

# PRAVNI ZAPISI

Časopis Pravnog fakulteta Univerziteta Union u Beogradu

UNION UNIVERSITY LAW SCHOOL REVIEW



**PRAVNI**  
**fakultet**  
Univerzitet UNION



### ***Izdavač / Publisher***

Pravni fakultet Univerziteta Union u Beogradu  
Union University Law School Belgrade

### ***Uredništvo / Editorial Board***

Glavna i odgovorna urednica / Editor-in-Chief  
Prof. dr Violeta Beširević, Pravni fakultet Univerziteta Union, Beograd, Srbija

### ***Izvršni urednik / Managing Editor***

Doc. dr Slobodan Vukadinović, Pravni fakultet Univerziteta Union, Beograd, Srbija

### ***Sekretari / Assistant Editors***

Asis. Iva Ivanov, Pravni fakultet Univerziteta Union, Beograd, Srbija  
Asis. Nikola Kovačević, Pravni fakultet Univerziteta Union, Beograd, Srbija

### ***Redakcija / Board of Editors***

Prof. dr Aleksandra Čavoški, Pravni fakultet Univerziteta Birmingem, Birmingem, Velika Britanija; prof. dr Tatjana Papić, Pravni fakultet Univerziteta Union, Beograd, Srbija; prof. dr Andrej Savin, Poslovni univerzitet Kopenhagen (CBS), Danska; prof. dr Tibor Tajti (Thaythy), Centralnoevropski univerzitet (CEU), Budimpešta/Beč, Mađarska/Austrija; prof. dr Miomir Matulović, Pravni fakultet Sveučilišta u Rijeci, Rijeka, Hrvatska; prof. dr Jelena Jerinić, Pravni fakultet Univerziteta Union, Beograd, Srbija; prof. dr Tomaž Keresteš, Pravni fakultet Univerziteta u Mariboru, Maribor, Slovenija; prof. dr Nataša Mrvić Petrović, Institut za uporedno pravo, Beograd, Srbija; prof. dr Katarina Ivančević, Pravni fakultet Univerziteta Union, Beograd, Srbija; prof. dr Bogoljub Milosavljević, Pravni fakultet Univerziteta Union, Beograd, Srbija; prof. dr Marko Božić, Pravni fakultet Univerziteta Union, Beograd, Srbija; doc. dr Jelena Arsić, Pravni fakultet Univerziteta Union, Beograd, Srbija; dr Katarina Jovičić, viša naučna saradnica, Institut za uporedno pravo, Beograd, Srbija; dr Srđan Milošević, naučni saradnik, Institut za noviju istoriju Srbije, Beograd, Srbija; mr Bojan Stanivuk, advokat, Beograd, Srbija

### ***Izdavački savet / Advisory Board***

Tibor Várady, Central European University, Mađarska/Emory University, SAD; Thomas Fleiner, University of Fribourg, Švajcarska; Nenad Dimitrijević, Central European University, Mađarska/Austrija; Niels Petersen, University of Münster, Nemačka; Marko Milanović, University of Nottingham, Velika Britanija; Bojan Bugarič, University of Sheffield, Velika Britanija; David Duarte, University of Lisbon, Portugalija; Stefania Ninatti, University of Milano-Bicocca, Italija; Boško Tripković, University of Birmingham, Velika Britanija; Thomas H. Speedy Rice, Washington and Lee University, SAD; Carlos Flores Juberias, University of Valencia, Španija; Jean-Paul Pancraccio, University of Poitiers, Francuska; Georgios Nektarios Lois, Hellenic Open University, Grčka; Mihajlo Dika, University of Zagreb, Hrvatska; Vesna Rijavec, University of Maribor, Slovenija; Arsen Janevski, Cyril and Methodious University, Severna Makedonija; Mladen Vukčević, Mediteran University, Crna Gora; Dragoljub Popović, Pravni fakultet Univerziteta Union, Srbija; Srđan Šarkić, Univerzitet u Novom Sadu, Srbija; Laposava Karamarković, Pravni fakultet Univerziteta Union, Srbija; David Dašić, Srbija; Milena Prokić Trgovčević, Pravni fakultet Univerziteta Union, Srbija; Jadranka Injac, Srbija

# PRAVNI ZAPISI

Časopis Pravnog fakulteta Univerziteta Union u Beogradu

---

UNION UNIVERSITY LAW SCHOOL REVIEW



GODINA XII • BROJ 2 • Str. 351–673

---

UDK 34

BEOGRAD, 2021.

ISSN 2217-2815 (Štampano izd.)  
eISSN 2406-1387 (Online)



## SADRŽAJ / TABLE OF CONTENTS

### UVODNI ESEJ / GUEST EDITORIAL

**Marko Milanović**

*The Compatibility of Covid Passes with the Prohibition of Discrimination*

*Kompatibilnost kovid propusnica sa zabranom diskriminacije . . . . .* 357

### ČLANCI / ARTICLES

**Petra Bárd**

*Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust*

*Kanarinci u rudniku uglja: urušavanje vladavine prava i*

*uzajamno poverenje . . . . .* 371

**Dragoljub Popović**

*Constitutional Design and Destiny of the States:*

*The Weimar Constitution and the St Vitus Day Constitution in Comparative Perspective*

*Ustavno uređenje i sudbina država: Vajmarski i Vidovdanski ustav u uporednoj perspektivi . . . . .* 396

**Marko Božić**

*The Law Unveiled: On Burka Ban, Kanzelparagraph and Militant Secularism in the Socialist Yugoslavia*

*Demistifikovani zakon: o zabrani vela, kancelparagrafu i militantnom sekularizmu u socijalističkoj Jugoslaviji . . . . .* 418

**Tamara Mladenović**

*Pravo na anonimni porođaj naspram prava deteta na identitet*

*Anonymous Birth Versus Child's Right to Identity . . . . .* 443

**Jelena Danilović**

*Etički kodeksi farmaceutskih kompanija kao akti autonomnog prava i njihovo mesto na Fulerovoj moralnoj lestvici*

*Codes of Conduct of Pharmaceutical Companies as Acts of Autonomous Law and Their Place Within Fuller's*

*Moral Scale . . . . .* 464

SIMPOZIJUM O KNJIZI / BOOK SYMPOSIUM

PREDGOVOR / PREFACE

**Bojan Spaić**

*Preface to Book Symposium: Miodrag Jovanović, The Nature of International Law (Cambridge University Press, 2019)*

*Predgovor simpozijumu o knjizi: Miodrag Jovanović, Priroda međunarodnog prava (Cambridge University Press, 2019) . . . . . 485*

ČLANCI / ARTICLES

**Goran Dajović**

*Normativnost međunarodnog prava*

*Normativity of International Law . . . . . 488*

**Tatjana Papić**

*In Defense of Uncertainty: Values Behind Indeterminate Rules of International Law*

*U odbranu neizvesnosti: dobre strane neodređenih pravila međunarodnog prava . . . . . 523*

**Miloš Hrnjaz**

*Nature of Customary International Law: All We Need Is Practice*

*Filozofija međunarodnog običajnog prava: dovoljna je praksa. . . . . 550*

**Ana Zdravković**

*Obligations Erga Omnes – Jus Cogens in Statu Nascendi? A Theory Inspired by “The Nature of International Law”*

*Obaveze erga omnes – jus cogens u nastajanju? Analiza inspirisana knjigom „The Nature of International Law” . . . . . 577*

**Jernej Letnar Černič**

*Institutional Actors as International Law-Makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and Beyond*

*Institucionalni akteri kao međunarodni zakonodavci u oblasti biznisa i ljudskih prava: Rukovodeća načela Ujedinjenih nacija o biznisu i ljudskim pravima i šire . . . . . 594*

PRIOLOG / CONTRIBUTION

**Miodrag Jovanović**

*The Nature of International Law and Beyond: A Reply to Commentators*

*Priroda međunarodnog prava i šire: odgovor komentatorima . . . . . 618*

## POLEMIKE / DEBATE

**Marko Božić***Sekularizam i ustavna sekularnost (Odgovor Srđanu Miloševiću)**Secularism and Constitutional Secularity**(A Reply to Srđan Milošević)* ..... 631

## KOMENTAR ODLUKE / CASE NOTE

**Tijana Kojović***EPIC v. APPLE: An Antitrust Experiment**EPIC protiv APPLE: Eksperiment iz prava konkurencije* ..... 634

## PRIKAZI / BOOK REVIEWS

**Vladeta Janković***Ogledalo običaja, slika istine: Tibor Varadi, Protivnarodni osmeh, Akademska knjiga, prevod s mađarskog Arpad Vicko, Novi Sad, 2021, 288 str.**A Mirror of Custom, An Image of Truth: Tibor Várady, An Anti-National Smile, Akademska knjiga, Translation from Hungarian Arpad Vicko, Novi Sad, 2021, 288 pp.* ..... 647**Jelena Jerinić***Two Hundred Years of Serbian Constitutional History, Dragoljub Popović, Constitutional History of Serbia, Brill, 2021, 249 pp.**Dvesta godina srpske ustavne istorije, Dragoljub Popović, Ustavna istorija Srbije, Brill, 2021, 249 str.* ..... 650

