe pain or with heavy bleeding, rather than treating the underlying health issue that is the cause of such symptoms.[38]

4. The Controversial Right to Menstrual Leave

As mentioned before, period policies can range from as basic as simply allowing employees to take a break to address their period or providing access to a female-friendly toilet, to policies that are more difficult to apply, such as guaranteeing the right to menstrual leave.

When the news broke in 2023 that Spain was the first European country to introduce menstrual leave of three up to five days for those individuals dealing with painful periods, everyone was in awe.[39] Even though not a new concept,[40] such a step felt like the beginning of something new.

Spain was actually not supposed to be the first European state to pass such a law,[41] since Italy was already well on its path to do the same in

36 In Bolshevik Russia, the negative impact of strenuous work on menstruating women, manifested in reported period irregularities, called for the introduction of period leave in some industries. For more on this subject, see Ilic, M., 1994, Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s, *Europe-Asia Studies*, Vol. 48, No. 8, pp. 1410–1414.

37 In Spain it is a policy that is restricted only to women with secondary dysmenorrhea. García-Egea, A. *et al.*, 2024, Perspectives on Menstrual Policymaking and Community-based Actions in Catalonia (Spain): A Qualitative study, *Reproductive Health*, Vol. 21, No. 1.

38 King, S., Menstrual Leave: Good Intention, Poor Solution, in: Hassard, J., Torres, L., (eds.), 2021, *Aligning Perspectives in Gender Mainstreaming. Health, Safety and Well-Being*, Cham, Springer, p. 158.

39 Bello, C., Llach, L., 2023, Painful periods? Spain just passed Europe's first paid 'menstrual leave' law, *Euronews*, 25 February, (https://www.euronews.com/next/2023/02/16/spain-set-to-become-the-first-european-country-to-introduce-a-3-day-menstrual-leave-for-wo, 8. 3. 2025).

40 According to available data, the first time a similar policy was introduced was in the early 20th century. Ilic, M., 1994, pp. 1409–1415. On the other hand, the first country to introduce the right to menstrual leave into legislation dealing with this subject was Japan, in 1947. For more on the origins of this right in Japan and the social context of that time, see Molony, B., 1995, Japan's 1986 Equal Employment Opportunity Law and the Changing Discourse on Gender, *Signs*, Vol. 20, No. 2, pp. 268–302.

41 Ley Orgánica 1/2023, por la que se modifica la Ley Orgánica 2/2010 (3 March 2010), de salud sexual y reproductiva y de la interrupción voluntaria del embarazo, *Boletín Oficial del Estado*, No. 51/2023 (28 February 2023).

2017.[42] To feminists, this newly established right felt like a small victory, while others cautioned that such a policy could trigger the degradation of women's rights in the labor market.[43] The latter point of view prevailed.[44]

Menstrual leave is a controversial right, one to which many possible pros and cons have been attributed. While such a policy can have various psychological benefits, e.g., the feeling that the employer cares about the wellbeing of their employees and reduced presenteeism, it can also lead to reduced privacy due to disclosure of an individual's menstrual status, abuses of such policies, and the disincentive to hire women.[45]

If one was to look at the effects of menstrual leave in countries that have already introduced such a right, it becomes clear what the critics of this right are warning of.

While in Japan employers accept the fact that they are less likely to hire women because of the costs of such a right and the challenges to determine whether an employee is truly in a position of needing to take menstrual leave,[46] in South Korea an airline company actually made requests for proof of menstruation in order to approve claims to this right, guaranteed by Korean Labor Standards Law.[47] In addition to that, data has shown that in both of these countries the number of menstrual leave claims has recorded a significant drop because of the realistic fear of discrimination, due to the general culture.[48]

Taking all of this into account, some researchers advocate for a different approach. Deborah Widiss, for example, advocates for workplace

42 BBC, 2017, Italy may pass a law that grants women monthly period leave, *BBC*, 29 March, (https://www.bbc.com/bbcthree/article/84f67498-b882-49df-82c3-26d3847589db, 8. 3. 2025).

43 Price, H., 2022, Periodic Leave: An Analysis of Menstrual Leave as a Legal Workplace Benefit. *Oklahoma Law Review*, Vol. 72, No. 2, pp. 187–188.

44 Hashimy, S., 2022, Menstrual Leave Dissent and Stigma Labelling: A Comparative Legal Discourse, *International Journal of Law Management & Humanitie*s, Vol. 5, No. 6, p. 1281.

45 For more on the topic of pros and cons of menstrual leave policies, see Price, H., 2022, pp. 214–216; Reljanović, M., Rajić Ćalić, J., 2024, Menstrual Leave and Gender Equality, *Strani pravni život*, Vol. 2, No. 1, pp. 4–6.

46 Hashimy, S., 2022, p. 1276.

47 Karin, M., 2022, p. 505.

48 Hollingsworth, J., 2020, Should women be entitled to period leave? These countries think so, *CNN Business*, 20 November, (https://edition.cnn.com/2020/11/20/business/period-leave-asia-intl-hnk-dst/index.html, 8. 3. 2025). The registered number of claims is also not significant in Spain, however, the reason for such a situation may be the fact that it is a right that is restricted and requires doctor involvement. Kassam, A., 2024, A year on, Spain's 'historic' menstrual leave law has hardly been used. Why?, *The Guardian*, 4 June, (https://www.theguardian.com/world/article/2024/jun/04/spain-historic-menstrual-leave-law-hardly-used-period-pain-endometriosis, 8. 3. 2025).

accommodations such as period-friendly restrooms and free menstrual products, as an alternative to menstrual leave (combined with sick leave for those who experience severe menstrual symptoms).[49] Sally King is of somewhat similar opinion, as she notes that vast majority of women do not face debilitating pain when menstruating, while the ones that do experience such an ordeal nearly always have an underlying health issue.[50] Therefore, in her opinion, "menstrual leave policies are based on fundamentally flawed assumptions about menstrual health," also due to the fact that taking time to rest during menstruation will not be an effective solution for women who experience severe menstrual symptoms.[51] For those women, adequate sick leave policies would be a far better option, rather than just taking some time off work.[52] To that she adds that it is highly likely that the very concept of menstrual leave actually came to existence due to intense and extreme working conditions, which prevented women who were menstruating to address their period in an adequate manner.[53] From this point of view, therefore, the need to take time off and claim the right to menstrual leave is actually a consequence of poor working conditions.

Hence it is difficult not to note that the number one catalyzer for the introduction of menstrual leave in Japan was the lack of access to adequate toilet facilities for female bus conductors, where they could address their periods.[54] Furthermore, the menstrual leave policy discourse in Russia began following menstrual irregularities reported by women who were working in specific industries, such as the leather and textile industries.[55] Therefore, menstrual leave could be seen as a "safety break" of sorts for those situations where other menstrual polices have failed and everything took a turn for the worse.

Period policies in general, however, do not have to be state-guaranteed in order for them to work.[56] It is up to the employer to organize the

49 Widiss, D., 2023, Time Off Work For Menstruation: A Good Idea?, *New York University Law Review Online*, Vol. 98, No. 170, p. 172.

50 King, S., 2021, pp. 158–159.

51 *Ibid*., p. 162.

52 *Ibid*., p. 162.

53 *Ibid*., p. 163.

54 Molony, B., 1995, p. 279. This is an issue that has also been reported fairly recently at construction sites in Australia. Hislop, M., 2021, Toilets for female tradies 'overlooked' on construction sites, *Women's Agenda*, 18 August, (https://womensagenda.com.au/latest/toilets-for-female-tradies-overlooked-on-construction-sites/, 6. 3. 2025).

55 Ilic, M., 1994, p. 1410.

56 As the matter of fact, the examples of Japan and South Korea indicate that menstrual leave, introduced by law, might in fact be a counterproductive step. Therefore, a more viable solution may be to introduce such a right at the company level, via the gen-

work and the work environment in a way that will promote the wellbeing of their employees. The same goes for the matter of period policies and menstrual wellbeing of employees. An interesting approach is the one taken by an Indian company Gozoop, which opted to offer its menstruating employees the right to take one day off from the office and work from the comfort of their homes, rather than to grant period leave.[57] Thus, instead of offering the right to menstrual leave, this company chose to offer its employees flexibility at work. Not all employers however can afford to provide such flexibility in the workplace, as not all of the business activities are the same. However, what all of them can do is create a respectful and healthy work environment which would respect menstrual wellbeing of their employees. This type of environment is the only thing that can put an end to the stigma, taboo and shame unjustly attributed to such a natural and normal process as is menstruation.

On the other hand, in an unhealthy work environment, menstrual leave does not seem to be an effective solution, but rather a route for a short escape from the harsh reality of the real everyday world. Moreover, as demonstrated in the example of Japan, not only can such a leave be a possible escape route, but it might not even be a viable getaway option in situations where it leads to fear of repercussions. It is therefore far more important to destigmatize and accept menstruation as something normal, rather than to introduce menstrual leave as a policy. On the other hand, for employees who face severe menstruation symptoms due to underlying health issues, an adequate sick leave policy may be a viable solution, not because menstruation itself should be perceived as an issue, but because such conditions are not a universal experience and should be treated as seriously and as carefully as any other health-related issue.[58]

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eral act of the employer. Still, that would imply that not everyone in the labor market would be able to count on such a right. On the other hand, such an issue could also be subject to collective bargaining. However, that would imply a strong culture of social dialogue, which is something not many countries can boast of. ILO, n.d., ILOSTAT data explorer, (https://rshiny.ilo.org/dataexplorer35/?lang=en&id=ILR_CBCT_NOC_RT_A, 28. 3. 2025).

57 Levitt, R., Barnack-Tavlaris, J., Addressing Menstruation in the Workplace: The Menstrual Leave Debate, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, p. 564.

58 In Serbia, *exempli causa*, the Regulations on Medical-doctrinal Standards for Determination of Temporary Incapacity to Work, enlists conditions such as Endometriosis and Menorrhagia as grounds for a sick leave. Pravilnik o medicinsko-doktrinarnim standardima za utvrđivanje privremene sprečenosti za rad, *Official Gazette of the RS*, Nos. 25/2020 and 78/2020. The indirect labor law protection to menstruating workers, on the other hand, is offered through the right to occupational safety and health, as well as the right to the protection of personal integrity and dignity of a person. Zakon o radu, *Official Gazette of the RS*, Nos. 4/2005, 61/2005, 54/2009, 32/2013,

5. Conclusion

Despite the fact that menstruation is a natural biological process, innate to female biology, it has always been a source of stigma, taboo and prejudice towards women, both in everyday life and in the working environment.

Due to menstruation, women can be perceived as less likable, less competent and emotionally labile, thus imposing on them a feeling of shame as well as the need to hide their menstrual status.

However, menstruation is nothing short of a miracle that enables the creation of new life, and it is in no way, shape or form a reason to hide, to feel unclean, unworthy or lesser.

Nevertheless, unwanted menstrual-related practices in the workplace seem to persist and withstand the test of time. It is therefore not unheard of, nor particularly rare, to witness discriminatory practices aimed at workers who menstruate or be a victim of negative period-related comments and other unwanted behaviors, which can, at times, even constitute an act of harassment or mobbing (depending on the motive of the unwanted behavior).

However, it is indisputable that the right to work is asexual and as such is guaranteed to everyone. Such a right, on the other hand, also implies the right to decent work and, therefore, the right to occupational safety and health, and protection from discrimination and other unwanted behaviors, such as harassment and mobbing.

It is therefore the responsibility of the employer to create an environment that will promote the health and overall wellbeing of their employees through various policies (including period policies) that will accommodate the needs of their menstruating employees. Such policies can range from simply allowing employees to take breaks to address their period or providing access to a female-friendly toilet, to policies that are more difficult to apply, such as the right to menstrual leave.

On that note, if previous experience is to be considered, menstrual leave, as a policy in an unhealthy work environment, does not seem to be an effective solution, but rather a questionable and mostly inefficient escape route. Therefore, it seems to be far more important to destigmatize and accept menstruation as a normal, natural process, through different accommodation policies, such as the access to period–friendly restrooms with free menstrual products, rather than to introduce menstrual leave as

75/2014, 13/2017 – decision CC, 113/2017 and 95/2018 – authentic interpretation, Art. 12, para. 1.

a policy. On the other hand, for those employees who experience severe menstruation symptoms as a consequence of underlying health issues, an adequate sick leave policy might be a viable solution. This not because menstruation should be perceived as an issue, but because such conditions are not the norm and should therefore be treated as seriously and as carefully as any other health-related issue.

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MENSTRUACIJA NA RADU NE BI TREBALO DA BUDE PROBLEM – TAČKA!

Mila Petrović

APSTRAKT

Iako je normalan deo ženske biologije, menstruacija i dalje predstavlja izvor tabua, stigme, predrasuda i praksi koje stvaraju dalje rascepe u već teško podeljenom društvu. Ne samo da je takva situacija nepravedna i prilično uvredljiva, već ona stvara i probleme u radnoj sredini. Sama činjenica da žena ima menstruaciju dovodi je u opasnost da bude percipirana kao nesposobna, stvara potencijalne higijenske i logističke probleme i, u određenom broju slučajeva, prilično otežava mogućnost zaposlenih žena da obavljaju svoj posao. Takva situacija zahteva politike koje mogu da zadovolje potrebe zaposlenih u menstrualnom ciklusu, kao i da pruže zaštitu od bilo kakvog neželjenog ponašanja koje bi moglo da ovu urođenu biološku osobinu pojedinca pretvori u oružje. Stoga je svrha ovog rada da analizira položaj zaposlenih koji imaju menstruaciju na poslu, kao i moguće politike koje poslodavac može uvesti kako bi olakšao njihov položaj.

Ključne reči: menstruacija, radna sredina, menstruacione politike, menstrualno zdravlje, menstrualno bolovanje.

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ORIGINAL SCIENTIFIC ARTICLE

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PHILOSOPHY OF MENSTRUATION: THE BODY THAT IS NOT BODILESS

Abstract: *The question this text raises is how do we think about the bodies that bleed, "we" being in particular those whose bodies bleed regularly? The question is philosophical in kind, as it tests our capacities to think about such bodies. Philosophy as a corpus has had little to say about menstruating bodies, which curiously also applies to feminist philosophy. Since these bodies do exist and we need to think of them in some way – not only for the sake of thinking, but also in order to apply legal measures in an equitable way – the text proposes the following: to see how bodies were framed in philosophical thought, departing from the notion of a bodiless body as the central paradigm in conceptualizing the philosophical subject, to make room for greater pluralism, and a fortiori, equality in thinking about human embodiment. The key claim is that it is bleeding that stands firmly in the way of conceptualizing bodies as bodiless.*

Key words: Body, Bleeding, Bodiless Body, Philosophy, Menstruation.

1. Introduction: Do Philosophers Menstruate?

Let me begin in a feminist fashion, with a first-person account. My first theoretical encounter with menstruation took place when I, a first-year student of philosophy, incidentally found a book in my parents' library dealing with blood rituals. By that time, I was a fully menstruating person,

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well acquainted with pains, stains, shame, and silence. The book whose title I cannot remember was in the field of anthropology, as it described tribal practices in the far-away lands frozen in time. And yet, the new millennium approaching, it felt strangely familiar, uncannily estranging.

I wager that many menstruating persons often imagine themselves as sometimes – irksomely, tiresomely, cyclically – bleeding, while at most other times they are something else; whatever they are or want to be, it is not bleeding that defines them. For example, I saw myself as a student of philosophy, a reader of Plato and Aristotle, Hobbes and Descartes. Yet, I can bet that many a time, while I was reading any of these thought-fellows, I was simultaneously producing blood, inadvertently, unwillingly, which somehow stained our fellowship. Can a philosopher menstruate? Or better still, am I one thing when I think, read and write, and something quite other when I bleed – something much closer to the indigenous women banished to their socially detached huts till their bleeding stops? Can we be philosophers – or doctors, engineers, priestesses, judges, scientists – while we at the same time bleed?

The question this text raises is how do we think about the bodies that bleed. Anthropology was for a long time the only sphere of knowledge that dared to speak about things impure and dangerous, possibly because it transferred them to realms distant and distinct from our own. Thus, for example, Mary Douglas tells us that in various peoples, such as the Māori, the Nyakyusa, and the Lele of the Kongo, menstrual blood signifies something *more*, through which a bleeding person is defined. This blood is, paradoxically, "the sort of human being manqué," a sign of a person that never was.[1] A living person, its temporary carrier who every now and then "has" in itself a dead person that never lived, emanates danger. The danger lies in small everyday actions that are potentially detrimental. For example, a "menstruating woman could not cook for her husband or poke the fire, lest he fall ill. She could prepare the food, but when it came to approaching the fire she had to call a friend in to help. These dangers were only risked by men, not by other women or children. Finally, a menstruating woman was a danger to the whole community if she entered the forest. Not only was her menstruation certain to wreck any enterprise in the forest that she might undertake, but it was thought to produce unfavourable conditions for men."[2]

We should not be too quick in concluding that these magical ascriptions resided solely in the indigenous, tribal minds, of interest only to the

1 Douglas, M., (1966) 2001, *Purity and Danger. An Analysis of the Concepts of Pollution and Taboo*, London and New York, Routledge, p. 97.

2 *Ibid.*, p. 152.

inquisitive anthropologists.[3] The dangers of the women's blood, realized or unrealized in a newborn person, were well known in the very cradle of the Western world. Anne McClintock argued that the ritual of baptism – in so many ways related to cleansing and removing stains of blood, of the earthly birth – "with its bowls of holy water, its washing, its male midwives – is a surrogate birthing ritual,"[4] re-enacting childbirth, but in a proper way. Women are "incomplete birthers", unfit to "inaugurate the human soul into the body of Christ".[5]

It is the blood that adds something to women. This addition is of a curious kind, since it functions rather as subtraction, a discount in humanity. Blood is the sign of lack, of the spectral, the earth, matter, filth, danger. This is why we do not like to see it. If it is only a sign and not an image, we can pretend not to know about it; we can unknow it by unseeing it. At the Menstrual (In)Justice conference, I used the PowerPoint presentation with few words and many artistic figurations of menstrual blood. My intention was to make us see, to make the signs overt. After the presentation, I was approached by two scholars who, with some discomfort, commented on how graphic the presentation was. Both of them were women and both presented on the topic, if from a different perspective. So, we can speak about "it", as we often do in venues not academic in kind, but we cannot allow "it" to be seen.

We know this phenomenon from the history of art. Venuses of all kinds, the epitomes of perfect female embodiment, often exude something entirely inhuman, where the body is "all surface, from which nothing leaks or exits".[6] One is not to play with this image. The artist Rupi Kaur posted an image of herself lying with her back to the viewers in a pose evoking the *Rokeby Venus* (though clearly outside of a boudoir and without Cupid and mirrors), with a patch of menstrual blood on the sheet and another one on the sleeping figure's pajama.[7] What this image depicts is known

3 Simone de Beauvoir quotes Pliny's *Natural History* saying that "the menstruating woman spoils harvests, devastates gardens, kills seeds, makes fruit fall, kills bees; if she touches the wine, it turns to vinegar; milk sours", qtd. in Beauvoir, S. de, 1956, *The Second Sex*, trans. by Parshley, H. M., London, Johnatan Cape, p. 168. For very contemporary biases along the same lines, see Marina Sakač Hadžić's paper Missing Menstruators: How Activist Work Highlights the Knowledge Gap, in this special section.

4 McClintock, A., 1995, *Imperial Leather. Race, Gender and Sexuality in the Colonial Contest*, New York and London, Routledge, p. 29.

5 *Ibid.*

6 McCormack, C., 2021, *Women in the Picture. Women, Art and the Power of Looking*, London, Icon Books, p. 58.

7 The name of the image is "period". The image, originally part of an educational project, is one in a series of menstruation-themed photographs, which unexpectedly gar-

to too many of us, yet it was censored twice and removed by Instagram for violating community standards for material. Contemporary Venuses in scanty lingerie hurt no communities and no standards, yet those that bleed do. The old magical notions of filth and danger are still with us, hampering how we see things and speak of them.

Seeing and speaking about things is always related to how we think of them. Are menstruating bodies excluded from the process of thinking? Do they fit in the frame of the human body, the frame we take into account when we think of humans, some of whom also menstruate? These seem to be philosophical questions that require a certain philosophy of menstruation. But, can there be such a thing as a philosophy of menstruation, and why does even this coinage sound preposterous and bizarre? This text aims to touch upon these questions, remaining focused on the crucial one: how is one to think the body that bleeds cyclically?

2. Philosophy and Bodies

One might argue that nothing mentioned in the introduction is of any relevance to philosophy. We are, in fact, moving within the realms of sociological imagination, where personal troubles – such as involuntary leaking[8] – are turned into social issues and problems open to reason.[9] Philosophy tackles the universal or, at the very least, universalizable phenomena: it is not interested in my body if my body cannot be elevated to "the" body or body "as such". The body is a generally suspect subject of philosophical reflection. Its position in the hierarchy of being, from Plato onwards, has always been quite low, especially if its functions are taken into account. In this merciless hierarchy, the bodies of women are yet another level down, since they belong to the paradigmatically particular cohort of bodies – sexed, wombed, marked by the unutterable, unseeable processes that stand in the way of their being being universalizable as human.[10]

Perhaps this is also why philosophy does not find itself among those strands of thinking that have put the body to the fore in the recent decades. Following Bryan Turner, one of the most ardent thinkers of bodies, it

nered global attention in 2015, when posted on Instagram, leading to a week-long battle against its removal. (https://www.instagram.com/rupikaur_/p/0ovWwJHA6f, 12. 5. 2025).

8 Moore, L. J., 2021, Revisiting Teaching While Leaking: COVID Edition, *Sociology Between the Gaps: Forgotten and Neglected Topics*, Vol. 6.

9 Wright Mills, C., (1959) 2000, *The Sociological Imagination*, Oxford, Oxford University Press.

10 Bourke, J., 2011, *What it means to be Human*?, London, Virago Press.

is four social movements that drove the articulation of the body as a topic forward: the women's movement, the gay and lesbian movement, the disability and, more recently, geriatric movements[11] – in a word, movements of people whose bodies singled them out from the generally accepted, valued and recognized form of the human. This, however, must revert us to philosophy. We need to ask not only how certain embodied persons never truly fitted into the frame of the human, but also how their particular embodiments stood in their way.

But let us, for a moment and in a somewhat Cartesian fashion, remove all that is personal, social, magical, or pertaining to the relatively recent history of certain movements, tribal imageries, and Instagram community standards. Upon removal of all potentially deceitful, experiential, culturally specific signs and images, we are left with two resolutely philosophical questions: do bodies that bleed exist, and how is one to think of them? The first question belongs to the realm of ontology, the second one to epistemology. Any reader of philosophy who attempts to grasp the history of philosophical accounts of the body ultimately has to confront these two compressed questions. We may surmise that the bodies philosophers talked about – on condition that they were not the bodies of angels, homunculi or machines (sometimes overlapping with the bodies of animals) – were human, universalizable to all humans, and thus representative of humans. Yet, it seems those were, at the same time, not bodies that bleed. If this is so, where are the bleeding bodies in the hierarchy of being (human)? And are they thinkable as bodies, i.e., as human?

These questions are pertinent not only in themselves because they force us to make room for plurality – and a fortiori equality. They are also of crucial importance for other domains of human action – such as jurisprudence – because to be able to think legally about something we need to be able to *think* about it in the first place. For this reason, a "philosophy of menstruation", a philosophical account on the bleeding bodies, needs elaboration in parallel, if not prior to resolving urgent legal matters of righting the various menstruation-related wrongs.

A philosophical take on menstruation would require a different philosophical approach to bodies. But, as Judith Butler famously claimed at the beginning of their book *Bodies that Matter*, there is "a vocational difficulty of those trained in philosophy, always at some distance from corporeal matters," who "invariably miss the body or, worse, write against it."[12]

11 Turner, B. S., 2012, Introduction. The turn of the Body, in: Turner, B. S., (ed.), *Routledge Handbook of Body Studies*, Abingdon and New York, Routledge.

12 Butler, J., 1993, *Bodies that Matter. On the Discursive Limits of Sex*, New York, Routledge, p. viii.

What would it mean to fail to take the body into account or to deny it by accounting without it? To offer an example, I will address three such accounts, significant because they come from the fathers of modern philosophy (mothers were, naturally, absent from this act of birth-giving). Here is Francis Bacon: "Certainly, man is of kin to the beasts by his body; and, if he be not of kin to God by his spirit, he is a base and ignoble creature."[13] This is one typical example of writing against the body, where the body is simply written off as a hindrance, a prison cell of the soul, an obstacle to eternity. Fortunately, however, we are kin to God, so we can put away – at least whilst we philosophize – our ignoble bestiality, reliance on nature, labor, pain, lust, mortality and profanity, not to mention bleeding.

Despite being written off, this body is at least imaginable as a nurtured one, laboring or in pains, if precisely for that reason lowly. In Hobbes's and Descartes's accounts, on the other hand, the body is missed. For Hobbes, "The World, (I mean not the Earth onely, that denominates the Lovers of it Worldly men, but the Universe, that is, the whole masse of all things that are) is Corporeall, that is to say, Body."[14] Hobbes's first philosophical principle aggrandizes the body into the cosmos, leading to the full conflation of body and matter. In Descartes, despite his being on the other side of the philosophical spectrum – as a rationalist and a metaphysical dualist – the body is a thing, something more and less than the ignoble entity Bacon referred to. Once proven to exist, my body is rather only the most intimate specimen of *res extensa*. Otherwise, it is the most certain truth that the mind that I am is distinct from my body,[15] and I, *res cogitans*, "would not fail to be whatever it is, even if the body did not exist."[16]

Whether it misses the body, or writes against it – in a variety of possible ways – philosophy could profess to thrive without bodies, especially those that are lived – changing, vulnerable, ailing, in the midst of and dependent on the world in which human bodies only occupy space, or come forward as extended. Instead, more often than not, when the body appears, it does so as the body as such:[17] a body that is somehow detachable

13 Bacon, F., (1625) 1985, *The Oxford Francis Bacon, Vol. XV: The Essayes or Counsels, Civill and Morall*, Oxford, Clarendon Press, p. 53.

14 Hobbes, T., (1651) 1968, *Leviathan*, New York, Penguin, p. 689.

15 Descartes, R., (1701) 1985, *Rules for the Direction of the Mind*, in *The Philosophical Writings of Descartes*, Vol. I, Cambridge, Cambridge University Press, p. 46.