## HRONIKA / CHRONICLE

*Hronika PFUUB (2020/2021), priredila Jovana Popović**Union University Law School Chronicle (2020/2021),**Contributor Jovana Popović* ..... 656



*Marko Milanović\**

## THE COMPATIBILITY OF COVID PASSES WITH THE PROHIBITION OF DISCRIMINATION

### 1. INTRODUCTION

Countries all over the world are increasingly introducing Covid-19 passes – certificates of an individual's vaccination status, testing status, or recovery from the virus – and mandating their use in certain contexts, such as access to bars, restaurants, public transport and other facilities. The most prominent such example is the EU Digital Green Certificate, but with an important caveat. While that certificate was designed so as to be interoperable and valid in all EU member states, its primary purpose was to facilitate the freedom of movement between member states.<sup>1</sup> But within the state it is up to each government to decide for itself whether, and to what extent, the certificate would be used to regulate access to public facilities locally – France and Italy have, for instance, been using them quite extensively. Many other states (or territorial sub-divisions within states) outside the EU are adopting similar policies, with a great degree of variety in how the regulation is framed, and with a degree of convergence with regard to their technical implementation (*e.g.* through the use of smart-phone apps and QR codes). Serbia is one such recent example, even if the mandated Covid pass was introduced only half-heartedly.<sup>2</sup>

In this editorial I will not engage in a detailed descriptive examination of how Covid passes have been implemented in individual states. Rather, my intention is to do a big picture analysis of the compatibility of such policies with the prohibition of discrimination and the principle of equality. Non-discrimination is a foundational rule of international human rights law and most domestic constitutional systems for the protec-

---

\* Professor of Public International Law and Co-Director of the Human Rights Law Centre, University of Nottingham; e-mail: marko.milanovic@nottingham.ac.uk

1 <https://www.covidpasscertificate.com/europe-digital-green-pass/>.

2 See 'Serbia introduces COVID-19 passes for indoor cafes and restaurants,' *Reuters*, 20 October 2021, (<https://www.reuters.com/world/europe/serbia-introduces-covid-19-passes-indoor-cafes-restaurants-2021-10-20/>).

tion of fundamental rights. It is not an absolute rule, in the sense that some distinctions in treatment can be reasonably and objectively justified. And Covid passes may well be justified in most states that have used them so far, depending on how precisely they were designed and implemented. That said, the key argument I wish to make here is that lawyers and policymakers need to be especially mindful of the potential indirect discriminatory effects of Covid passes. In order to mitigate such effects, all state rules and policies need to be thoroughly scrutinized, be evidence-based and subject to oversight and judicial review. The state must gather data about the real-world effects of Covid passes, positive and negative, and subject them to ongoing, dynamic evaluation, including meaningful equality impact assessments. Finally, the positive and negative effects of Covid passes will always be variable and context-specific – they may be a great success in one country but not in another; the circumstances of each society need to be taken into account.

The essay proceeds as follows. I will first outline some basics of non-discrimination law. I will then examine the different types of Covid pass mandates. I will then discuss how Covid passes can be directly discriminatory, and finally how they can be indirectly discriminatory.

## 2. NON-DISCRIMINATION: THE BASICS

Most human rights treaties and domestic constitutions do not define the concept of discrimination, although they may refer to some of its constituent elements, *e.g.* differentiation between individuals on the basis of some personal characteristic. Similarly, most instruments do not contain an express limitations clause, *i.e.* do not state explicitly that not all distinctions on the basis of a specific characteristic are wrongful, but that some can be justified. This is nonetheless the constant jurisprudence of all human rights bodies, which broadly accept that non-discrimination claims require value judgments as to the comparability of the situations of the relevant individuals and as to the justifiability of any distinctions made (or not made) between them.<sup>3</sup>

Thus, distinctions in treatment will be regarded as objectively and reasonably justified if they pursue a legitimate aim and are proportionate to that aim. For example, a rich person can be taxed more than a poor one; the health care needs of a gravely ill individual can be prioritized over those of an individual who is at lesser risk; the elderly and those with comorbidities can have earlier access to Covid vaccines than the younger

---

3 For an example of a jurisprudential interpretation of the prohibition of discrimination, see UN Human Rights Committee, General Comment No. 18 (1989).

and the healthier. There is some terminological variance in comparative practice as to whether justified differential treatment/distinctions are not labelled as discrimination at all, or whether justified discrimination would simply not be unlawful but would still be called discrimination.

Comparative practice is also complex and contested as to the doctrinal role that discriminatory purposes and effects should play in justifiability analysis – the most difficult cases are those in which authorities enact measures with entirely good motives but which may cause disparate impact on a particular group or class of individuals. That said, there is widespread recognition that equality requires not only treating those who are alike alike, but also treating those who are different differently. Consequently, discrimination can be direct, in the sense that a measure is based on a specific characteristic, or indirect, in the sense that facially neutral measures produce effects that excessively disadvantage a particular group. States thus have to take into account – and need to justify – the indirect disparate impacts of their policies.

Consider, for example, the recent views of the UN Human Rights Committee in *Elena Genero v. Italy*.<sup>4</sup> The claimant in the case was an Italian female firefighter, who for 17 years performed those duties on a temporary (voluntary) basis. She then entered a competition for a permanent position. Her application was refused because she did not fulfil the minimum height requirement of 165 cm, set out in the relevant national decree.<sup>5</sup> This decree was on its face directly discriminatory on the basis of height. But it was also indirectly discriminatory on the basis of sex, since a substantially greater proportion of women will, when compared to men, fail to satisfy that height requirement.

Before the Committee, Italy argued that the height requirement was justified essentially as a proxy for physical competence that a firefighter needs to have to perform their job adequately. But the Committee found that explanation wanting, finding it to be unnecessary and disproportionate and resulting in indirect gender-based discrimination:

*While acknowledging that the State party may have a legitimate interest in ensuring the effectiveness of the National Firefighters Corps and while admitting that the activities undertaken by firefighters may require certain physical conditions, the Committee notes that neither the State party nor the national administrative courts have justified the precise role that a height of 165 cm would play in the effective performance of these functions, nor that other physical attributes, such as corporal composition, muscular force and active metabolic mass, could not compensate for not meeting the existing height requirement. The Committee notes, in that*

---

4 UN Doc. CCPR/C/128/D/2979/2017, 28 May 2020.

5 *Ibid.*, para. 2.1.

*regard, the author's uncontested argument that she had been successfully employed as a temporary firefighter for 17 years at the time of submitting the present communication, having participated in several rescue teams during that period and having carried out the same functions as permanent staff members.*<sup>6</sup>

In the Covid-19 context, the lockdown measures imposed by various governments can provide a good example of both direct and (unintended) indirect discriminatory effects. Consider, for instance, the spring 2020 Serbian restrictions on the freedom of movement, imposed during a declared state of emergency and a formal derogation from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Persons older than 65 were categorically prohibited from leaving their residences (with some very minor exceptions gradually introduced over time), whereas younger individuals were subjected to curfews that were less restrictive, but still substantial. This is an example of direct differential treatment on the basis of age, which may or may not have been justified due to the greater vulnerability of the elderly to the virus. I hedge my language here only because the one institution that was supposed to assess the justifiability of this distinction, the Serbian Constitutional Court, entirely abdicated its responsibility to do so, essentially on the basis that the prohibition of age-based discrimination does not apply in a state of emergency.<sup>7</sup> But the lockdown measures were also indirectly discriminatory, in that some individuals were affected by them disproportionately on account of their difference – for example, children with autism or persons with disabilities whose wellbeing and access to care were significantly curtailed.<sup>8</sup> The Serbian government only very belatedly recognized the specific position of some of these groups by granting them partial exceptions, did so only after public pressure and was never subjected to meaningful judicial scrutiny.

Bearing all this in mind, let us turn back to Covid passes, which can also be directly or indirectly discriminatory, with or without justification. It is first important to consider the different types of such passes.

<sup>6</sup> *Ibid.*, para. 7.5.

<sup>7</sup> See Decision IUo-45/2020, 25 October 2020, at VI. The Court ruled that the general prohibition of discrimination in Article 21 of the Serbian Constitution was displaced by a more specific rule in Article 202(2) of the Constitution during a state of emergency, even though the text of the Constitution does not actually say so, and without examining whether any supposed derogations from the prohibition of discrimination were strictly required by the exigencies of the situation.

<sup>8</sup> See, e.g., United Nations COVID-19 Socio-Economic Impact Assessment (Serbia), Sept. 2020, ([https://serbia.un.org/sites/default/files/2020-09/seia\\_report%20%281%29.pdf](https://serbia.un.org/sites/default/files/2020-09/seia_report%20%281%29.pdf)) at 28; Belgrade Centre for Human Rights, *Human Rights in Serbia January-June 2020* (2020), (<http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2014/01/Human-Rights-in-Serbia-I-VI-2020.pdf>), at 86.

### 3. TYPES OF COVID PASSES AND MANDATES

The design of Covid passes and any mandates to use them is crucial for assessing their proportionality. This requires answering at least five preliminary questions: (1) what information is contained and certified in the pass; (2) in what format; (3) in what regulatory context; (4) which public services and facilities are being restricted through the mandated use of the pass; (5) who is doing the mandating and restricting?