16 Descartes, R., (1637) 1985, *Discourse and Essays*, in *The Philosophical Writings of Descartes*, Vol. I, trans. by Cottingham, J., Stoothoff, R., Murdoch, D., Cambridge, Cambridge University Press, p. 127.

17 It may be argued that this statement does injustice to certain philosophers who tried to think the body differently, or that it refers only to canonical Western metaphysics, strongly marked by Cartesian dualism. This is in part true, since my aim here is

from the embodied I that inhabits it almost accidentally, with the powers to leave it whilst philosophizing, and augment itself into something far grander than the particular piece of matter that the body is, extending or ignoble. This peculiar capacity to detach from the body – whatever is doing the detaching, the mind, the thinking, the spirit made in the image of God – engenders the philosophical subject. The subject is a fleshy mass of tissues and bones, but only accidently. Essentially, it is a thinking substance, a disinterested knower, an ethical subject, or a political reasoning being with rational objectives and self-interests.

Elsewhere, I dubbed this creature a "bodiless body".[18] The Cartesian subject that lost all its corporeal features in the process of application of methodical doubt is perhaps only the most acclaimed example of bodilessness. But bodiless bodies are in fact to be found in various philosophically infused environments. In epistemology, we often speak of the dislocated, disembodied ideals of rational autonomy and solitary epistemic self-sufficiency.[19] These self-sufficient monads are also a staple ingredient in political philosophy and we know them by the name of individuals – the independent, sovereign, self-sufficient, and self-actualizing possessors of their life and limb.[20] The same characters appear in political economy, defined as rational actors and deemed to operate as isolated, "physically disembodied and socially disembedded" individuals who act instrumentally with regard to their abstract preferences rather than physical needs.[21] Ultimately, we find a variant of the bodiless body in legal theory, since the "law's subject, its unit, its person, its basic concept, is an individual. Its oft-

neither to offer a comprehensive overview of all philosophical traditions, nor, for the time being, to depart from the canon. The canon is deeply marked by the rigid mind-body dualism, which is as old as the Pythagorean table of opposites and still survives today, despite some important 20th century challenges to it, crucially those coming from the phenomenological tradition. Cf. Johnson, M., 2008, What Makes a Body?, *The Journal of Speculative Philosophy*, Vol. 22, No. 3, pp. 159–169.

18 Zaharijević, A., 2020, Becoming a Master of an Island Again: On the Desire to be Bodiless, *Redescriptions*, Vol. 23, No. 2, pp. 107–119; Zaharijević, A., 2023, *Judith Butler and Politics*, Edinburgh, Edinburgh University Press, pp. 193–198.

19 Code, L., Feminist Epistemologies and Women's Lives, in: Alcoff, L. M., Kittay, E. F., (eds.), 2006, *The Blackwell Guide to Feminist Philosophy*, Oxford, Blackwell, p. 215.

20 Locke, J., (1689) 1824, *Two Treatises of Government*, London, Rivington *et al.*; Macpherson, C. B., 2011, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Ontario, Oxford University Press Canada; Zaharijević, A., Independent and Invulnerable: Politics of an Individual, in: Rodriguez, B., Sanchez Madrid, N., Zaharijević, A., (eds.), *Rethinking Vulnerability and Exclusion. Historical and Critical Essays*, Cham, Palgrave, pp. 83–100.

21 Hooper, C., Disembodiment, Embodiment and the Construction of Hegemonic Masculinity, in: Youngs, G., (ed.), 2000, *Political Economy, Power and the Body. Global Perspectives*, Basingstoke, MacMillan, p. 31.

stated concern is to preserve the autonomy and integrity of individuals, conceived in a highly abstract manner."[22]

The philosophical subject lives its many parallel lives. To claim universality, it needs to remain bodiless, since bodies introduce particularity, create exceptions, divide and exclude. Thus, if bodies are put out of the way, we arrive at the essential quality shared by all creatures deemed human. The trouble is that bodiless bodies – once they are removed from the universalizable abstraction that cushions their humanity – turn to be bodiful again (and all along). This does not refer only to the single units that each of us is in our fleshy exposure, I-in-my-body, you-in-your-body, but also to other bodied features, one of which is bleeding. Being bodiful also means extending in space, which, contrary to Hobbes's and Descartes's intuition, is not only a matter of physical expansion, measurable in a purely mathematical manner. Bodies take up space in a world in which we are not alone; we do not appear on our own; we do not stand continuously erect; many of the relations we are born into existed before we arrived and will remain in place after our passing. The world in which we are human bodies – and not just physical objects – is a much more complex place that holds us (as bodies), together or apart. Ultimately, this world is replete with histories that form our present. For example, historically, "to be a person, as that term has been employed in a variety of statutes on public legal life, one has had to be a man. It has been an often-unstated but utterly assumed necessary prior condition and hence built into the very definition of the person."[23] Prior to becoming bodiless, the person had a body – so did the *homo economicus* and the individual. In the words of philosopher Mary Midgley:

> The whole idea of a free independent, enquiring, choosing individual, an idea central to European thought, has always been essentially the idea of a male. It was so developed by the Greeks, and still more by the great libertarian movements of the 18th century. In spite of its force and nobility, it contains a deep strain of falsity, not just because the reasons why it was not applied to one half of the human race were not honestly looked at, but because the supposed independence of the male was itself false. It was parasitical, taking for granted the love and service of non-autonomous females (and indeed often of the less enlightened males as well). It pretended to be universal when it was not.[24]

22 Naffine, N., 2004, Our legal lives as men, women and persons, *Legal Studies*, Vol. 24, No. 4, p. 624.

23 *Ibid.*, p. 634.

24 Midgley, M., 1984, Sex & Personal Identity. The Western Individualistic Tradition, *Encounter*, Vol. 63, p. 51.

3. Feminist Philosophy and Bodies That Bleed

Not only was there a false pretense regarding universality and independence (from non-autonomous females and various less or non-autonomous males, but also from the [social] world on which we depend in so many ways, most of which we never chose). Independence is preconditioned by another very dubious assumption – invulnerability. An invulnerable body is a bodiless one. To the question – whose body is this? – the answer would be, no one's. However, bodilessness is often (and rightly so) related to a certain kind of philosophically masculine ideal, underpinned by rationality, invulnerability and autonomy.

That such an ideal exists and that it may be termed masculine was revealed by feminist philosophy. Somewhat similar to Midgley, herself not a feminist philosopher, Marylin Frye addressed the reality of this ideal on decidedly feminist terms, claiming that those who possess power also possess the means to define their own reality, from which the experiences – nay, the existences of those who make their lives possible, become erased. Since it was created by men (for men), philosophy created a reality that failed to recognize women.[25] Or, to paraphrase Butler, women were invariably missed or, worse, written against. This is why, for Frye and many others, it is up to feminist philosophers to expose this reality as illusory, deficient, premised on particular ideals posing as universal, akin to the reality of Plato's cave.

As expected, feminist philosophy did a lot to reinstate the body. The subject of feminist philosophy is not only embodied, but bodies come in genders. Such a subject is much less likely to remain detached from the flesh and the world in which the needs and desires the bodies have have become acknowledged. Feminist philosophy shows us that bodies are born, that they need crutches of all kinds to stand upright, that they are nurtured and fed, and that nurturance and feeding is done by a certain cross-section of subjects, whose love and service needs acknowledgment, as does the (private) sphere in which these processes take place. In feminist philosophy, some of the devalued dimensions of our embodiment shine for the first time, now appearing as our main human traits. Crucially, whatever their approach to bodies, feminist philosophers reject their being bodiless. This also amounts to the concurrence that the bodies are vulnerable, and that we are rarely, if ever, in full control over them.

25 Frye, M., 1983, *The Politics of Reality. Essays in Feminist Theory*, New York, Crossing Press.

That being said, one would be right to expect that bleeding appears as a recurrent bodily feature of the subjects given shape by feminist philosophy. Existing as a body that bleeds is a form of existence not accounted for in so-called traditional philosophy, and it may be surmised that its obliteration helped create the figure of the bodiless body. Putting these bodies in thought, registering them as thinkable, alongside bodies not characterized by bleeding, seems an epistemologically worthwhile project with palpable effects in other spheres of thinking and action. In a sense, this seems crucial – if the aim of feminist philosophy (and feminist epistemology in particular) is to create plurality and equality in thinking. Yet, not many feminist philosophers embarked on this journey.[26]

Opening her text on Embodiment and Feminist Philosophy, Sara Heinämaa claims that "feminist thinkers have developed philosophical arguments and concepts to tackle problems that are central in women's lives such as pregnancy, childbirth, abortion, rape, pornography, prostitution, sexual orientation, and the division of labor between the sexes."[27] Menstruation obviously does not belong to this corpus. One may opine that Heinämaa overlooked this particular topic, despite the fact that her contribution was supposed to give a thorough and comprehensive overview, being the only one focusing on bodies in the voluminous and thus far most representative companion to feminist philosophy. Perhaps no such slippage appeared in other representative takes on what a body is. A careful look at four hefty companions, published by Routledge, Cambridge, and Blackwell between 1998 and 2017,[28] featuring some of the most prominent names in the English-speaking feminist philosophy, attests to the contrary. The term "menstruate" either does not appear in them, or when it does sporadically – it is always only accompanying those more central experiences in women's life, to reiterate Heinämaa. I find this telling, because such volumes often showcase what is relevant for a discipline or a specific topic, aiming to encompass everything that

26 Iris Marion Young notes the same in 2005: "Most feminist treatises are silent about the experience and social significance of menstruation." See Young, I. M., 2005, Menstrual Meditations, in: *On Female Body Experience. "Throwing Like a Girl" and Other Essays*, Oxford, Oxford University Press, p. 99.

27 Heinämaa, S., Embodiment and Feminist Philosophy, in: Garry A., Khader, S., Stone, A., (eds.), 2017, *The Routledge Companion to Feminist Philosophy*, New York and London, Routledge, p. 180.

28 Jaggar, A., Young, I. M., (eds.), (1998) 2000, *A Companion to Feminist Philosophy*, Malden, Blackwell; Fricker, M., Hornsby, J., (eds.), 2000, *The Cambridge Companion to Feminism in Philosophy*, Cambridge, Cambridge University Press; Kittay, E. F., Alcoff, L. M., (eds.), 2008, *The Blackwell Guide to Feminist Philosophy*, Malden, Blackwell; Garry, A., Khader, S., Stone, A., (eds.), 2017, *The Routledge Companion to Feminist Philosophy*, New York, Routledge.

defines or should define it. In my understanding, such an outcome is not only surprising, but seems to be producing a new kind of misrepresentation of what bodies are.

Indeed, all of the enlisted problems "that are central in women's lives" relate to an embodied life – some to the inherent capacities of bodies that may get pregnant (pregnancy itself, childbirth), some to the effects of those capacities (motherhood, nursing, abortion), some to the exploitation or violence that may happen to them in certain ways (gendered division of labor, rape, pornography). However, pregnancy, childbirth, abortion and rape do not constitute a lived reality of all women, as well as queer, trans or non-binary persons. Many of these humans may get pregnant, many just once or several times in their life, many will give birth, while some may terminate their pregnancies, and yet some may be also exposed to rape, which may happen to some men and some queer, trans or non-binary persons as well. In the event that they do occur, they have a tendency to define some or many dimensions of our embodiment for a protracted period of time.[29] However, although they are by all means major bodily events that in many ways function as turning points in the lives of those affected by them, they also never happen to many persons, women or others whose bodies are capacitated in certain ways and may be violated on that basis.

There is a prior and more universalizable bodily distinction related to bleeding. Unlike any of the inherently corporeal capacities (pregnancy, parturition, and lactation), bleeding does not need activation; it is a self-activating capacity of a menstruating body. Likewise, menstrual bleeding is not about our actions, desires or will (abortion or nursing, and especially motherhood – as a lifelong complex of volitions, activities and desires – are). We make certain decisions based on certain desires or notions regarding if and how we maintain or terminate the effects of our activated bodily capacities – and sometimes we make them in restricted circumstances, with little or no support. Some of the said activations

29 It is necessary to emphasize that all of these "problems" do not have to actually occur in order to have an import for us. Since our bodies live in the social and not merely the physical world, our movements may be severely restricted by fear of rape. Or we may feel deeply deficient if we do not or cannot get pregnant, because a woman is expected to realize herself as a mother – a cross-cultural phenomenon that still has a strong bearing on many women across the globe. Or one may not be able to go through abortion without fear of various kinds of complications, medical or legal, that may profoundly affect our bodily lives afterwards. These and other problems enumerated above have a tendency to shape our ideas, roles, behaviors, etc., that we feel very bodily, even if we never actually go through them, turning them into a bodily event.

may last our entire life, albeit in changed and altering ways, motherhood being the case in point. Bleeding is also not subsumable under any of these bodily activities: pregnancy and lactation, for example, are only possible on condition of bleeding already being there. There are no pregnant or lactating men, but neither are there pre-menarche or post-menopausal pregnancies. Ultimately, we may menstruate our entire life without ever getting pregnant, but we will not get pregnant without a prior bodily feature a facet of which is monthly bleeding. Therefore, all of the concomitant actions of the menstruating subjects, or bodily functions activated by some of such actions, are posterior to the bodily "action" of menstruating.

In addition, menstruation is a designation of one type of body that could not be, and historically was not, "translated" the way other physiological translations were achieved. For thousands of years, it was taken as scientific fact that women and men had the same genitals, except that, "as Nemesius, bishop of Emesa in the fourth century, put it: 'theirs are inside the body and not outside it.'"[30] According to Galen, women were essentially men, though lesser ones, because the lack of vital heat in their bodies resulted in the retention of the organic structures, visible on the outside in the vitally more heated, and therefore more perfect, male bodies. In the Galenic medical imagination, which had its incarnations well into the 18th century, the ovaries were understood and even named as testicles, the vagina was as an interior penis, the labia were seen as foreskin, while the uterus was a deflated scrotum. Menstrual blood was explained as plethora or leftover for nutrition,[31] a surplus that flowed out of the body if unused for the nourishment of the fetus (or in breastfeeding, since the blood not used up for nourishing the womb was thought to flow to the breasts and whiten into milk). Although the ancient doctors believed that women menstruate less in summertime (since they perspire more, as men do) and that there is less bleeding from the vagina, where there are hemorrhoids and varicose veins in women to strike a balance in bleeding,[32] menstrual blood was still not fully translatable into any of the physiological processes characterizing vitally heated, male bodies.

Men simply do not bleed – if nosebleeds, hemorrhoids and accidental wounds are excluded, none of which constitute their being bodily as such, though it does say something about their bodies being vulnerable. On the

30 Laquer, T., 1992, *Making Sex. Body and Gender from the Greeks to Freud*, Cambridge Mass. and London, Harvard University Press, p. 4.

31 *Ibid.*, 34.

32 *Ibid.*, 37.

other hand, menstruating bodies on average produce 20 liters of blood over the total of seven years in their lifetime. This "production" is not manufacture: it is the body doing something on its own, without any other factor – including the bleeding person's will – interfering in this "doing". A healthy menstruating person has about 13 periods, lasting on average 5 days and with a loss of 50 ml of blood, for about 35 years of their life.[33] This is, therefore, a constituent trait of bodies that are periodically ejecting blood, without any pre-activation or intention.

I thus want to claim that menstrual bleeding not only belongs to the set of central issues related to the embodiment of women and other people who menstruate, but is central to our understanding of what bodies are. It is ultimately bleeding that stands firmly in the way of conceptualizing bodies as bodiless.[34]

4. Philosophy of Menstruation

A body that menstruates exists. Then why was it for centuries omitted, if not banished from thinking about embodiment? And why does this seem to happen again, even in the feminist philosophical endeavors to retrieve the significance of an embodied life and make it more capacious and equal? Several decades ago, Gloria Steinem published a short satirical essay in *Ms. Magazine*, asking "what would happen if suddenly, magically, men could menstruate and women could not?"[35] Her answer, somewhat echoing Frye's take on the politics of reality, is that whatever the superior

33 Droz, L., 2024, The Menstrual Cycles: Philosophical and Ethical Insights in a Powerful Tool, *Humanities Bulletin*, Vol. 7, No. 1, p. 31.

34 One of the reviewers of this paper questioned this claim, asking why menstrual bleeding would stand in the way of bodilessness any more than breathing, ovulating, nutrition, crying, aching, ejaculating, urinating, or perspiring. Indeed, a bodiless body does not seem to have the lungs to breathe, brain to signal the bladder muscles to tighten and sphincter muscles to relax; it also must be without inner organs that produce ova or sperm, lacrimal glands that make tears, or neurotransmitters triggering sweat. Yet the bodiless body is not the same as the organ-less body, a body of an angel, or an automaton. A bodiless body is indeed similarly fictional, but it is a foundational philosophical fiction: it is an everyone's body, a *human* body, in control and invulnerable to itself and its environments. A body that bleeds, not being everyone's yet being human, shows the fictional character of the universal quality of the philosophical bodilessness, demonstrating that no bodies can be detached from themselves, cannot be bodiless, while also insinuating that pains, nutrition, and other bodily events, not fully in control of the one alone, belong to the very nature of being human.

35 Steinem, G., (1978) 2020, If Men Could Menstruate, in: Bobel, C. *et al.*, (eds.), *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave, p. 353.

group has will be used to justify its superiority, and, vice versa, whatever characterized the inferior group would end up being its plight. Thus, if men could menstruate, Steinem suggests, menstruation would become an "enviable, boast-worthy, masculine event. Men would brag about how long and how much."[36] Their menstruating would be a socially valuable, culturally prominent, and politically protected bodily feature.[37] In other words, all that it is not in women's reality.

I began this text with a vague proposition that many menstruating persons feel their bleeding as a temporary nuisance, as something that is inescapably there – a doing of their own bodies happening to them. And yet, we feel that this is not what defines us. More often than not, we feel split from ourselves, as if in a conflict, as if attacked or abandoned by the very body that one is. Let us extend but also go beyond Steinem's metaphor and ask: how would it be if we first thought of bodies that bleed, and only then of those that do not? This would be a sort of inverted thought-world. When *we* think of *the* body – we, being women and people who menstruate – do we think of the menstruating body? Or do we think of a neutral, "everyone's", bodiless body? Could it be that this obstacle to thinking of bodies, even our own, as bodies that bleed introduces this split, which often functions as an omittance or even expunging we commit against ourselves? Ultimately, what will it take to be able to think of bodies in plural – as this is what I believe is crucial – taking into account those that do and those that do not bleed? Do we need a radical transformation of the symbolic order of imagination for that? How do we create one? And who does?

Few feminist philosophers who attempted to ponder the bleeding demonstrate why this reversal – even in a mere thought experiment or a lampoonery – proves so hard yet so necessary. The first piece of crucially feminist philosophy, Simone de Beauvoir's *The Second Sex*, abounds with blood. Beauvoir wanted to provide a conclusive answer to the decidedly

36 *Ibid.*, pp. 353–354.

37 Steinem's words merit reciting: "Generals, right-wing politicians, and religious fundamentalists would cite menstruation ('*men*-struation') as proof that only men could serve God and country in combat ('You have to give blood to take blood'), occupy high political office ('Can women be properly fierce without a monthly cycle governed by the planet Mars?'), be priests, ministers, God Himself ('He gave this blood for our sins'), or rabbis ('Without a monthly purge of impurities, women are unclean'). Male liberals and radicals would insist that women are equal, just different; and that any woman could join their ranks if only she were willing to recognize the primacy of menstrual rights ('Everything else is a single issue') or self-inflict a major wound every month ('You *must* give blood for the revolution')", *ibid.*, p. 354, emphasis in original.

ontological question "what is a woman?" – and menstruating was a part of it. Bleeding first appears in Beauvoir's overview of "the data of biology", at the very beginning of her account. These data confirm that "from puberty to menopause woman is the theatre of a play that unfolds within her and in which she is not personally concerned. Anglo-Saxons call menstruation 'the curse'; in truth the menstrual cycle is a burden and a useless one from the point of view of the individual."[38] The drama that is a woman's body, itself of no concern to individual women (not a matter of her particular desires or volitions), says something about the world in which our biological features have a social meaning, in which we are born female, but become women. In the existentialist vein, Beauvoir wants a world in which no one would have to bear the brunt not begotten by their choices. However, women are beings that, whatever their choices, remain burdened by the species that speaks through their bleeding. In the social world as it is, in which the species has preeminence over individual specimens, the end of this onerous bleeding marks an escape from "the iron grasp of the species".[39] Only then a woman ceases to be the "prey of overwhelming forces, she is herself, she and her body are one,"[40] this becoming one with herself, a woman finally becomes "one", not split and multipliable, which in Beauvoir's opinion turns women into "a third sex".

This is, ultimately, a key characteristic of women's existence. The onset of menstruation is termed as crisis, and it is this crisis, together with alienation and ambivalence, that marks the life of women. This life is not a straight, expansive line, but a becoming punctuated by small, monthly crises and the big crises called menarche and menopause. At a certain point in their life, women even become a sex that they were not, a sex that cannot be accommodated in the neat division of male and female, the main social register for understanding "the data of biology". The body of a woman comes as split and doubled, my own and not my own, belonging to the species, belonging to society, belonging to me, none of these belongings being stable, continuous, undeviating – and then, it (again?) belongs to itself, becoming freed from "sex", i.e., freed from bleeding.

Simone de Beauvoir did not imagine a world in which it would be only post-menopausal women who take their existence into their hands, finally unburdened from essences imposed on them by their bodies. Although she in many ways struggled with what the world was for women at the close of

38 Beauvoir, S. de, *The Second Sex*, p. 55.

39 *Ibid.*, 58.

40 *Ibid.*

the 1940s, she ended her uncanny ontological treatise with some optimism: "What is certain is that hitherto women's possibilities have been suppressed and lost to humanity, and that it is high time she is permitted to take her chances in her own interest and in the interest of all."[41] Crucially, releasing possibilities meant releasing the bodies that bleed from being written off as the vehicle of the species, not vehicles of their own choices.

Many decades later, Elizabeth Grosz presents the body that bleeds as another type of unchosen fulness (bodifulness). This is now not the body in clutches of the species, but "a formlessness that engulfs all form, a disorder that threatens all order," corporeality as a mode of seepage.[42] The woman's body is a projected liquidity, continuous secreting, unbounded leaking. Women are fluid, men are solid. Women are changing, men remain self-identical (so much so that in a Cartesian manner they can will their bodies away). For Grosz, menstruation is configured as something that goes against the borders of the self: blood pushes through and out of the bloodstream, it leaves the closed system of the body and complicates its boundaries. The blood is associated with "injury and the wound, with a mess that does not dry invisibly, that leaks, uncontrollable," indicating "an out-of-control status",[43] which marks not only the body of the woman, but her entire existence. From the vantage point of the body that can be proclaimed bodiless, there is something inherently inconsistent and anomalous about the body defined by abrupt and cyclically abrupt incursions of the bodily insides. Again, we see that where there should be a flat line, there is constant and repetitive change.

In her essay *Menstrual Meditations*, probably the only piece to tackle such kinds of meditations, Iris Marion Young dwells not upon the ontology of the body, but on its afterlives in the lives of ordinary women. She focuses on the social oppression of women (as menstruators) through shame – something that accompanies women's bodies as rationality accompanies men's minds – and through the lack of appropriate public infrastructures that would acknowledge women's social and physical needs while they bleed. Reflecting on our times in which we are all supposedly social equals, Young says: "For a culture of meritocratic achievement, menstruation is nothing other than a healthy biological process that should not be thought to distinguish women and men in our capacities and behavior. Women have demonstrated that there is no womanly nature that prevents us from achieving what men achieve. We can do anything we choose while

41 *Ibid.*, p. 672.

42 Grosz, E., 1994, *Volatile Bodies. Towards a Corporeal Feminism*, Bloomington and Indianapolis, Indiana University Press, p. 202.

43 *Ibid.*, 205.

menstruating."[44] However, "from our earliest awareness of menstruation until the day we stop, we are mindful of the imperative to *conceal* our menstrual processes."[45] We are socially equal, but on condition that we hide this strange difference that refuses to accommodate itself to us being the same. The same as what? Young says that "the normal body, the default body, the body that every body is assumed to be, is a body not bleeding from the vagina."[46] She goes on to claim that menstruators – in our supposedly gender-egalitarian societies – are as queer as all those who remain in the closet.

How do we think about the bodies when we expressly do not want to miss them or think against them? Will the inverted thought-world experiment suffice? Hardly. If the bleeding body does appear, if it is not missed altogether, it is routinely thought against: as the aggrandized womb, the haunting species, the monstrous filth, the incontrollable seepage, the unbounded body swallowing the self and menacing other adjacent bounded selves, the very abject and the ignoble that must remain closeted. No wonder, then, that one would rather unthink such bodies, banishing them to the huts of unthinkability forever.

Yet, the bodies that bleed exist. In another thought experiment, we may separate them from any of these phantoms, and simply see them on an equal footing with bodies that do not bleed. This experiment is inevitable in order to speak about human rights, legal solutions, fairness and taxation related to menstrual products. We must become able to think of the body and imagine how it also bleeds. In a next step, we need to see nothing deviant in this bleeding, but a mere trait of the many bodies around us. This may ultimately lead to a reimagination of all bodies, leaving the fictional bodiless body forever behind, together with the monster filth and gargantuan wombs. Leaving these immaterial fantoms behind, we may end up reimaging our social world as well.

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44 Young, I. M., Menstrual Meditations, p. 106.

45 *Ibid.,* (emphasis in original).

46 *Ibid.*, p. 107. Young continues, "thus to *be* normal and to be taken as normal, the menstruating woman must not speak about her bleeding and must conceal evidence of it". This returns us to the scene of the *Menstrual (In)Justice* conference, where the very fact of speaking about menstrual blood makes us un-normal, abnormal, at least so long as we are gathering there to reflect on its mere factualness.

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FILOZOFIJA MENSTRUACIJE: TELO KOJE NIJE BESTELESNO

Adriana Zaharijević

APSTRAKT

Pitanje koje ovaj tekst postavlja jeste kako mislimo o telima koja krvare, posebno mi čija tela krvare. Pitanje je filozofsko pošto testira našu sposobnost da uopšte mislimo o takvim telima. Filozofija je, kao korpus znanja, imala malo toga da kaže o telima koja menstruiraju, što, zanimljivo je, važi i za feminističku filozofiju. No, kako ta tela postoje i stoga o njima moramo nekako misliti, ne samo mišljenja radi već i da bismo na njih mogli pravično da primenjujemo određene pravne mere, ovaj tekst predlaže sledeće: da se razmotri kakav je oblik telima davala filozofska misao, napuštajući shvatanje o bestelesnom telu kao središnjoj paradigmi u određenju filozofskog subjekta, da bi se načinilo više prostora za pluralizam i, *a fortiori*, za jednakost u mišljenju o ljudskoj telesnosti. Ključna je teza ovog teksta da upravo krvarenje stoji na putu razumevanju tela kao bestelesnih.