As for the first of these questions, the initial design choice is whether the pass will include solely information about vaccination status (as, for example, with the NHS pass in the UK), or will also include additional information, such as the result of the most recent PCR or antigen test or proof of recent recovery from a Covid infection (as is the case with the EU digital certificate). A particularly notable example is the United Arab Emirates' Al Hosn pass, which always requires periodic PCR testing to maintain its validity, but the period of validity will vary depending on the individual's vaccination status – for example, a fully vaccinated individual needs to get tested only once every 30 days in order to get a green pass, whereas an individual who received no doses of a vaccine would need to get tested every 3 days for the pass to remain valid.<sup>9</sup> A further issue is whether the validity of a pass also requires the individual to carry a piece of photographic ID.

Second, as for the format of a Covid pass, the key question is whether the certificate is only available digitally, normally as a smartphone app, or whether there is also some kind of paper alternative, which may be particularly helpful to the elderly and other individuals who do not have easy access to smartphones. The EU digital certificate can easily be printed out, for example, whereas the generation of a paper vaccination certificate in the UK is much more cumbersome.

Third, as for the regulatory context, the most important question is whether the Covid pass (and any mandate to have one) exists alongside a prior legal obligation to get vaccinated or not. In most countries Covid-19 vaccination is not legally mandatory and is ostensibly a matter of individual choice, or is mandatory only in specific contexts (*e.g.* for health care workers). But if the state has chosen to mandate vaccination, then the justifiability of Covid pass mandates will likely be parasitic on the justifiability of the vaccine mandate (although distinct issues remain, as we shall see). If, however, the state does not mandate vaccination, then the problem of justifying mandatory passes certifying ostensibly voluntary vacci-

---

9 <https://u.ae/en/information-and-services/justice-safety-and-the-law/handling-the-covid-19-outbreak/the-green-pass-system>.

nation is more easily separated out. Very broad and burdensome Covid pass mandates, especially when the alternatives to vaccination (such as testing) are either non-existent or cumbersome, may in effect become *de facto* vaccine mandates and their justifiability should be assessed as such. To be clear, legally mandatory vaccinations for Covid – and other diseases – can be justified, and manifestly so in specific contexts of high risk of transmission, such as for health care and care home workers. For example, the European Court of Human Rights has already examined some mandatory vaccinations for children and found them to be compatible with the right to private life.<sup>10</sup> My point is simply that the justifiability of vaccination mandates and Covid passes need to be carefully distinguished, especially as to their equality impacts.

Fourth, the scope of restrictions on access to public services and facilities for those without a valid Covid pass is the most important question for assessing their justifiability. Mandates that require passes only for entry to a very small number of venues and events, such as nightclubs or large concerts, impose a lower burden and are easier to justify than those that restrict access to essential public services, such as transport or education, or those that directly affect an individual's livelihood by restricting their ability to work.

Fifth, and finally, it is important to understand that mandates requiring the use of Covid passes may come from both state and private actors. Thus, for example, the state may choose to require passes for access to bars and restaurants. But even in the absence of a state mandate, the individual owners of such venues may themselves decide to require their customers to produce a pass, or may indeed require their employees to have a Covid pass in order to continue working as a health and safety measure in the workplace. Similarly, the state may mandate the use of Covid passes in schools and universities. But even in the absence of such a mandate an educational institution may decide to impose such a mandate for itself – in Serbia this was, for example, done by the University of Belgrade Faculty of Medicine, which requires staff and students to present proof of vaccination, testing or recovery in order to access its facilities.<sup>11</sup> In any given country there may therefore be many state and private mandates co-existing in parallel. Private mandates potentially trigger the state's positive duty of protection, requiring it to exercise due diligence to prevent unjustified discrimination by private actors, even if the state is not itself engaging in any discriminatory conduct.

---

10 See *Vavrička and Others v. the Czech Republic* [GC], nos. 47621/13 etc., 8 April 2021.

11 <https://rs.n1info.com/vesti/medicinski-fakultet-u-beogradu-uveo-kovid-propusnice/>.

#### 4. COVID PASSES AND DIRECT DISCRIMINATION

How do Covid passes differentiate or discriminate directly? They clearly draw distinctions between those who possess a certificate and those who do not. But implicit in that distinction is also differentiation between the vaccinated and the non-vaccinated, even for those certificates that include information other than vaccination status, such as testing or proof of recovery. A vaccinated individual who can get a valid pass simply on that basis is clearly being treated more favourably than a non-vaccinated person who needs to get tested every few days in order to generate a valid pass.

As we have seen, the differential treatment will constitute (unlawful) discrimination if it lacks objective and reasonable justification. In principle Covid passes pursue a legitimate aim – the protection of public health – which can then be balanced against the burdens they impose on the non-vaccinated. Covid passes can benefit public health in two basic ways. First, by reducing the risk of transmission of the virus in the contexts for which they are mandated, such as public events. Second, by incentivizing the uptake of vaccination in the population, as people realize that getting vaccinated would make their lives practically easier and thus overcome any hesitancy that they might have.

The former rationale rests on the ability of vaccines to interrupt transmission, and, if combined with alternatives such as negative tests or recent recovery from infection, on a probabilistic assessment that infection would be less likely in gatherings including only individuals with a valid pass. The actual extent of any risk reduction is a difficult empirical question that is hard to answer reliably; the evidence base for the effectiveness of Covid pass regimes remains small, and they are grounded more in precaution than rigorously obtained and evaluated evidence. In particular, the emergence and subsequent dominance of the highly infectious Delta variant has certainly lowered the ability of vaccines to reduce transmission (and not all vaccines are equally potent in that regard anyway).<sup>12</sup> It can fairly be said that Covid passes have some effect on reducing transmission

---

12 See, e.g., Singanayagam, A., Hakki, S., Dunning, J. *et al.*, ATACCC Study. Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study. *Lancet Infect Dis* 2021. doi:10.1016/S1473-3099(21)00648-4 (finding that 25% of vaccinated members of households of Delta Covid patients got infected with the virus, compared to 38% of unvaccinated members, and also finding that peak viral loads of vaccinated individuals with breakthrough infections were similar to those of unvaccinated individuals).

(which will likely be quite variable from context to context), but that no policymaker or expert can reliably say how large that effect actually is.

The second rationale, that of incentivizing vaccination, is likely to be more beneficial in the long run, because increased vaccination rates would reduce the overall disease burden on vaccinated individuals and society as a whole. Some may object to it ideologically as a form of paternalism. Others might point out that it would be more honest and straightforward to legally mandate vaccination as such rather than to do so *de facto*, through ostensibly softer means such as access restrictions coupled with Covid certificates. But at least empirically the introduction of Covid passes has, in fact, led to substantial increases in vaccination rates in several countries.<sup>13</sup>

So much for the public health advantages of Covid passes. On the other side of the proportionality equation are the various burdens that they may impose. Again, relatively low-level restrictions to non-essential services – nightclubs, cinemas, bars, restaurants – would be easier to justify in terms of harms to unvaccinated individuals than restrictions to essential services, such as education or social care. Similarly, if unvaccinated individuals can obtain a valid Covid pass through testing, restrictions would be easier to justify if testing was free of charge and widely available.

Somewhat paradoxically, however, it is precisely such lowering of the burdens on unvaccinated individuals that also lowers the effectiveness of Covid passes with regard to the second rationale above – that of incentivizing vaccination. Lesser restrictions on access or the greater availability of alternatives such as testing may reduce the inconvenience (and cost in money and time) that incentivizes vaccination. Consider, for example, how after introducing Covid passes for access to facilities such as bars and restaurants Switzerland then went on to abolish government-sponsored free antigen testing, precisely in order to incentivize vaccination – as the Swiss Federal Council put it, “it is not up to the public as a whole to finance the cost of tests for people who decide not to get vaccinated”.<sup>14</sup>

To sum up, while there is substantial uncertainty as to the extent of public health benefits of Covid passes, especially with regard to the reduc-

13 In France, for example, “[m]ore than a million people made a vaccine appointment in the 24 hours after [President] Macron’s July 12 announcement that a health pass would soon be required for public venues. Almost 10 million people got a first dose over the subsequent month.” See Covid health pass prevails over French vaccine scepticism in boost for Macron, *France 24*, 14 October 2021, (<https://www.france24.com/en/europe/20211014-macron-s-covid-health-pass-a-success-in-overcoming-france-s-vaccine-scepticism/>).

14 Coronavirus: Free tests for those waiting for second vaccine dose, Press Release of the Federal Council, 24 September 2021, (<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-85254.html>).

tion of transmission, the balance between these benefits and the restrictions imposed on the unvaccinated would generally satisfy the IHRL proportionality test, especially when bearing in mind that courts and human rights bodies would defer to state authorities and the political process on matters that require the balancing of risks when fighting a public health crisis. The French Constitutional Council has thus, for example, found the *passé sanitaire* used in France to be compatible with fundamental rights, including equality.<sup>15</sup>

There are therefore in my view only three types of situations in which Covid passes are likely to be found to be directly discriminatory. First, and most obviously, if such passes were to be introduced by a state that has an insufficient supply of vaccines, *i.e.* if there were people who wanted to get vaccinated but there simply were no vaccines available. As of the time of writing (November 2021) severe supply issues remain globally; most countries in Africa in particular have vaccination rates in the single digits,<sup>16</sup> simply because wealthier states have cornered the market. Introducing Covid passes in a country in which a substantial number of people never had the opportunity to get vaccinated would be objectively unjustified, and would directly create a divide between the privileged and the underclass.

Second, Covid passes would be directly discriminatory against the unvaccinated if three conditions were cumulatively met: (1) the overall activity of the virus in the given society was low; (2) vaccination rates were high; and (3) the restrictions on the unvaccinated remained substantial. In this scenario Covid passes would be making only a minimal benefit to public health, if any, since the baseline risk of transmission would be low anyway and since very few people could still be incentivized to get vaccinated, while the burden imposed on the unvaccinated would be significant.

Third, depending on their design, Covid passes could also be directly discriminatory against individuals who were vaccinated in a foreign country, especially those who may have been vaccinated using a shot that did not receive regulatory approval in both states. Thus, for example, the EU and the UK had to agree on a mutual recognition of vaccine certificates, even though they have been using the same vaccines, while the domestic use of foreign certificates for accessing restricted services and facilities was until then largely discretionary.<sup>17</sup> Or, consider all those vaccinated

---

15 Décision n° 2021-824 DC, 5 August 2021, (<https://www.conseil-constitutionnel.fr/decision/2021/2021824DC.htm>).

16 [https://ourworldindata.org/covid-vaccinations?country=OWID\\_WRL](https://ourworldindata.org/covid-vaccinations?country=OWID_WRL).

17 <https://www.publictechnology.net/articles/news/uk-and-eu-agree-digital-vaccine-pass-reciprocity>.

with Chinese vaccines – which account for almost half of all administered doses worldwide<sup>18</sup> – but who may want to visit or study in states that have not approved these vaccines. While it is understandable that technical problems may impede the easy cross-border recognition of vaccine certificates, treating individuals with foreign vaccinations as legally unvaccinated serves no cognizable public health purpose in situations in which the same vaccines were approved in both states – in particular, concerns about potentially fraudulent foreign certificates can be resolved through other means. And even if the two states are using different vaccines, which may have variable effectiveness in reducing risk of serious illness, there is very little comparative evidence on any difference between vaccines in the reduction of transmission (which is one of the main goals of a Covid pass). There would be little point to revaccinating these individuals with other vaccines unless their immunity is waning, especially when there is scarcity of vaccines elsewhere. In that regard, the problem of waning immunity would be better solved by requiring boosters for the validity of the pass after a certain period (e.g. six months) from the completion of the main vaccination course than by simply disregarding the initial vaccinations altogether.

## 5. COVID PASSES AND INDIRECT DISCRIMINATION

This brings us to the indirect – most often unintended – discriminatory effects of Covid passes. Depending on the design of these passes and the specific social context, such effects can be substantial and are more likely to enable successful legal challenges to pass mandates than claims of direct discrimination. Common to all of the examples below is that they may warrant exceptions from a regime of general applicability such as a Covid pass, or at least require the active consideration of alternative or supplementary measures by the state. And again in evaluating the possible indirect effects of Covid passes it is crucial to evaluate their relationship to any relevant vaccine mandate.

The first group of individuals who may be adversely affected indirectly by a Covid pass regime is relatively small – those with specific health conditions that mean that vaccination is permanently or temporarily medically contraindicated. Such individuals may well want to have a Covid vaccine, but are simply not allowed to have it, for example because they are allergic to one of the vaccine components such as polyethylene glycol.<sup>19</sup> A Covid pass that functioned solely on the basis of vaccination

---

18 <https://www.nature.com/articles/d41586-021-02796-w>.

19 See, e.g., the contraindication guidance from the US Centers for Disease Control, (<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines->

status would clearly produce a disparate impact on such individuals (as would a vaccine mandate that contained no exemptions). Allowing for a valid certificate on the basis of testing would alleviate the disparate impact somewhat, depending on the cost, ease and availability of testing. In any event authorities must actively monitor the situation of such individuals and make any reasonable accommodations.

Second, in states that conduct vaccination along stratified priority tiers, starting with the eldest and those with comorbidities, the young will have had the shortest window of opportunity to get vaccinated. The premature introduction of a Covid pass may thus affect them disproportionately, indirectly discriminating on the basis of their age. Any exemptions for children, for example, would also be important for this assessment.

Third, for Covid pass regimes that rely heavily on smartphone apps and online tools, some groups, especially the elderly and persons with disabilities, may experience substantial difficulties in using such technologies. Easily obtaining paper certificates may, for instance, be a necessary accommodation for individuals in these circumstances.<sup>20</sup>

The moral intuition underlying the reasoning regarding the three examples above is that having, or lacking, a choice to get vaccinated or use the relevant technology is important in balancing the adverse impact that Covid passes may have on these individuals. It is very easy to fall into a mindset that individuals who have the ability and free choice to get vaccinated or not and choose not to do so should then bear the consequences of that choice – unlike those who never had this choice, they have only themselves to blame if their life becomes more difficult. There is some truth to this position. But we should also always be mindful of how constrained that supposed freedom to choose can really be, often by objective circumstances outside any individual's control, including their belonging to a particular group.

There are numerous other categories of individuals whose ability – and choice – to get vaccinated or use a Covid pass are substantially more limited when compared to the general population. This includes the poor, and especially the homeless, whose access to vaccinations, testing and/or

---

us.html#Contraindications). Temporary contraindications would cover persons undergoing some forms of cancer treatment, such as immunotherapy, or those who have pericarditis or myocarditis.

20 A good example of reasonable alternative accommodation in the context of Covid contract tracing apps is the approach taken in Singapore, where the government distributed Bluetooth tokens to children, the elderly, the disabled and other groups who could not use smartphones easily. See Singapore gives out pocket-sized device to trace coronavirus, *Reuters*, 14 September 2020, (<https://www.reuters.com/article/us-health-coronavirus-singapore-idUSKBN2651OZ>).

smartphones may be inadequate, particularly in the developing world. It also includes irregular migrants, who may – depending on the country in which they are located – be denied the opportunity to get vaccinated, or be unable to get a valid certificate due to their undocumented status.<sup>21</sup> (The homeless may be in a similar situation because they may lack a formally registered address.) The Bureau of Investigative Journalism has thus reported that “administrative barriers in at least 10 European countries are blocking access to Covid-19 vaccines for nearly four million undocumented migrants”.<sup>22</sup> Moreover, irregular migrants may be afraid that they may be reported to immigration authorities if they go to a vaccination site, or be afraid that a smartphone app might share their data with the authorities, thus discouraging vaccination and/or the use of a Covid pass.

Similarly, individuals belonging to minority racial or ethnic groups may be systematically disadvantaged in certain societies and may harbour deep-seated mistrust of state institutions, affecting their vaccination rates and/or the use of any related Covid pass. For example, for a number of reasons vaccine hesitancy has been higher in the Black population of the United States than in the majority white population. Vaccine take-up was substantially lower among Black people for many months into the Covid-19 vaccination campaign, and improved only upon the implementation of proactive vaccination efforts, including community outreach and mobile vaccinations centres.<sup>23</sup> In Eastern Europe, the Roma will be in the same general position; vaccination rates are certainly lower than in the majority population, and there seems to be a complete absence of targeted vaccination campaigns and community outreach in most of the states in the region.<sup>24</sup> Mandating Covid passes can therefore indirectly adversely affect this group, which can only be justified if the state takes some form of remedial action to assist them.

Depending on the society in question, religious minorities may be in a similar position. They – or their leadership – may be opposed to vac-

21 See WHO, COVID-19 immunization in refugees and migrants: principles and key consideration: interim guidance, 31 August 2021, (<https://apps.who.int/iris/bitstream/handle/10665/344793/WHO-2019-nCoV-immunization-refugees-and-migrants-2021.1-eng.pdf>).

22 <https://euobserver.com/coronavirus/152781>.

23 See Nambi, N. *et al.*, Latest Data on COVID-19 Vaccinations by Race/Ethnicity, *KFF*, 3 November 2021, (<https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/>); Landry, L. *et al.*, 2021, Minority and Rural Coronavirus Insights Study (MRCIS): The Need for Targeted COVID-19 Vaccination Efforts in Minority Populations. *medRxiv*. doi:10.1101/2021.10.06.21264407, (<https://www.medrxiv.org/content/10.1101/2021.10.06.21264407v1>).

24 See, *e.g.*, Holt, E., 2021, COVID-19 vaccination among Roma populations in Europe, *The Lancet Microbe*, 2(7), e289. [https://doi.org/10.1016/S2666-5247\(21\)00155-5](https://doi.org/10.1016/S2666-5247(21)00155-5).

cines or the use of Covid passes, severely affecting vaccination rates. One question of principle, which I will not be examining, is whether sincerely held religious beliefs should be sufficient grounds for exemptions from a vaccine mandate (and indeed whether religious beliefs on vaccines should carry more weight than similar beliefs that are not religious in character). Leaving that aside, it is simply a fact that in some societies religion can affect vaccination rates; consider Israel as but one example, where vaccination efforts substantially lagged in ultra-Orthodox Jewish communities and improved only after a sustained targeted effort and the endorsement of vaccinations by religious leaders.<sup>25</sup> It is simply illusory to say that people belonging to such communities can just choose to disregard the views of authoritative voices within these communities. The state must, again, take proactive measures to reduce vaccine inequities and to thereby also reduce any inequities resulting from the introduction of Covid passes.