Ključne reči: telo, krvarenje, bestelesno telo, filozofija, menstruiranje.

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REVIEW ARTICLE

*Marina Sakač Hadžić**

MISSING MENSTRUATORS: HOW ACTIVIST WORK HIGHLIGHTS A KNOWLEDGE GAP

Abstract: *With the global and cultural shifts challenging the silence and taboo, menstruation is becoming increasingly present in the media. By looking the work of artists and activists, this paper highlights the development of knowledge about menstruation. In promoting menstruation and period poverty, activists and NGOs have contributed to changes in schools and universities in Serbia and the Western Balkans. Some of these institutions now provide free menstrual products. The paper explores the role of digital activists and civil society as drivers of change, focusing on producing and sharing knowledge about menstruating bodies. They fill gaps created by the neglect or lack of interest of public health institutions. This draws on legal reforms, civil society contributions, critical menstrual studies, digital ethnography, and content analysis.*

Key words: Digital Activism, Menstrual Activism, Knowledge Production, Human Rights, Public Health Law, Serbia, Western Balkans.

1. Introduction

In the wake of a global shift towards anti-intellectualist sentiments and right-wing leaning politics, society is facing increased restrictions and diminished autonomy. In the Western Balkans, however, there is a growing interest in menstrual health among various civil society actors, journalists, feminists, and digital activists, many of whom have amassed large followings. In this paper, we will look at three examples of digital and menstrual activists: kriticki, Ženska Inicijativa, and the Gender Knowledge Hub. Through humor, art, podcasts, and research, they are bringing attention to important questions menstruators often ask but rarely find answers to.

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The title of this paper highlights a knowledge gap: the "missing menstruators." These are individuals who have been overlooked in research, education, and policy strategies. Half of the population in Serbia, those who have, are, or will experience menstruation, still lack access to up-to-date medical knowledge on how to approach their menstruating bodies holistically. While this does not imply that women and menstruators are incapable of caring for themselves, it highlights the lack of adequate information, medical attention, and support for them and their health needs. Menstrual knowledge is still passed down from older women, mothers, aunts, grandmothers, sometimes friends, based on individual experience, which is crucial during menarche; however, it is insufficient when confronted with one or multiple menstrual symptoms or disorders.[1] While we can recognize that pain is often a side effect or symptom of menstruation, it is unwise to normalize it as necessary, especially if an underlying disorder can cause infertility or be life-threatening if left untreated.

In recent years, several universities and schools in Serbia and the region Western Balkans region have adopted new policies regarding menstruation and its associated necessities, such as providing free menstrual products to students. These changes are also visible in public institutions and even in legislation, such as the reduction of taxes on menstrual products in the Western Balkans and Europe. For example, the 2022 the EU Reduced VAT Rates Directive introduced greater flexibility, allowing Member States to reduce VAT to 0% – a significant shift from the previous minimum of 5%.[2] These legislative changes can have a positive impact on menstrual poverty if implemented responsibly and in line with the local context and needs of the population.

Following the work of digital and offline activists and civil society actors, the line of knowledge they produce is essential for bringing crucial information to women and menstruators. This is especially relevant since the institutions responsible for public health often seem indifferent or are undervalued and lack the necessary capacity. The goal here is to explore the work of digital activists, civil society actors, and others, as catalysts

1 Common menstrual and reproductive health conditions include: polycystic ovary syndrome (PCOS) – irregular periods, high androgens, ovarian cysts; premenstrual dysphoric disorder (PMDD) – severe mood symptoms before period; premenstrual syndrome (PMS) – mood swings, bloating, cramps, fatigue; amenorrhea – absence of menstruation (primary or secondary); oligomenorrhea – infrequent menstruation; menorrhagia – heavy or prolonged bleeding; metrorrhagia – bleeding between periods; dysmenorrhea – painful periods (cramps, nausea, fatigue); and endometriosis – endometrial-like tissue grows outside uterus which causes pain, infertility.

2 Baert, P., 2025, *Taxation's impact on gender equality in the EU* (PE 767.188), European Parliamentary Research Service, (https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/767188/EPRS_ATA(2025)767188_EN.pdf, 24. 5. 2025).

for change. The initiatives and activists discussed in this paper have been collaborating with their followers, sharing insights, personal stories, and exposing the broader impact of the patriarchal norms that perpetuate the menstrual taboo.

Since 2015 there has been a notable global increase in the visibility of menstruation and menstrual activism internationally and within Serbia and the broader Western Balkan region.[3] This increased visibility correlates with the expansion of digital platforms, particularly within feminist circles on social media networks, such as Instagram and Facebook. Particularly noteworthy is how these activists engage with their audiences, navigating the intersection between cultural traditions and influences from Western feminist discourses. A key turning point in this broader global movement occurred in 2015, designated by scholars as "the year the period went public", marked most prominently by Rupi Kaur's controversial images of menstrual blood, which also resonated within the Serbian public discourse. This moment catalyzed a reexamination of menstrual taboos and challenged the so-called "concealment imperative",[4] prompting critical engagement among younger generations. This analysis examines the transference of a cultural phenomenon from one context to another, both of which are characterized by a dominant public and political narrative of progressivism. However, beneath this surface of advancement, both contexts reveal persistent patriarchal structures that continue to constrain the lived experiences of women and menstruators on a daily basis.

Looking at the path of resistance and empowerment for all menstruators in this region, we can consider digital activists as examples of how women, individuals, and communities can come together to demand and advocate for legislative changes and bring an end to the stigmatization of menstruation.

2. Conceptual Framework

This paper adopts digital ethnography as its principal method of inquiry and analysis. John Postill defines digital ethnography as "an open-ended, immersive, inductive, versatile and reflexive approach to the study of digital phenomena that typically, but not necessarily, entails online and/or offline participant observation, as well as semi-structured interviews,

3 Bobel, C., 2015, The year the period went public, *Gender & Society Blog*, (https://gendersociety.wordpress.com/2015/11/12/the-year-the-period-went-public, 18. 5. 2025).

4 Wood, M. J., (In)Visible Bleeding: The Menstrual Concealment Imperative, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 319–336.

archival work and other research methods."[5] The research draws specifically on Postill's concept of "flat methodology", which promotes a flexible and pragmatic application of diverse research techniques rather than privileging any single method. This approach enables the strategic use of online observation methods, including "lurking", to minimize the Hawthorne effect, whereby the researcher's presence could influence the subjects of study.[6] Consistent with Postill's analogy of the "digital magpie", the study engages in systematic collection of digital materials, including photographs, videos, audio recordings, social media posts, threads, and digital documents.[7] The method emphasizes an inductive, bottom-up process to enhance validity by prioritizing insider (emic) perspectives.

Over an extended period, data was compiled through the ongoing observation of digital and menstrual activism networks, including civil society organizations and non-governmental actors. Content from publicly available profiles was archived using Instagram's built-in tools, supplemented by screenshots where necessary, to allow for subsequent analysis. This unobtrusive method aims to capture activists' communication patterns and public engagement without disturbing the organic dynamics of the communities observed. The researcher's position is aligned with the typical user perspective, particularly that of a woman seeking accessible knowledge regarding menstrual health, bodily autonomy, and related rights. The inquiry focused on how discourses surrounding normalcy, bodily expectations, hormonal variations, and political narratives are constructed and disseminated within digital spaces.

2.1. ACTIVIST SELECTION AND CASE RATIONALE

To illustrate the multi-layered nature of menstrual activism in Serbia, the three distinct examples chosen operate at different levels of engagement: individual, community, and institutional. These cases have been selected to highlight the diverse strategies, approaches, and impacts that shape the broader discourse and actions in menstrual activism.

Kriticki[8] is led by activist and journalist Nina Pavicević, who provides a personal and media-savvy perspective and has a following of over

5 Postill, J., Doing digital ethnography: A comparison of two social movement studies, in: Cox, L. *et al.*, (eds.), 2024, *Handbook of Research Methods and Applications for Social Movements*, Cheltenham, Edward Elgar Publishing, p. 145.

6 *Ibid.*, p. 150.

7 *Ibid.*, p. 152.

8 *Kritički* (adverb/adjective in Serbian) translates as *critically* (adv.) in English, typically used to describe a mode of thinking or analysis marked by careful judgment and evaluation. For example: "To think critically" = *kritički razmišljati*.

113,000 users. With a direct and interactive approach to her audience, she responds to comments, questions, and requests on social media. The communication strategy, which emphasizes accessible language, facilitates the dissemination of feminist perspectives in formats easily understood by wider audiences. Her followers are mostly a younger audience, particularly millennials and Generation Z. Her feminist and journalistic background has helped prompt a public discussion on the menstrual discourse and its stigmatization. An example of her work is a newly released series titled *Kritički Kviz*.[9] The first episode was about menstruation. The quiz combines education and entertainment to promote destigmatization, and it has reached over 26,000 views on YouTube. Notably, the series includes almost exclusively men as participants – actors, podcasters, singers, and other public figures – who demonstrate a willingness to engage with the subject respectively and learn in a public forum.

The second example examines the Ženska Inicijativa initiative, which is a natural starting point, as it started a kind of snowball effect in menstrual activism. This student-led initiative was founded at the University of Novi Sad Faculty of Philosophy and has amassed a following of over 2,000 individuals. In 2021, this grassroots initiative successfully launched a project to secure donations of menstrual products for university students. Ženska Inicijativa also engages in educational efforts, disseminating informational posts concerning menstruation framed around the recurring question: "Did you know?" The visibility and impact of their work have been amplified through media coverage, and the Faculty of Philosophy has continued to support and develop the project beyond its initial one-year scope. Their trajectory offers insight into how grassroots educational initiatives can evolve into broader community engagement. As a result, similar initiatives have been established at more than twenty faculties across Serbia, as well as several in Kosovo and several at high schools.

Finally, the third example is the Gender Knowledge Hub, an organization committed to producing and applying gender-related knowledge across various sectors. With an audience of over 1,000 followers, the Hub aims to promote collaboration among institutions and non-profit, public, and private sector actors, to improve the development and implementation of gender-sensitive policies. Its work emphasizes knowledge transfer and practical policy solutions designed to achieve substantive gender equality. Their work exemplifies how community-based knowledge and lived experiences – which are often overlooked in policymaking – can be

9 Pavićević, N., 2024, E01 Kritički kviz o menstruaciji: Marko i Viktor iz Njuzneta (video episode), *Nina kritički* YouTube channel, 20 March, (https://www.youtube.com/watch?v=YXWy-nimicg, 18. 5. 2025).

mobilized to effect tangible change. By actively engaging in advocacy and producing research-driven publications, the organization positions itself as a key actor in the policy landscape.

2.2. CONTEXTUALIZING MENSTRUAL ACTIVISM

"Menstrual activism works to move embodiment from object to subject status – to see the body not as trivial or unimportant, but as something foundational, urgent, and politically relevant."[10] The menstrual activists presented in this paper are engaged in an ongoing effort to break down the stigma surrounding menstruating bodies while at the same time fostering a network of self-aware and empowered individuals. When Chris Bobel and Breanne Fahs speak of moving embodiment from object to subject status, we have to consider how the notions of purity, cleanliness, "a woman's problem" and the "curse" are imbued with essentialist notions that women and menstruators are somehow lesser.[11] Their bodies are portrayed as weak, always in flux, sometimes dirty, and need to be kept away from men and boys to not tarnish or harm them. Many cultures have come up with ritual practices aimed at keeping the "unruly" menstruating body under control and away from others.[12]

The menstrual activists discussed here are countering these narratives by offering compassion, respect, and understanding for the cyclical nature of menstruation, which has largely been overlooked in medical research due to its inherent variability. While some argue that feminism is redundant in "developed" nations, given the purported equality of men and women, the disparities revealed by this movement are troubling. Menstrual activism thus occupies a unique position within feminist and critical scholarship, urging a deeper exploration of the complexities surrounding gender and the body.[13]

Menstrual activism is neither a transient trend nor a novel phenomenon. As Bobel observes, the feminist menstrual activists of the 1960s, emerging alongside the second-wave feminist movement, redefined menstruation as a symbol of empowerment and solidarity among women. Instead of accepting the "curse", they reframed its meaning through art,

10 Bobel, C., Fahs, B., The messy politics of menstrual activism, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 1001–1018.

11 *Ibid*.

12 Buckley, T., Gottlieb, A., (eds.), 1988, *Blood magic: The Anthropology of Menstruation*, University of California Press.

13 Bobel, C., Fahs, B., 2020, pp. 1001–1018.

filmmaking, music, poetry, and ritual.[14] This reframing is encapsulated in the words of Carol Hanisch, from 1969: "personal problems are political problems. There are no personal solutions at this time. There is only collective action for a collective solution."[15] This pivotal shift in perspective laid the groundwork for contemporary menstrual activism, which continues to challenge societal taboos and promote a broader, more inclusive discourse surrounding menstruation.