## 6. CONCLUSION

Depending on their design, Covid passes can be useful public health interventions that may be justified under international human rights law. But great care needs to be employed by state authorities in their design and implementation. In particular, they must be mindful of both the direct and indirect discriminatory effects of these passes, and of any further consequences imposed by private actors, *e.g.* in the employment context. Many vulnerable groups may be adversely affected by such passes, and, at a minimum, reasonable remedial measures must be in place to eliminate or mitigate such effects. This is especially the case for indirect discrimination that may be intersectional, *i.e.* cover multiple grounds (such as age, income, or belonging to a minority) simultaneously, and when the restrictions on access to public services imposed through a pass are relatively high.

It is in principle legitimate for Covid passes to function as a soft form of vaccine mandates, with the goal of inducing vaccination through inconvenience. But that goal must be tempered with the harm that a Covid pass regime may cause. This includes harms to individuals who have chosen not to get vaccinated, especially if the state has refrained from directly imposing a vaccine mandate. For many of these people choice is severely

---

25 See Rosen, B., Waitzberg, R., Israeli, 2021, A. *et al.* Addressing vaccine hesitancy and access barriers to achieve persistent progress in Israel's COVID-19 vaccination program. *Israeli Journal Health Policy Research* 10, 43, <https://doi.org/10.1186/s13584-021-00481-x>; How Israel Persuaded Reluctant Ultra-Orthodox Jews To Get Vaccinated Against COVID-19, *NPR*, 22 April 2021, (<https://www.npr.org/2021/04/22/988812635/how-israel-persuaded-reluctant-ultra-orthodox-jews-to-get-vaccinated-against-cov>).

constrained by factors beyond their control. In particular, individuals who are victims of manipulation and disinformation, especially in the context of confused and inconsistent public health messaging from the state, can hardly be said to be exercising free choice. Even more so when it was the state itself – often through some of its highest officials – that engaged in manipulation and misinformation.

Essay History:

Received: 10 November 2021

Accepted: 6 December 2021

Petra Bárd\*

## CANARIES IN A COAL MINE: RULE OF LAW DEFICIENCIES AND MUTUAL TRUST

**Abstract:** *The value decline in the EU has manifold consequences. It jeopardizes the very essence of Europe as a community of values. At the same time it endangers legal principles, such as mutual recognition, which is based on mutual trust presuming that all Member States are based on the rule of law and protect fundamental rights. Once trust is rebutted, Member States' judicial authorities will refuse to cooperate and recognise each other's judgments in order not to become complicit in individual rights violations and not to contradict the European Convention for the Protection of Human Rights and Fundamental Freedoms. This paper argues that EU law must allow for such considerations and suspend mutual recognition-based laws not only on a case-by-case basis, as it happens today in practice, but in general with regard to Member States undergoing rule of law decline, in order to uphold the EU's fundamental rights culture, and EU law's equivalency with the Convention's human rights regime.*

**Key words:** rule of law, judicial independence, human rights, fair trial rights, mutual trust, mutual recognition, EU law, European Arrest Warrant, European Convention on Human Rights, Bosphorus presumption.

### 1. RULE OF LAW DECLINE IN THE EU

The rule of law, democracy and fundamental rights, all enshrined in Article 2 of the Treaty on the European Union (hereinafter: TEU) along some other values, have a special place in EU law. These are the values that capture the very essence of Europe as “a community of values (*Wertegemeinschaft*)”, a representative of a certain tradition, which has created – though amongst pain and failures – patterns for a humane and at the same time viable world order”.<sup>1</sup> These are the values that all Member

\* Fernand Braudel Fellow, the European University Institute, Florence; Associate Professor, ELTE Faculty of Law, Budapest; Research Affiliate, Central European University, Democracy Institute, Budapest; e-mail: bardp@ceu.edu

1 Hassemer, W., 2004, *Strafrecht in einem europäischen Verfassungsvertrag*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 116, No. 2, pp. 304–319, p. 308.

States are expected to share and promised to respect and promote when signing the Treaty of Lisbon.<sup>2</sup> The rule of law, democracy and fundamental rights are co-constitutive, and inherently interconnected. Once one of them is violated, the other cannot be left intact either.<sup>3</sup> The rule of law without democracy is a contradiction, while democracy without the rule of law may easily turn into the dictatorship of the majority. In addition, fundamental rights are closely interlinked with the other two values.<sup>4</sup> Take for example the relation between freedom of expression, the right to receive information and informed participation in a democracy. One can only make informed choices during elections, or meaningfully participate in public debates in the possession of knowledge about the facts.<sup>5</sup> One may wish to add academic freedom to show the interrelatedness of rights and democracy: “[o]ne of the things about a democracy that people forget is how important knowledge is [...] If you don’t have knowledge then all you get to go on is tweets and Facebook, and rumors and fantasy and paranoia [...] You need knowledge in order to make choices.”<sup>6</sup> Finally let me mention an aspect of the correlation between values that is of direct relevance for this paper. Judicial independence, an integral part of the rule of law is one side of the coin, the other side of which is the suspect’s right to a fair trial. Should the former be violated, the latter will not be guaranteed either.

Taking up on this latter point, from among Article 2 TEU values, the rule of law including judicial independence, or rather the lack of it, is of

- 
- 2 Cf. Art. 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Art. 3(1) TEU: “1. The Union’s aim is to promote peace, its values and the well-being of its peoples.”
  - 3 Carrera, S., Guild, E., Hernanz, N., 2013, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, Brussels, CEPS.
  - 4 Bárd, P. et. al., 2016, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels, CEPS.
  - 5 Bayer, J. et. al., 2019, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States*, Brussels, European Parliament, Policy Department C, Citizens’ Rights and Constitutional Affairs, p. 62.
  - 6 See the speech by Michael Ignatieff, Professor and then Rector and President of the Central European University chased out of Hungary by the government in the middle of the legal and political turmoil around the university’s presence in the country, ([https://www.youtube.com/watch?v=FoMd\\_Bxn5rg&feature=youtu.be&fbclid=I-wAR2uHR\\_3m4w5DbB1ndIBRbvYHfHT\\_eIB9\\_V9kaaXvfi7\\_X16dDYclajnDEg](https://www.youtube.com/watch?v=FoMd_Bxn5rg&feature=youtu.be&fbclid=I-wAR2uHR_3m4w5DbB1ndIBRbvYHfHT_eIB9_V9kaaXvfi7_X16dDYclajnDEg)). See also CJEU, case C-66/18, *Commission v. Hungary* (Higher Education), Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:792.

special importance for illiberal regimes.<sup>7</sup> Interpreting and applying EU law is the joint task of the Court of Justice of the European Union (hereinafter: CJEU) and domestic courts. Upholding EU law is only possible if judiciaries at the various levels of EU governance cooperate. A prime form of this cooperation is the procedure of preliminary references under Article 267 TFEU. Whenever the meaning of a piece of EU law is unclear, domestic courts must turn to the CJEU, which is the sole interpreter of EU law. Should national judges be subjected to disciplinary proceedings for inviting the CJEU to give an interpretation of EU law, as the Polish ‘muzzle’ law dictates,<sup>8</sup> and as it happens in Hungary on an *ad hoc* basis,<sup>9</sup> the application of EU law, and thus the whole EU legal system is fundamentally jeopardized. In other words, judicial independence is important for both guaranteeing human rights with an emphasis on the right to a fair trial in criminal cases, but also for the proper application of EU law.

In this chapter we will show the scale of rule of law decline and argue that the EU fails to respond to the phenomenon in a dissuasive and effective manner, even though it has the tools arsenal to tackle the problem. In chapter 2, the consequences of rule of law backsliding – normalised by EU institutions’ passivity will be explained for mutual recognition-based laws in the field of judicial cooperation between the Member States in criminal matters, with special regard to surrender procedures. It will be argued that neither black letter law, nor the judicial tests developed by the CJEU take due account of fundamental rights threats resulting from rule of law decline. In chapter 3, the most immediate effects on the individual and individual rights will be shown, which have both external and intra-EU consequences. Member States may get into conflict with the European Convention on Human Rights (hereinafter: ECHR) when adhering to EU law, as a recent line of European Court of Human Rights (hereinafter: ECtHR or Strasbourg) case-law shows. At the same time, inside the EU, executing courts may fail to recognise judgments of captured courts and non-courts in order not to become complicit in individual rights violations and not to contradict the

---

7 In this paper we do not go into the various labels attached to such regimes in the political science literature, such as “hybrid regimes”, or “competitive” or “electoral authoritarianisms”, but will accept the self-proclaimed illiberal nature of government. See Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, Budapest Beacon, 29 July 2014, translated at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>.

8 CJEU, case C-791/19, *Commission v. Poland* (Régime disciplinaire des juges), Judgment of 15 July 2021, ECLI:EU:C:2021:596; and case C-204/21, pending.