The continuation of these efforts is seen in the third-wave feminism, which found alignment with punk and anarchism's anti-capitalism and DIY ("do-it-yourself") ethos.[16] What is brought to the fore is some of the starting points of what we today understand by the term menstrual activism; it has been with us throughout the 20th century, and it is still with us at the end of the first quarter of the 21st century. This global and almost universal experience of menstrual stigma has affected most cultures throughout history, and today's activists are still doing the groundwork necessary for a more equal and equitable society.

As Bobel and Fahs assert, "[u]ltimately, we argue that menstrual activism has radical potential to deeply unsettle many assumptions about gender, bodies, political activism, embodied resistance, and feminist coalition-building."[17]

2.3. DIGITAL ACTIVISM IN SERBIA AND THE WESTERN BALKANS

Social media and online forums serve as important spaces for addressing significant gaps in knowledge regarding the menstrual cycle and menstrual health. To paraphrase Jacqueline Gaybor, social media and forums are a space to address a gap in knowledge about the menstrual cycle and menstrual health; they are also platforms to break the silence around menstruation and to make it visible to the public; and they are a tool for building a caring community among participants.[18]

Digital feminist activism in Serbia and Montenegro has a history going back decades, and what has been characteristic the entire time is raising issues (sometimes in very innovative ways) that were regularly

14 *Ibid*.

15 Hanisch, C., 1969, *The Personal Is Political*, Women of the World Unite: Writings by Carol Hanisch, (https://www.carolhanisch.org/CHwritings/PIP.html, 24. 5. 2025).

16 *Ibid.*, p. 1003.

17 *Ibid.*, p. 1001.

18 Gaybor, J., 2020, *Everyday (online) body politics of menstruation*, Feminist Media Studies, Vol. 22, No. 4, pp. 898–913.

neglected and excluded from the public discourse, as irrelevant "women's issues".[19] Online activism has proven particularly effective for marginalized groups, including young people and women, who are often excluded from traditional forms of political engagement. Social media platforms allow these groups to build political identities and advocate for their interests in a manner that is typically not permitted within conventional political structures.[20] The younger generations have a growing number of tech-savvy women who enjoy and consume digital media as much as boys and men have in the past two decades. This means that the content that women started creating was catered to their needs. They wanted to have the interactions they missed as young girls or teenagers growing up, about their bodies, their purpose in life, questions that are often ignored or somehow considered rude, pointless, or inappropriate. Unfortunately, silencing has a negative effect, but not only does it make girls more insecure – it also can leave a vacuum which can be filled with anything: spreading wrong information or even using knowledge to manipulate and ridicule someone. This, in turn, can affect a person's health and bring shame to anyone who seeks medical care, mixing shame with rude comments or bad etiquette, and patients losing trust in the system, leaving them vulnerable to self-help guides, witchdoctors, or "healers" – who often seek to exploit insecurities.

Building upon the work of Hristina Cvetinčanin Knežević, who authored the first comprehensive study on digital activism in Serbia, her definition of digital activism is particularly relevant to this discussion. She defines digital activism as "the use of digital technologies to organize, mobilize, and promote social, political, cultural, and environmental changes."[21] This demarcation is significant for understanding the broader implications of digital activism. While numerous scholars have carefully dissected and defined digital activism both terminologically and conceptually, drawing out its exhaustive and exclusive meanings,[22] this work does not aim to delve into the semantic complexities of these definitions.

19 Cvetinčanin Knežević, H., 2024, *Digitalne Superheroine: Prvo istraživanje o digitalnom feminističkom aktivizmu u Srbiji i Crnoj Gori* (Digital superheroines: The first study on digital feminist activism in Serbia and Montenegro), Belgrade, Fondacija Jelena Šantić, p. 50, (https://fjs.org.rs/wp-content/uploads/2024/11/Digitalne-superheroine-WEB.pdf, 24. 5. 2025).

20 Cooper, K., 2023, *The Effectiveness of Online Activism: Who It Is Effective for, What Issues It Ss Effective for, and What Time Period It Is Effective for*, Honors thesis, University at Albany – State University of New York, p. 13, (https://scholarsarchive.library.albany.edu/honorscollege_pos/42/, 24. 5. 2025).

21 Cvetinčanin Knežević, H., 2024, pp. 10–60, translated by author.

22 Joyce, M., (ed.), 2010, *Digital Activism decoded: The New Mechanics of Change*, New York/Amsterdam, International Debate Education Association, pp. 1–15.

In 2020, activists affiliated with the Gender Knowledge Hub in Serbia initiated a campaign focused on addressing menstrual poverty. The campaign sought to reduce the VAT on menstrual hygiene products from the current rate of 20% to 5%. This initiative highlighted the issue of gender blindness in public policies, emphasizing that basic necessities for women, such as pads and tampons, are often overlooked or categorized as non-essential luxuries. The campaign also called for the removal of the stigma surrounding menstruation and advocated for improved accessibility of hygiene products, particularly for women in socioeconomically disadvantaged communities.[23]

It is deeply concerning to discover that menstrual products are not classified as "essential goods" under current tax regulations, while other everyday items such as bread, milk, and even theatre tickets and newspapers are taxed at a much lower rate of 10%. Menstrual products, by contrast, are taxed at 20%. Rather than focusing solely on tax reductions, a more forward-thinking approach might involve the provision of free menstrual products in public institutions and workplaces, as has been successfully implemented in countries such as Scotland, New Zealand, Spain, Kenya, South Africa, France, and Canada. Such initiatives could shift the financial burden onto employers, thereby fostering a more equitable society by addressing the monthly expenses that women and menstruators are disproportionately subjected to due to biological differences. This challenge brings to mind the seminal works of Emily Martin (1991) and Caroline Criado Perez (2019), which question the pervasive notion of the male body as the societal norm. This "male body as standard" has had a profoundly negative impact on the quality of life for women and menstruators, effectively marginalizing them by imposing the monthly purchase of disposable products to maintain a semblance of normalcy in a society where menstruation remains stigmatized.[24]

A similar approach in campaigning is employed by Nikolina Nina Pavićević, who is behind the Instagram account kriticki, who actively engages with her followers by responding to their comments and queries. Through this engagement, she fosters an open dialogue on complex and often traumatic subjects, such as revenge pornography and obstetric violence. Such transparency and willingness to conduct an open dialogue help build trust and create a space where constructive discussions can be held on important topics, no matter how "combustible" they may be.[25]

Next to these two, we also have Ženska Inicijativa, an initiative which, since its establishment in 2022, has organized various forums, educational

23 Cvetinčanin Knežević, H., 2024, p. 52.

24 Wood, M. J., 2020, pp. 319–336.

25 Cvetinčanin Knežević, H., 2024, p. 58.

workshops, and provided support to the non-governmental sector in matters concerning reproductive health and youth advocacy. Notably, in 2023, the initiative launched Serbia's first free menstrual tracking mobile app, Pink Flag, with assistance from Vega IT. That same year, it successfully secured donations of menstrual products at five universities in Serbia, thereby supporting 16,500 students for an entire year. This initiative exemplifies how civil society campaigns can effectively mobilize and influence policy changes within public institutions – something that was previously considered improbable. And while the disposable product is not the perfect solution in a world characterized by an increasing amount of waste and pollution, it is a starting point to help those who are most vulnerable financially and in terms of health.

Despite the challenges it faces, digital activism has had, and continues to have, a profound impact on the development of laws and policies regarding women's rights around the world. Campaigns such as #MeToo have contributed to the establishment of more stringent laws against sexual harassment and abuse, and other campaigns have prompted governments to reevaluate and reform their policies on reproductive health and abortion rights.[26]

The process of digital empowerment has directly contributed to the strengthening of the feminist movement in the region, thereby establishing feminism as a relevant and contemporary framework that addresses the everyday issues of various generations. This is particularly true when feminist discourse is framed in a manner that is simultaneously educational, simple, humorous, empowering, and accessible.[27]

To conclude this part, I would like to reiterate the words of Bobel and Fahs: "We argue that feminists must challenge generations of silence and shame that obstruct quality menstrual health education. We must also promote a culture of curiosity and informed decision-making about caring for our bodies. Finally, we must counter the assumption that menstruation matters *only* to menstruators."[28]

3. Knowledge Distribution Through Menstrual Activism

"Menstruation unites the personal and the political, the intimate and the public, and the physiological and the socio-cultural. Menstruation is fundamental because it either facilitates or impedes the realization of a

26 *Ibid.*, p. 30.

27 *Ibid.*, p. 61.

28 Bobel, C., Fahs, B., 2020, p. 1001, (emphasis in original).

whole range of human rights."[29] When examining the compiled data and transforming it into analytical categories, the underlying patriarchal norms begin to surface. This is the point where human rights have to be considered. The key question becomes: how can we create a safe, destigmatized space for women and menstruators that not only provides structural support for their physical health, but also addresses the psychosocial aspects of menstruation? The potential harms of shame, stigma, and the concealment imperative – all of which are deeply rooted in patriarchal culture – must be addressed. How should we treat the "other" – the individual who does not align with the medical or cultural norm? Feminist scholars and philosophers have explored this issue throughout the 20th century: can the "other sex" become just one of the sexes, and if so – should it be done and how? While these theoretical concerns are important, it is critical to return to the empirical data and focus on the lived experiences of many women and menstruators in Serbia.

3.1. ANALYTICAL FRAMEWORK AND APPROACH TO DATA

This article draws on the digital ethnographic approach to explore how selected feminist actors use Instagram to engage with menstrual activism. Rather than applying a rigid coding scheme, the analysis developed organically through repeated readings of their content, allowing key themes to emerge over time. These themes were shaped by the broader methodological and conceptual framework introduced earlier and they serve as interpretive tools to better understand how activist messaging is crafted and shared in digital spaces. To respect the linguistic and contextual nuance, all examples are paraphrased and translated from Serbian into English. The tables that follow highlight selected posts, grouped into analytical categories, to show how menstrual activism unfolds across three levels of engagement: individual, community organizing, and institutional advocacy.

3.1.1. Individual-Centered Digital Engagement: kriticki

Menstruation is often depicted as something so powerful that it must be contained, yet in other instances, it is viewed as something so putrid that it should never be spoken of – particularly not in front of men. This "concealment imperative"[30] is prevalent in many of the examples presented below. In Serbia and the broader Balkan region, there are a

29 Winkler, I. T., Introduction: Menstruation as Fundamental, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 15–25.

30 Wood, M. J., 2020, pp. 319–336.

number of rituals a woman or menstruator may practice to protect others from the perceived impurity, but the general expectation is that by keeping a distance, they are adhering to societal norms. One particularly revealing example is the compilation of comments in posts by kriticki while attempting to understand some of the most peculiar things women have been told they should not do while menstruating.

The table below contains comments in posts by kriticki and subsequently shared within the "highlights" section of the account. These examples illustrate specific experiences, narratives conveyed to women, and intergenerational beliefs regarding menstruation. The categories listed on the left-hand side have been formulated by the author for analytical purposes and do not represent the original wording of the individual comments.

Table 1. Inherited shame: Beliefs about menstruation shared by followers

Analytical category	**Paraphrased and translated examples**
Food	*Food prepared by menstruating women should not be eaten.*
Children	*Contact with small children will give them a rash – baby showers should not be attended, as to not harm the baby.*
Men	• *Fathers should not be informed of their daughter's menstruation.* • *Husbands should not know about their wives' menstruation; he will start hating her.*
Religion	• *Persons should not partake in liturgy when menstruating. The reasoning is that women are unclean; it is against God.* • *In Islam, women should not go to cemeteries, funerals, or mosques while menstruating, because menstruation is considered unclean (not the woman).*
Magic	*If you put a little bit of menstrual blood in a drink or coffee and give it to your partner, they will be yours forever.*
Gardening	*Flowers or plants will not grow if a menstruating woman does the gardening.*
Bathing	*Cleaning oneself, and especially washing hair, is considered bad during menstruation.*
Menstrual blood	*Menstrual products shouldn't be mixed with other trash because the menstrual blood is "cancerous".*
Tampons as sex toys	• *Virgins can't use tampons.* • *You're a whore if you use a tampon.* • *Tampons are products for self-pleasure but are sold as hygiene products.*

Analytical category	Paraphrased and translated examples
Medical professionals	• *Not believing girls about their pain, ignoring or not giving adequate or safe advice, and considering pain to be psychological in nature.* • *Advising a young woman under tremendous pain to put soap in their rectum to alleviate pain.* • *How will you give birth if you think menstruation is painful?* • *Interrogating young girls about pregnancy when they come for a check-up due to amenorrhea.* • *Shame about going to the gynecologist in a small town; unless you've given birth or are pregnant, you don't need to go there (even doctors have this attitude).*

While each of these categories warrants more critical and detailed analysis, particular attention will be given here to the "medical professionals" category. The initial premise of this paper was to examine how knowledge is generated and disseminated between menstrual and digital activists and their audiences. A recurring sentiment expressed by young individuals seeking medical assistance for conditions such as dysmenorrhea or polycystic ovary syndrome (PCOS) is encapsulated in the regularly shared statement encountered in clinical settings: "Do not worry; it will resolve itself once you give birth." As exemplified above, for some women, this message implicitly discourages them from seeking medical attention until pregnancy occurs.[31]

The significant contribution of the digital activist whose work is presented here lies in her engagement with these individual experiences. By offering a platform and visibility to these stories, while simultaneously challenging harmful medical narratives, she fosters a critical discourse. Pavićević regularly produces brief videos summarizing such examples, providing candid support and referencing feminist scholarship or suggesting practical strategies to combat menstrual stigma. However, a methodological challenge arises for digital ethnographers, as some of these digital materials are ephemeral and are not systematically archived; responses posted months or years ago are no longer retrievable in her "highlights" section. Drawing upon my recollection and her current digital footprint, it is nevertheless apparent that her interaction with the audience remains

31 Similar dynamics of medical neglect and the stigmatization of menstruation can be observed beyond Serbia. For a closely related context, see the study conducted in Bosnia, which documents the lack of empathy and respectful treatment in healthcare settings: Kovačević, J., Spahić Šiljak, Z., 2025, *The price of impure blood: cultural and economic aspects of menstruation in Bosnia and Herzegovina*, Sarajevo, TPO Fondacija, pp. 134–142.

sincere and impactful. This example offers a limited but telling insight into the experiences women often face when seeking medical care. Although doctor–patient abuse specifically in the context of menstruation has not yet been comprehensively examined in Serbia, a related phenomenon has been explored by Ljiljana Pantović, a medical anthropologist, who investigated the prevalence of obstetric violence in Serbia and highlighted the normalization of a doctor–patient dynamic in which the patient is presumed ignorant and discouraged from questioning medical authority.[32]

This dynamic reveals a broader pattern of misogyny in the provision of medical services in Serbia, Montenegro, Bosnia and Herzegovina, and the wider Balkan region, characterized by patronization, trivialization, and infantilization, practices disproportionately directed at female patients. Consistent with the analysis by Miren Guilló-Arakistain,[33] the biomedical model of menstruation upholds a normative and pathological framework that reinforces these dynamics. One critical observation from her work concerns the inherently fragmented perspective of biomedical science, which, by compartmentalizing medical knowledge and framing menstruation solely in terms of reproduction, systematically ignores broader systemic effects. As noted by Valls-Llobet, "[l]ittle attention is paid to what are termed peripheral or systemic effects such as its influence on metabolism, the osseous or vascular system, the skin, or mucosae."[34]

As an additional example of Pavicević's influence on public discourse is the launch of the YouTube series *Kritički Kviz* opens with an episode dedicated to menstruation. With over 26,000 views, the episode stands out precisely because it frames menstrual education as both engaging and socially relevant. The format blends humor and learning, inviting predominantly male guests, consisting of well-known public figures, such as actors, podcasters, and musicians, to respond to questions about menstruation. Their willingness to participate in an open, respectful dialogue about a topic traditionally considered taboo highlights a shift in how menstrual issues are entering mainstream, male-dominated digital spaces. This visibility marks a tangible step toward normalization and broader cultural recognition.

32 Parađanin Lilić, I., (ed.), 2022, E04 Akušersko nasilje: Ljiljana Pantović, doktorka antropologije (podcast), *Tampon Zona Podkast*, (https://www.youtube.com/watch?v=nJMrV1wKkrk&t=3312s, 18. 5. 2025).

33 Guilló-Arakistain, M., Challenging menstrual normativity: Nonessentialist body politics and feminist epistemologies of health, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, pp. 891–902.

34 According to Guilló-Arakistain, M., 2020, p. 872.

3.1.2. Collective Action and Community-Based Organizing: Ženska Inicijativa

The work of Ženska Inicijativa (Women's initiative) serves as a compelling example of effective activism carried out both in digital spaces and through offline engagement. Through its online presence, it disseminates educational materials relating to the menstrual cycle, bodily autonomy, and the broader context of their advocacy efforts. Offline, its activism has been instrumental in campaigning for the provision of free menstrual products at universities and high schools throughout Serbia. Its activities encompass educational workshops, active media engagement, and organized donation initiatives.

Despite having low engagement with followers in its Instagram posts, the initiative's in-person workshops and direct project have led to the inclusion of free menstrual products at more than 20 faculties and several high schools in Serbia. In addition, it has developed a mobile application, PinkFlag, designed not merely as a menstrual calendar but as an educational platform aimed at informing users about upcoming campaigns, conferences, forums, and workshops. The initiative's work is underpinned by a feminist framework, emphasizing the reduction of menstrual poverty and the promotion of health and wellbeing among menstruators. One of the notable engagement strategies on its Instagram page involves posing accessible and engaging questions beginning with "Did you know?", effectively using social media tools to present concise and digestible information concerning menstrual health and relevant public policy issues.

Table 2. Challenging menstrual taboos:
"Did you know?" as a tool for raising awareness

Analytical category	**Paraphrased and translated examples**
Menstrual health and biology	• *Women have around 450 menstrual cycles in their lifetime.* • *Women usually lose around 30–40 ml of blood during one period.* • *Cervical fluid increases right before the period – these are called the moist days.* • *5–10% of women suffer from premenstrual dysphoric disorder.* • *80% of women have PMS, and 50% seek medical help for it.* • *Women lose around 5 months of sleep in their lifetime due to discomfort, anxiety, and fear during menstruation.*

Analytical category	Paraphrased and translated examples
Historical and cultural beliefs	• *In the early 20th century, people believed that academic study could harm women's reproductive health.* • *Period shaming: the stigma surrounding menstruation that makes people feel embarrassed or dirty.* • *Free bleeding: a movement where people menstruate without using products, often as a form of protest.*
Rights and policies	• *Scotland was one of the first countries to offer free menstrual products to everyone.* • *Spain introduced menstrual leave – paid time off for people experiencing painful periods.* • *In Germany, tampons are taxed at 19%, while books are taxed at 7% – some companies sell tampons as books to protest this.* • *In the U.S., women have lost federal protection of abortion rights.*
Advocacy and awareness	• *February 4th is World Cancer Day, used to highlight the fight against cervical cancer.* • *The number of menstrual products used per cycle (22).* • *What free bleeding or period poverty means.* • *How policies like menstrual leave or tax reduction affect real lives.*

Community-led and grassroots initiatives, combined with activism, play a critical role in raising awareness and providing knowledge to those previously unaware of menstrual health. Educational workshops, particularly those conducted at high schools, are prime examples of how these efforts can succeed, especially when state-level engagement or national sex and health education programs are lacking. These initiatives empower young people with essential information that might otherwise be inaccessible. As exemplified in the work of Fahs and Bacalja Perianes – "menstrual education is no longer simply focused on the need to 'manage menstruation' hygienically and periodically, rather menstruation as an opportunity to increase bodily autonomy and as central to closing the gender gap. As a result, doctors work in tandem with public health officials. Community organizers work in partnership with schools."[35]

The following categories are designed to reflect the complexity of the topics presented within the "Did you know?" format. They illustrate how knowledge production and dissemination can be effectively achieved via social media platforms when framed in accessible and non-technical

35 Fahs, B., Bacalja Perianes, M., Transnational Engagement: Designing an Ideal Menstrual Health (MH) Curriculum – Stories from the Field, in: Bobel, C. *et al.*, (eds.), 2020, *The Palgrave Handbook of Critical Menstruation Studies*, Singapore, Palgrave Macmillan, p. 450.

language, as opposed to the often inaccessible biomedical terminology encountered in clinical settings. By drawing upon the diverse academic backgrounds of the activists, namely, degrees in Literature, Sociology, and Media Studies, the resulting material demonstrates a clear impact and quality, resembling what could be characterized as a form of educational pamphleteering.

3.1.3. Institutional Advocacy and Policy Engagement: Gender Knowledge Hub

The GKH is an organization that deals with complex issues of gender imbalance in economies, budgeting, unpaid labor, equity instead of equality (to denote that not everyone is the same), financial means of women in rural areas, with its research aimed at providing humanistic perspectives and feminist methods to the development of public policies.

Table 3. Menstrual policy and advocacy: educational and empowering posts

Analytical category	**Paraphrased and translated example**
Menstrual poverty	• *What is menstrual poverty*? • *Statistics show that more than 500 million women worldwide lack access to basic menstrual products.*
Economic dimension of menstruation	• *Campaign to reduce VAT on menstrual products.* • *How much does gender cost*? • *Prices are rising, but menstruation doesn't stop.*
Menstruation and stigma	• *Menstruation is not a synonym for shame, embarrassment, humiliation, secrecy, dirtiness, or ugliness.* • *Voldemort or menstruation – that which must not be named.*
Right to information and health	• *Menstrual health is a human right.* • *Toxic shock syndrome.* • *Reasons why you used a menstrual product longer than recommended or didn't change it on time.*
Access to free products in institutions	• *Free menstrual products at high schools.* • *In the pocket, in the sleeve, in the bag.*
Activism and campaigns	• *Campaign announcement: for the next 12 months, we will fight for menstrual justice.* • *Menstruation – so what? No more whispering.* • *The prices are rising, but the period doesn't stop.* • *Let's fight for menstrual justice.*

The Instagram posts from the GKH's menstrual advocacy work, illustrated above, emphasize a broad intersectional approach to public policy and gender equity. The content reveals how menstruation is not only a biological fact but also a deeply political issue tied to economic justice, access to health, and human rights. Posts highlight systemic problems such as menstrual poverty and the disproportionate financial burden placed on those who menstruate, especially in underserved rural areas. There is a clear effort to dismantle the stigma surrounding menstruation, using empowering language to challenge taboos and encourage open conversation. Educational posts aim to raise awareness on practical and urgent topics, like the dangers of toxic shock syndrome or the need for timely access to hygiene products, linking them to broader calls for policy change. Campaigns push for free products in public institutions and for the reduction of unfair taxation on menstrual items, framing these as essential services, not luxuries. Similarly to the previous example, the online following does not have high numbers, but the GKH's efforts in staying relevant and communicating its work are highly valuable. Its work focuses on compiling data, researching, and preparing policy papers that can and should be used in national strategies regarding menstrual health.

In 2024, the GKH prepared a final conference for the successful completion of their project Menstrualna pravda: Zajedno ka smanjenju menstrualnog siromaštva (Menstrual justice: together towards the reduction of menstrual poverty). This initiative was part of the public advocacy support program Pokret Polet, administered by the Trag Foundation with financial assistance from the European Union, in partnership with the Center for Social Policy and the Coalition for the Development of Solidarity Economy – KoRSE.

In the post-project documentation, the GKH provided a detailed account of the project activities alongside policy recommendations derived from the collected data. The research identified adolescent girls, aged between 12 and 18 years and living in poverty, as the group most vulnerable to menstrual poverty, due to the economic and structural limitations imposed by parents or guardians. These adolescents were found to have diminished agency over their bodies, limited access to sanitary spaces and bathrooms, and an increased likelihood of missing school during menstruation owing to a lack of menstrual products. Notably, the human rights framework adopted by the GKH stands out as a crucial element of their approach. An extensive literature review identified significant gaps within the Serbian legislative framework. The findings revealed that none of the four most pertinent laws (the Law on Social Protection, the Law on Public Health, the Law on Prohibition of Discrimination, and the Law on Gender Equality) contains any explicit reference to menstrual health. Given that adolescent girls and women

of reproductive age comprise approximately 23.5% of Serbia's total population, this omission is deeply concerning, especially considering the substantial impact menstruation has on their physical, mental, and social wellbeing. As a corrective measure, the GKH proposed amending the Law on Public Health, specifically Article 7, to incorporate menstrual hygiene within the scope of public health protections, arguing that ensuring the availability and accessibility of menstrual products would directly enhance women's health outcomes and improve their overall quality of life.[36]

4. Conclusion

The "study of menstrual activism yields important insights into the evolution of social movements and feminist epistemology, a system of knowledges in constant flux."[37] Here, I provide a perspective on what digital activism can be and how it can be interpreted. While we have established concrete definitions through the methodological and theoretical conceptualization, it is essential to reconsider and question their limitations. Digital activism in the context of menstrual justice can manifest in various ways: sometimes it involves storytelling and community engagement, while at other times it focuses on informational outreach or institutional policy work. All three examples here utilize digital tools, but their orientation, target audience, and forms of activism differ significantly. Their presence on Instagram is not always intended to maximize engagement; rather, they function as digital pamphlets, public diaries, or repositories of knowledge. One nuance that should be considered is that not all digital engagement is activist in its intent or effect.

The similarities between these civil society actors include the use of knowledge production as resistance, they are working towards destigmatization and recognition of menstrual health, ensuring that the pain and real experience are not erased. They address stigma as structural violence, they engage with menstrual shame, as a form of systemic harm, through humor, workshops, and legal critique. Their contribution to everyday feminist discourse on menstrual justice might be low-engagement, and even quiet, but it is part of building new narratives that unveil the truth, reality, vulnerability, and pain that menstruation brings about.

36 Pavlović, J., 2024a, *Menstrualna pravda u Srbiji: Prepoznavanje potreba žena i adolescentkinja kroz javne politike* (Menstrual justice in Serbia: Recognizing the needs of women and adolescent girls through public policies), Novi Sad, Gender Knowledge Hub.

37 Bobel, C., 2010, *New Blood: Third-Wave Feminism and the Politics of Menstruation*, New Brunswick, Rutgers University Press, p. 7.

Notably, while these activists and civil society organizations engage with stigma, access, and bodily autonomy, the sustained discourse around intersectional identities is absent. Particularly, there is a lack of intersection of disability, gender diversity, and menstruation. This silence is not necessarily a reflection of individual oversight, but it is more indicative of the current cultural constraints within which civil society actors in Serbia operate.