9 CJEU, case C-564/19, *IS* (Illégalité de l’ordonnance de renvoi), Judgment of 23 November 2021, ECLI:EU:C:2021:949. For an immediate analysis see Bárd, P., 2021, The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS, *VerfBlog*, (<https://verfassungsblog.de/the-sanctity-of-preliminary-references/>, 26. 11. 2021).

ECHR, which in turn may go against their EU law obligations. In the concluding chapter a clear suggestion will be formulated to ease the tension between First Principles and a fundamental rights culture. It will be suggested that mutual trust is suspended with regard to Member States whose governments are the most notorious rule of law violators engaging in systemic dismantling of Article 2 TEU values, until these are restored.

### 1.1. THE SCALE OF THE PROBLEM

Even though the mentioned Article 2 TEU values including but not limited to the independence of the judiciary had been taken for granted for a long time in the EU, a solid decline started a decade ago in Hungary and other Member States are following suit. By now, the EU is harboring Member States that are no constitutional democracies anymore. Were they to apply for EU membership today, they would not be admitted to the European club. Poland and Hungary are undergoing Article 7(1) procedures designed to determine a clear risk of a serious breach of Article 2 TEU values.<sup>10</sup> According to think tanks, Hungary and Poland are among the top three autocratizing countries.<sup>11</sup> Whereas in 2009 both Member States were clustered as liberal democracies, by 2019 Hungary became an electoral autocracy and Poland an electoral democracy.<sup>12</sup> For the first time in the history of EU integration, in 2020 Freedom House stopped placing a Member State, Hungary among the “free countries”.<sup>13</sup> In many states including Poland and Romania separation of powers has weakened, and international cooperation has decreased.<sup>14,15</sup>

10 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)); European Commission, 2017, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final.

11 V-Dem Institute, (<https://www.v-dem.net/en/>).

12 V-Dem Institute, 2020, *Autocratization Surges–Resistance Grows, V-Dem Annual Democracy Report*, Gothenburg, V-Dem Institute, p. 16.

13 Freedom House, <https://freedomhouse.org/countries/freedom-world/scores>. Degrading the country with respect to freedom, happened in 2020, but the situation did not change for the better in 2021 either. Maksimov, V., 2011, Hungary Drops in Freedom House Report, *Euractiv*, ([https://www.euractiv.com/section/politics/short\\_news/hungary-drops-in-freedom-house-report/](https://www.euractiv.com/section/politics/short_news/hungary-drops-in-freedom-house-report/)).

14 BTI, The Transformation Index, (<https://www.bti-project.org/en/home.html?&cb=00000>).

15 WJP Rule of Law Index, 2020, (<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>).

No state is immune to individual violations of Article 2 TEU values. However, we must distinguish between sporadic instances of rule of law violations from systemic rule of law decline, such as the well-documented cases of Hungary, and more recently Poland. The governments of these countries introduced processes “through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power entrenching the long-term rule of the dominant party.”<sup>16</sup>

## 1.2. THE EU-RELEVANCE OF RULE OF LAW DECLINE IN A MEMBER STATE AND THE LACK OF DISSUASIVE RESPONSES

The value decline in the EU has manifold consequences. It endangers the very essence of Europe as a community of values, based on democracy, the rule of law, fundamental rights. At the same time also so-called First principles<sup>17</sup> are endangered, which are based on the assumption that all Member States are based on the rule of law and protect fundamental rights and in all Member States independent courts will ensure the application of EU law. Should this not be the case, it will have an impact in many EU fields, but the most immediate effects on the individual and individual rights will be traced in the area of EU criminal justice. In EU criminal law a series of legal instruments are based on the principle of mutual recognition, which again are based on the presumption of mutual trust. Once trust is rebutted, Member States’ judicial authorities will refuse to cooperate and recognise each other’s judgments. As explained above, judicial independence, a significant element of the rule of law and fair trial rights of the individual are two sides of the same coin. Executing courts will fail to recognise judgments of captured courts in order not to become complicit in individual rights violations.

It is therefore existential for the EU to react to rule of law violations and other value deficiencies in the Member States. The EU also possesses a sufficient number of tools to counter these problems. The Copenhagen dilemma, having strong scrutiny before accession, but no dissuasive re-

---

16 Pech, L., Scheppele, K. L., 2017, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, Vol. 19, pp. 3–47, p. 10. See also Müller, J-W., 2015, Should the EU Protect Democracy and the Rule of Law inside Member States, *European Law Journal*, Vol. 21, No. 2, pp. 141–160.

17 Koncewicz, T. T., The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First Principles in: Szczepanowska-Kozłowska, K. (ed.), 2020, *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin*, Warsaw, C.H. Beck, pp. 223–240.

sponses after, exists on the one hand because these tools have a scattered and patchwork nature and on the other because the institutions and the Member States which are entitled to use the tools they have available are reluctant to do so.<sup>18</sup> Several authors argue that the trend of creating new tools of monitoring and discussion platforms only gives the false semblance that the EU takes steps against rule of law backsliding, whereas in reality they only let illiberal regimes get away with deconstructing any checks on governmental powers.<sup>19</sup>

The wide variety of rule of law enforcement tools include Article 7(2)-(3) TEU, which might not be effective due to its high political threshold necessary for the respective procedure to lead to a determination of the existence of a serious and persistent breach of any Article 2 TEU value by a Member State, and to result in legal consequences. But the Commission could certainly make better use of infringement procedures, and rule of law conditionality tools.

Articles 258 and 260 TFEU provide for Commission-initiated infringement procedures. These are currently heavily underused in the enforcement of the rule of law.<sup>20</sup> As we have argued elsewhere,<sup>21</sup> for Article 258 infringement procedures to be truly effective, the European Commission shall frame rule of law problems as such; shall act promptly and not waste time during the first phase of the process, while a Member State openly violates the rule of law; interim measures should be used to put an

18 Pech, L. *et al.*, 2019, Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, *Reflection Paper*, No. 1.

19 Tool creation however seems to be unjustified: “rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-in-activation, or their timid use”. Pech, L., Wójcik, A., 2018, “A Bad Workman Always Blames His Tools”: an Interview with Laurent Pech, *VerfBlog*, (<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>, 28. 5. 2018). R. Daniel Kelemen also makes this point rather forcefully, when he compares the EU to “a home repair DIYer who constantly goes to the hardware store to buy new tools, rather than actually getting started on projects with the tools he has”. He sees this phenomenon not only unnecessary, but as a cheap excuse for inaction. See UCL European Institute, 2020, Curing the Virus of Autocracy in Europe: Q+A with Daniel Kelemen, *UCL Europe Blog*, (<https://ucluropeblog.com/2020/12/07/curing-the-virus-of-autocracy-in-europe-qa-with-daniel-kelemen/>, 7. 12. 2020).

20 Pech, L., 2021, Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas, *RECONNECT Policy Brief*, pp. 8–11, ([https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21\\_update.pdf](https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf)).

21 Bárd, P., Śledzińska-Simon, A., 2019, Rule of Law Infringement Procedures – A Proposal to Extend the EU’s Rule of Law Toolbox, *CEPS Papers in Liberty and Security in Europe*, No. 9.

immediate halt to rule of law infringements that can culminate in serious and irreversible harm; and the CJEU shall automatically prioritize and accelerate infringement cases with a rule of law element. Also, the Commission could bundle cases, and point to the systemic nature of various problems.<sup>22</sup> Finally, in line with Article 260, once a violation of Article 2 TEU is determined by the CJEU, the Commission should closely scrutinise and carefully assess whether the Member State in question took the necessary measures to comply with the judgment, and if not, it should bring the case before the Court, specifying the amount of the lump sum or penalty payment to be paid by the Member State.

Also, several studies show at the power of the purse *vis-à-vis* rulers that engage in rule of law backsliding.<sup>23</sup> In line with Regulation (EU) No 1303/2013, the Commission could suspend European Structural and Investment Funds where a Member State does not uphold the rule of law.<sup>24</sup> The institutions could have made a more frequent use of the above law, but for future cases, now there is a more comprehensive conditionality regulation in force: a Regulation on the protection of the Union's budget in case of generalized rule of law deficiencies in the Member States, which may lead to suspend or reduce payments to that country from the EU budget and may prohibit to enter into new legal commitments (hereinafter: Conditionality Regulation).<sup>25</sup> According to the text adopted, rule of

- 22 Scheppele, K. L., Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures, in: Closa, C., Kochenov, D. (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP, p. 105.
- 23 Halmai, G., 2018, The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States, *EUI Department of Law Research Paper*, No. 6; Bugarič, B., 2014, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, *LEQS Paper*, No. 79; Closa, C., Kochenov, D., Weiler, J. H. H., 2014, Reinforcing Rule of Law Oversight in the European Union, *Robert Schuman Centre for Advanced Studies Research Paper*, No. 25.
- 24 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, *OJ L* 347, 20. 12. 2013, Article 142(1)(A). Butler, I., 2018, *Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs*, Civil Liberties Union for Europe, (<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>). Kelemen, R. D., Scheppele, K. L., 2018, How to Stop Funding Autocracy in the EU, *VerfBlog*, (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>), 10. 9. 2018).
- 25 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L* 4331, 22. 12. 2020, pp. 1–10.

law breaches will be sanctioned if they affect or seriously risk affecting the Union budget or EU's financial interests in a sufficiently direct way.<sup>26</sup> Several compromises led to the final version of the Regulation, but even so, once it entered into force, two Member States attacked it in front of the CJEU.<sup>27</sup> The European Parliament in a Resolution<sup>28</sup> emphasized that it is the duty of the Commission to ensure the application of the Treaties and other pieces of EU laws including the Conditionality Regulation, and that the Commission must “abide by law, *dura lex sed lex*”, and not wait for the outcome of the CJEU challenge before triggering the new instrument.<sup>29,30</sup> But the Commission failed to act, therefore the European Parliament ultimately filed an action against the Commission in line with Article 265 TFEU.<sup>31</sup> So again, even though the new instrument is promising in the medium term, its failure of its timely use shows an openness to give in to rule of law violators, and an unwillingness on behalf of at least certain institutions to make prompt use of a new instrument that was allegedly more needed than ever.

## 2. MUTUAL TRUST, MUTUAL RECOGNITION, AND JUDICIAL TESTS TO SUSPEND THEM

Rule of law decline, including violations of judicial independence have a particular effect on the relation between judges at the various levels of the EU's system of multi-level constitutionalism, especially on the cooperation between domestic courts in the area of freedom, security and justice (hereinafter: AFSJ). The principle of mutual trust assumes that, however different criminal and criminal procedural laws across EU member states are, all persons will get a fair trial by an independent judiciary complying with minimum standards of fundamental rights and procedural

26 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, EUCO 10/20, 21 July 2020.

27 CJEU, cases C-156/21, *Hungary v. Parliament and Council*, 26 March 2021, pending; C-157/21 *Hungary v. Parliament and Council*, 26 March 2021, pending.

28 European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP) OJ C 445, 29.10.2021, pp. 15–17.

29 *Ibid.*, point 6.

30 For an academic account of the reasons for which the Conditionality Regulation could be triggered see Scheppele, K. L., Kelemen, R. D., Morijn, J., 2021, *The EU Commission has to Cut Funding to Hungary: The Legal Case, Report*, Brussels, Greens/EFA Group, European Parliament, ([https://danielfreund.eu/wp-content/uploads/2021/07/220707\\_RoLCR\\_Report\\_digital.pdf](https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf), 7. 7. 2021).

31 CJEU, case C-657/21, *Parliament v. Commission*, lodged on 29 October 2021, pending.

guarantees at all times, wherever they are in the EU. This optimistic starting point is backed up by the mentioned black-letter law of Article 2 TEU, the text of the Charter of Fundamental Rights, a series of secondary laws on criminal procedure, and standards on detention conditions. But it has also been reconfirmed by the CJEU on multiple occasions.<sup>32</sup>

In Opinion 2/13<sup>33</sup> the CJEU reiterated how crucial mutual trust was; in fact it was deemed to be of such essential importance that it appeared as one of the reasons why EU accession to the ECHR was not warranted. The CJEU stated that EU Member States are required to presume that fundamental rights have been observed by other Member States, and trust may only be suspended in exceptional circumstances. This case-law is recurring in the CJEU's jurisprudence up to this day, as shown in the following.

### *Scene 1: Judicial “reform”*

In a series of cases in relation to the framework decision on the European Arrest Warrant,<sup>34</sup> which foresees a simplified and expedited extradition within the AFSJ, the CJEU insisted that mutual trust as such must not be suspended, until the sanctioning prong of Article 7 TEU has not been applied – something which has never happened in EU history. It allowed domestic courts however, to deny surrender requests on fundamental rights grounds on a case-by-case basis. First in *Aranyosi and Căldăraru* with regard to prison conditions,<sup>35</sup> later in the *LM* case with regard to the right to a fair trial,<sup>36</sup> the CJEU developed a test on how to proceed in cases where the executing authority has doubts as to fundamental rights in the issuing country. Accordingly, as a first step, the executing judicial authority must assess whether the issuing state suffers

---

32 Starting with Case, C-294/83, *Les Verts*, EU:C:1986:166, where the CJEU held that neither EU institutions nor the Member States are above the law. A whole new case-law emerged on judicial independence since the Case C-64/16 *Associação Sindical dos Juizes Portugueses* (Portuguese Judges) of 27 February 2018, EU:C:2018:117. For an excellent comprehensive summary see Pech, L., Kochenov, D., 2021, Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case, *SIEPS*, No. 3, ([https://www.sieps.se/globalassets/publikationer/2021/sieps-2021\\_3-eng-web.pdf](https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf)).

33 Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 192.

34 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L* 190, 18. 7. 2002, pp. 1–20.

35 Joined Cases C-404/15 and C-659/15 PPU – *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198, para. 81.

36 Case C-216/18 PPU *LM* Minister for Justice and Equality (Deficiencies in the system of justice), 25 July 2018, ECLI:EU:C:2018:586, para. 70.

from general deficiencies. When doing so, it must consider objective, reliable, specific and properly updated information. Once a systemic problem with regard to Article 2 TEU values is determined, judges have to move to the second, individual prong of the test, and the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, will be exposed to a real risk of a human rights violation.<sup>37</sup> This prong of the test is extremely burdensome for the individual, because it is close to impossible for them to prove how they would be affected by systemic problems in a Member State. We have long disagreed with the second prong of the test and suggested an alternative. “Once the first step of the test is satisfied, the onus should shift to the stronger party, *i.e.* the state accused of rule of law violations, in light of the bedrock of the principle of a fair trial [...]”<sup>38</sup> The insistence of the CJEU that the executing and issuing courts acquire engage in a ‘dialogue’ about the issuing state’s human rights situation may make sense with regard to prison conditions. But it is absurd to make a court engage in a discussion about its own independence.

### *Scene 2: The muzzle law*

In the meantime matters in Poland have gone from bad to worse since the judgment in *LM* had been rendered, even by the CJEU’s own account. Luxembourg denounced various elements of the Polish judicial ‘reforms’, from prematurely retiring judges to the muzzle law. In light of the latter, the International Legal Aid Chamber (IRK) of the Amsterdam District Court invited the CJEU to allow surrenders to be suspended in general, and not only on a case-by-case basis, given that the muzzle law is applicable to, and thus potentially has a chilling effect on every single judge in Poland. But in *Openbaar Ministerie*<sup>39</sup> the CJEU refused to distinguish the case in light of the new circumstances (the muzzle

37 See Ballegooij, W. van, Bárd, P., 2016, Mutual Recognition and Individual Rights, Did the Court Get It Right?, *New Journal of European Criminal Law*, Vol. 7, No. 4, pp. 439–464; Bárd, P., Ballegooij, W. van, 2018, Judicial Independence as a Pre-condition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*, *New Journal of European Criminal Law*, Vol. 9, No. 3, pp. 353–365.

38 Ballegooij, W. van, Bárd, P., 2018, The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU, *VerfBlog*, (<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, 29. 7. 2018). In detail see Bárd, P., Ballegooij, W. van, 2018, pp. 353–365.

39 Case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire émise)* *L and P*, 17 December 2020, ECLI:EU:C:2020:1033, para. 52.

law) and upheld the test it developed in *LM*. According to the judgment, systemic rule of law problems should still not automatically lead to the suspension of mutual trust in general. In the view of the CJEU, an opposite conclusion would contradict previous case-law which made general suspension of the Framework Decision on the European Arrest Warrant dependent on successfully invoking the sanctioning arm of Article 7 TEU.<sup>40</sup> According to the CJEU, systemic or generalised deficiencies concerning the independence of the judiciary of the issuing state, “does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case”.<sup>41</sup> Even in light of *LM* and *Openbaar Ministerie*, in theory, national courts retain a room of maneuver to refuse surrenders, but it is extremely difficult to prove the individual concern, especially in light of the fact that the primary source for determining such an individual concern is the very court, whose independence is in doubt.

*Scene 3: Questioning supremacy and an EU understanding of judicial independence*<sup>42</sup>

On 7 October 2021 the Polish Constitutional Court delivered its judgment in case K3/21, holding that the basic foundations of EU law, such as the principle of primacy of EU law over domestic laws, and the EU understanding of judicial independence, were contrary to the Polish Constitution.<sup>43</sup> On 24 November 2021 in case 6/21 it found Article 6(1) ECHR also incompatible with the Polish Constitution, at least “insofar as it comprises the European Court of Human Rights’ review of the legality of the process of electing judges to the Constitutional Tribunal”.<sup>44</sup> The judgments can only be understood as an attempt to constitutionally rubber-stamp the restructuring of the Polish judiciary, which severely undermines judicial independence. One may wonder what legal consequences can be attached to judgments of a court, which – or at least a panel of

---

40 *Ibid.*, para. 59.

41 *Ibid.*, paras. 41–42.

42 Arguments in this subchapter were presented in Bárd, P., Bodnar, A., 2021, The End of an Era. The Polish Constitutional Court’s judgment on the primacy of EU law and its effects on mutual trust, *CEPS Policy Insights*, No 15.