This paper set out to examine the digital strategies of menstrual activists in Serbia, but what has emerged is a more nuanced understanding of what digital activism can be, and how feminist work is developing both online and offline. While I acknowledge that only one of the three examples fully embodies the traits of what is defined under the term digital activism, each of these examples contributes relevant work to the broader project of menstrual justice in Serbia and the Western Balkans.

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ZABORAVLJENE MENSTRUACIJE: ULOGA AKTIVIZMA U RAZOTKRIVANJU NEZNANJA

Marina Sakač Hadžić

APSTRAKT

Menstruacija je, usled globalnih kulturnih promena koje prevazilaze tišinu i tabu, postala češća tema u medijima. Prateći rad umetnica i aktivistkinja, rad osvetljava razvoj znanja o menstruaciji. Promovišući menstruaciju i menstrualno siromaštvo, aktivistkinje i NVO doprinele su promenama u školama i na univerzitetima u Srbiji i na Zapadnom Balkanu. Neke od ovih institucija danas obezbeđuju besplatne menstrualne proizvode. Rad istražuje ulogu digitalnih aktivistkinja i civilnog društva kao pokretača promena, sa fokusom na proizvodnji i deljenju znanja o telima menstruirajućih osoba. One popunjavaju praznine nastale nebrigom ili izostankom interesovanja javnog zdravstva. Ovaj članak se oslanja na zakonske izmene, doprinos civilnog sektora, kritičke menstrualne studije, digitalnu etnografiju i analizu sadržaja.

Ključne reči: digitalni aktivizam, menstrualni aktivizam, proizvodnja znanja, ljudska prava, javno zdravlje, Srbija, Zapadni Balkan.

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BOOK REVIEW / PRIKAZ

Jelena Ćeriman[*]

REFRAMING MENSTRUATION: CULTURAL STIGMA, ECONOMIC EXCLUSION, AND THE POLITICS OF THE BODY

Jasna Kovačević and Zilka Spahić-Šiljak *The Price of Impure Blood: Cultural and Economic Aspects of Menstruation in Bosnia and Herzegovina*, Sarajevo, TPO Foundation, 2025, pp. 221

The book *The Price of Impure Blood: Cultural and Economic Aspects of Menstruation in Bosnia and Herzegovina*, by Jasna Kovačević and Zilka Spahić-Šiljak, offers a compelling and interdisciplinary examination of menstruation as a deeply embedded cultural, economic, and political issue in Bosnia and Herzegovina. Combining historical analysis, sociocultural critique, and empirical research, the authors move beyond surface-level discussions of menstrual health to expose the structural inequalities and cultural taboos that continue to shape women's experiences. The book's title, *The Price of Impure Blood*, effectively captures its core thesis: that menstruation, long constructed as biologically impure, imposes material, social, and psychological costs on women. This framing also raises important questions about the ways in which notions of bodily purity continue to organize access to citizenship, dignity, and full social participation. The authors' insistence that menstrual health must be understood not only as a personal issue but as a deeply political one represents a critical intervention into ongoing debates about bodily autonomy.

Structured into five interconnected chapters, the study moves from historical and symbolic understandings of menstruation to contemporary empirical findings, linking these insights to broader issues of gender, health, and social justice.

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In the introductory part of the book, the authors establish menstruation as a socially constructed phenomenon, historically framed by religious and cultural codes that associate menstrual blood with impurity and danger. The authors convincingly demonstrate that menstruation, traditionally associated with impurity and danger, has served as a site of broader social control over women's bodies. Rather than treating these constructions as relics of the past, the authors argue that the logic of impurity continues to inform modern perceptions and practices. This framing immediately signals the study's commitment to examining menstruation not merely as a biological fact but as a culturally loaded category that has justified exclusion, shame, and control.

Crucially, the authors highlight that menstrual poverty is not solely a function of economic hardship but reflects broader systemic inequalities. Their analysis situates menstrual health within the context of economic dependency, inadequate public health infrastructures, and persistent gender stereotypes. By doing so, they push against narrow understandings of menstrual health as an isolated "women's issue", arguing for its recognition as a matter of social justice and human rights. The notion that menstruation serves as a "boundary marker" between acceptable and unacceptable forms of femininity is a powerful insight.

Another significant strength of the book lies in its linking of cultural norms to healthcare practices. The authors describe how healthcare professionals often dismiss or minimize menstrual-related complaints, framing menstrual pain as a trivial or temporary inconvenience. This medical trivialization not only discourages women from seeking help but reflects deeper institutional misogyny within healthcare systems. Importantly, the book frames menstrual health as an indicator of systemic gender biases in healthcare provision, a point that could be fruitfully expanded through comparison with other countries in Europe.

The first substantive chapter deepens this historical contextualization, tracing how religious traditions, folk beliefs, and patriarchal norms have shaped enduring perceptions of menstrual blood as "unclean". The analysis demonstrates how these narratives became institutionalized across different domains of life, influencing gendered norms of bodily regulation. While this section is rich in historical detail, it leaves open space for a deeper engagement with feminist critiques of religious discourses and the mechanisms through which such symbolic orders are maintained in secular modernity.

Building on this foundation, the next chapter addresses menstrual poverty, conceptualizing it as a multidimensional issue encompassing economic precarity, infrastructural inadequacy, lack of education, and

persistent cultural stigma. The authors rightly situate menstrual poverty as a structural phenomenon rather than a personal hardship, demonstrating how limited access to hygiene products is symptomatic of broader inequalities. The authors show how the failure to incorporate comprehensive, destigmatizing menstrual education in schools perpetuates misinformation and reinforces cycles of shame. The recommendation to integrate menstruation into broader sexual and reproductive health curricula is a necessary one, but the analysis would be further strengthened by a discussion of political resistance to such reforms in Bosnia and Herzegovina, particularly from conservative and religious actors. Economic instability, post-conflict fragmentation, and underfunded public services in the Western Balkans intersect to exacerbate menstrual inequities. Here, the analysis is both empirically grounded and theoretically robust, although a more systematic comparison between rural and urban settings, or among different ethnic groups within Bosnia and Herzegovina, could have enriched the discussion further.

The fourth chapter presents the core empirical findings of the study, based on surveys and interviews with women and girls. Using a mixed-methods approach, the authors document how economic precarity intersects with cultural stigma, limiting women's access to hygiene products and healthcare. The interviews and survey data vividly capture how young girls internalize shame from early childhood and how structural barriers prevent women from managing menstruation with dignity. The research reveals how stigma around menstruation is internalized through early socialization, manifesting in practices such as the use of euphemisms, feelings of embarrassment when purchasing hygiene products, and the normalization of silence about menstrual pain. This empirical material powerfully illustrates how bodily shame is not only imposed externally but also reinforced through intimate, everyday practices. However, the chapter remains largely focused on internalization and less attentive to potential sites of resistance, negotiation, and subversion – an area that would merit further exploration given the broader feminist scholarship on bodily autonomy.

In the fifth chapter, the authors shift their focus to the economic dimensions of menstruation, examining how financial instability impacts menstrual management and menstrual health. They show that the cost of menstrual products, relative to household income, presents a serious burden for many women, forcing some to resort to unhygienic alternatives. This final chapter of the book sets out a series of policy recommendations, including the subsidization of menstrual products, comprehensive menstrual education programs, and the integration of menstrual health into

national public health strategies. The authors insist that menstrual health must be recognized as a human rights issue, inherently tied to issues of dignity, equality, and social inclusion.

Throughout the book, the authors successfully avoid sensationalism, maintaining an academically rigorous tone while clearly conveying the urgency of menstrual justice. Their interdisciplinary approach – drawing on sociology, economics, public health, and gender studies – makes the book accessible to a wide range of audiences, including researchers, policymakers, activists, and students.

The Price of Impure Blood stands out as a critical contribution to the field, particularly in post-socialist and post-conflict contexts. By centering on Bosnia and Herzegovina, the authors challenge the Eurocentric bias that dominates much of the existing scholarship on menstruation and health, offering a nuanced account of how local histories, economies, and cultural norms shape embodied experiences.

In conclusion, Kovačević and Spahić-Šiljak offer a timely and necessary exploration of menstrual health as both a cultural and socio-economic issue. Their work not only documents the realities of menstrual stigma and poverty but also calls for a reconceptualization of menstruation as central issue in broader struggles for gender equality, human rights, and social justice. While future research might build upon their findings by engaging more deeply with questions of agency and political resistance, *The Price of Impure Blood* remains an essential text for anyone seeking to understand the entanglements of gender, health, and inequality in contemporary societies.

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3. Gde odgovara potrebi, skraćeno ime predmeta treba navesti u zagradi, takođe u kurzivu.
4. Ako se citira deo presude/odluke, referenca treba da sadrži broj strane ili stava u kojem se citat pojavljuje.

Međunarodni sud pravde

Navođenje ovog suda u engleskoj skraćenici (ICJ), puno ime predmeta u kurzivu, u slučaju međudržavnih sporova navođenje strana u sporu u zagradi, vrsta odluke, datum, publikacija u kurzivu, prva strana na kojoj se slučaj pojavljuje, strana i stav gde se pojavljuje konkretan deo teksta na koji se poziva.

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14, p. 62, para. 109.

Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion of 20 December 1980, *ICJ Reports 1980*, p. 73, pp. 89–90, para. 37.

U slučaju pozivanja na izdvojeno mišljenje sudije, posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije.

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, *ICJ Reports 1986*, p. 259, p. 388, para. 257.

Stalni sud međunarodne pravde

Npr. PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B, No. 5, p. 7.

Međunarodni krivični tribunali

Navođenje tribunala u engleskoj skraćenici (ICTY, ICTR), puno ime predmeta u kurzivu, veće, broj predmeta, vrsta odluke, datum, u zagradi internet adresa na kojoj se nalazi odluka posle koje sledi datum pristupa stranici (u skladu s pravilom o citiranju tekstova s interneta) i broj stava na koji se poziva.

ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (http://***, DATUM), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema*, ICTR-95–1, Judgment of 7 June 2001 (http://***, DATUM), para. 85.

Evropski sud za ljudska prava

Navođenje ovog suda u engleskoj skraćenici (ECtHR), puno ime predmeta u kurzivu, broj predstavke, vrsta odluke, datum i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

ECtHR, *Osman v. the United Kingdom*, no. 23452/94, Judgment of 28 October 1998, para. 116.

Ako je u pitanju odluka Velikog veća (Grand Chamber) navesti njegovu englesku skraćenicu u uglastoj zagradi [GC], nakon datuma.

Lautsi and Others v. Italy, no. 30814/06, Judgment of 18 March 2011 [GC], para. 70.

U slučaju pozivanja na izdvojeno mišljenje sudije, shodno primeniti pravilo navedeno u citiranju presuda Međunarodnog suda pravde (posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije) i navesti tačku mišljenja na koje se poziva.

Lautsi and Others v. Italy, no. 30814/06, Judgment of 18 March 2011 [GC], Concurring Opinion of Judge Bonello, point 3.5.

Sud pravde EU

Navođenje ovog suda u engleskoj skraćenici (CJEU), broj predmeta, puno ime predmeta u kurzivu, vrsta odluke i datum, referenca za identifikovanje i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013, ECLI:EU:C:2013:107, para.11.

Kod navođenja mišljenja opšteg pravozastupnika ili mišljenja CJEU ne treba navoditi vrstu odluke.

Opinion of AG Tanchev to CJEU, case C-619/18, *European Commission v. Republic of Poland*, 11 April 2019, ECLI:EU:C:2019:325, para. 8.

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Ponovljeno citiranje

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- Citiranje podatka sa iste stranice istog dela kao u prethodnoj fusnoti: *Ibid*.
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Brown, C., 2008, Multicriteria analysis, pp. 89–112, *Operational Research Conference*, London, September 17–19.

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Pravni zapisi, Union University Law School Review requires exclusive submissions written in English and only exceptionally in the Serbian language (the contributions written in Serbian will have a low priority). It seeks two categories of works: the first category includes scholarly articles. The second category includes case notes (on recent landmark decisions), comments on recent legislation, and book reviews.

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In footnotes: Art. 3; Art. 5–9; Art. 5(1)(3).

Citation of international case law

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4. If a part of the judgement/decision is cited, the reference should contain the page number or paragraph in which the cited text appears.

International Court of Justice

The name of the court should be given in its English abbreviation (ICJ), with the full title of the case *in italic* and in the case of interstate disputes with determination of

parties to the dispute in parentheses, type of decision, date, publication in *italic*, the first page in which the case appears, page and paragraph in which the referenced part of the text appears.

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In case a dissenting opinion is cited, after the date of the decision the type of dissenting opinion and surname of the judge should be given:

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel*, ICJ Reports 1986*, p. 259, p. 388, para. 257.

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English abbreviation of the name of the tribunal (ICTY, ICTR), full title of the case *in italic*, chamber, number of the case, type of decision, date, Internet site where the decision can be downloaded from in parentheses followed by the date when the page was accessed (in accordance with citation of texts from the Internet) and number of para. which is cited.

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European Court of Human Rights

English abbreviation of the court's name (ECtHR), full title of the case *in italic*, application number, type of decision, date, paragraph in which the cited part of the text is.

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When decisions of the Grand Chamber are cited, its English abbreviation in square parentheses should be written after the date.

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If a dissenting opinion is cited, apply accordingly the rule for citation of judgements of the International Court of Justice (after the date of the decision write the type of dissenting opinion and surname of the judge) and provide the number of paragraph in the opinion referred to.

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