43 Polish Constitutional Court, judgment K3/21, 7 October 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

44 Polish Constitutional Court, judgment K6/21, 24 November 2021, (<https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojciem-sad-obejmuje-trybunal-konstytucyjny>).

which – had earlier been declared to be a non-court by the ECtHR.<sup>45</sup> But most importantly for our discussion, Polish Constitutional Court ruling made clearer than ever that the presumption of mutual trust *vis-a-vis* Poland is unjustified. Poland departed from the European understanding of the rule of law and judicial independence, and every single judge in the country is to follow this reading. The *LM* test is no longer viable; its second prong of checking whether an individual court or a specific judge was still independent in the anti-constitutional setting is meaningless. The era of case-by-case scrutiny of judicial independence in the individual cases should therefore be declared over. The CJEU will have ample opportunities to make this finding, as several domestic courts have pending preliminary references with regard to the *LM* test, by the Irish Supreme Court,<sup>46</sup> and the Amsterdam District Court.<sup>47</sup>

### 3. WHAT IS AT STAKE?

#### 3.1. CLASHES BETWEEN THE ECHR AND EU LAW

Thus far a scrupulous mutual respect characterised the relationship between the ECHR and EU law, dictated by the Strasbourg and Luxembourg courts. To give an objective picture, we should also highlight that the relation between the two courts was also burdened with envy about the jurisdictional divisions. As the judiciary of a relatively young organization in constant struggle with establishing legitimacy over its members having a much longer tradition and well-established sovereignty, the CJEU always insisted on autonomy of EU law and its self-proclaimed status as the final arbiter of this autonomous legal system. The EU system and its ultimate guardian, the CJEU are probably too recent creations and their sovereignty might be too weak to be subjected to external powers. What nation states can afford is seemingly not (yet) a tolerable external over-

45 ECtHR, *XERO FLOR w POLSCE sp. z o.o. v. Poland*, no. 4907/18, Judgment of 7 May 2021. For a concise summary see Grabowska-Moroz, B., 2021, Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v. Poland, *Strasbourg Observers*, (<https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/>, 15. 9. 2021).

46 CJEU, case C-480/21, Reference for a preliminary ruling from the Supreme Court (Ireland) made on 3 August 2021 – W O, J L v. Minister for Justice and Equality.

47 CJEU, case C-562/21 PPU, Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) made on 14 September 2021 – Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission); Case C-563/21 PPU, Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) made on 14 September 2021 – Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission).

view for the EU. Or at least this is one reading of Opinion 2/13 essentially vetoing EU accession to the ECHR. Other than that, the CJEU has always followed the Convention and the attached case-law in order to strengthen its legitimacy, and especially its legitimacy in human rights matters.

Formally, as a direct consequence of Opinion 2/13, the EU never acceded to the ECHR despite a legal obligation to do so enshrined in Article 6(2) TEU.<sup>48</sup> But Article 6(3) TEU states that the fundamental rights as they are enshrined in the ECHR are general principles of EU law. Article 52(3) of the Charter of Fundamental Rights also lays down relevant rules on the relation between the two legal systems: Charter rights that correspond to rights guaranteed under the ECHR shall be afforded at least the same meaning and scope as by the ECHR. The explanations to the Charter, extend this correspondence to the ECtHR case-law as well.<sup>49</sup> Even though the explanations are strictly speaking not binding, they must be given “due regard” by domestic and EU courts.<sup>50</sup>

Simultaneously, the ECtHR did everything not to enter into an open conflict with EU law. The heightened sensitivity on the ECtHR’s side can be explained by the soft enforcement mechanism of the Strasbourg system ultimately depending on the consensus of the contracting parties. The EU, *i.e.* the entity that was at least partially responsible for certain ECHR violations, is not a party to the Convention thus far and therefore could not be made directly liable for ECHR breaches. Instead, only Member States could be condemned, whereas in certain cases Member States find themselves between a rock and a hard place: being obliged to follow pieces of EU law and not having any room of manoeuvre to implement them. Had the Strasbourg court made Member States liable for complying with their EU law obligations, it would have engaged in a direct conflict with the Union. The Strasbourg court therefore instead, while ultimately upholding the theoretical possibility of making Member States liable for ECHR violations resulting exclusively from following their EU obligations, exercised deference in these instances. In order to justify that deference, the ECtHR came up with the *Bosphorus*-test.<sup>51</sup> For the past 15 years the ECtHR has presumed that ECHR obligations are not violated when Member States implement EU law, given that the protection of fundamental

---

48 Cf. CJEU, case *Åkerberg Fransson*, 7 May 2013, C-617/10, ECLI:EU:C:2013:105, para. 44: the ECHR “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.”

49 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Art. 52.

50 Art. 52(7) Charter; Art. 6(1) TEU.

51 ECtHR, *Bosphorus v. Ireland*, no. 45036/98, Judgment of 30 June 2006.

rights afforded by the EU was in principle equivalent to that of the Convention system.<sup>52</sup> Certain conditions need to be satisfied for the *Bosphorus*-presumption to kick in. First, it applies, if the Member State had no discretionary power under EU law when applying EU law. Secondly, the full potential of the EU's supervisory mechanism must have been exhausted, so that in essence the CJEU was given an opportunity to have a say on the human rights element of an EU law related controversy, before it reaches Strasbourg.

The *Bosphorus*-presumption is rebuttable, even if the threshold is high. The equivalency in human rights protection is rebutted only in the case of manifest deficiency. Despite the difficulty in reaching the manifest deficiency test, it starts showing its teeth in mutual recognition cases. In other words, the CJEU insistence on automatic recognition not paying due regard to human rights so long that the ECtHR had to step in, and do away with its cautiously guarded deferential stance.<sup>53</sup>

*Avotiņš v. Latvia*,<sup>54</sup> concerning the interpretation and application of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, was the first case where the ECtHR laid down important principles with regard to the relation between mutual recognition and the right to a fair trial. The ECHR acknowledged the importance of the principle of mutual recognition for the EU legal order, and came to the conclusion that the conditions for the *Bosphorus*-presumption to apply were met, but at the same time, it made clear that mutual trust must have its limits. The ECtHR was “mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. [...] Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67 § 1 of the TFEU.”<sup>55</sup> The ECtHR at this point made a reference to Opinion 2/13, where the CJEU held that when implementing EU law, Member States may be required to presume that fundamental

52 See in particular ECtHR, *Michaud v. France*, no. 12323/11, Judgment of 6 December 2012.

53 For the CJEU's engagement with the case law of the ECtHR in asylum cases and a comparison between clashes in asylum and criminal cases see the excellent assessment of Krommendijk, J., Vries, G. de, 2021, Do Luxembourg and Strasbourg Trust Each Other? The CJEU's engagement with the jurisprudence of the ECtHR in AFSJ cases concerning mutual trust since 2017, presented at the *ECPR General Conference*, 3 September, manuscript on file with the author.

54 ECtHR *Avotiņš v. Latvia*, no. 17502/07, Judgment of 23 May 2016.

55 *Avotiņš v. Latvia*, paras. 113–114.

rights have been observed by all other Member States, meaning that “save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.<sup>56</sup> Limiting fundamental rights review to exceptional cases, the ECtHR continued, “could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient.”<sup>57</sup> In *Avotiņš* the ECtHR thus made clear that the EU does not simply rubber-stamp Member States’ review of other Member States’ legal systems including a check of their fair trials guarantees. Instead Member States as contracting parties to the ECHR continue to be bound by Strasbourg standards and the ECtHR will review whether the fundamental rights review in intra-EU matters satisfied the expectations in the framework of the Council of Europe.

In later cases, albeit the ECtHR held that the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights,<sup>58</sup> with regard to fair trial rights, the ECtHR was satisfied with an executing state checking only whether a flagrant denial of a fair trial in the requesting country may occur, which is a rather high test.<sup>59</sup>

With regard to prison conditions, the ECtHR held – for the first time in history – that the *Bosphorus*-presumption was rebutted. In *Bivolaru and Moldovan v. France*<sup>60</sup> a Member State was condemned for not paying due regard to its ECHR obligations and violated Article 3 ECHR when surrendering the Applicant Moldovan to Romania, where there was a real risk of inadequate detention conditions.<sup>61</sup>

Should the CJEU push for a test that does not sufficiently ensure fair trials rights, and we have argued above that the *LM*-test is not compat-

---

56 Court of Justice of the European Union, Opinion 2/13, of 18 December 2014, ECLI:EU:C:2014:2454, para. 49.

57 *Avotiņš v. Latvia*, para. 114.

58 ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, Judgment of 9 July 2019, para. 24.

59 See the inadmissibility decision in ECtHR, *Stapleton v. Ireland*, no. 56588/07, Judgment of 4 May 2010, paras. 25–27; ECtHR, *Pirozzi v. Belgium*, no. 21055/11, Judgment of 17 April 2018, para. 71.

60 ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgment of 25 March 2021.

61 On the difference between the outcome of the cases of the two Applicants, which “can primarily be attributed to the thoroughness of the review conducted by the French court”, which was thorough *Bivolaru*, and insufficient in *Moldovan*. See Krommendijk, J., Vries, G. de, 2021.

ible with fundamental rights, more Strasbourg condemnations can be expected. Such a situation is even more likely to occur, since the Polish Constitutional Tribunal questions the supremacy principle, which will now have to be in theory followed by all ordinary courts. Placing member states between a rock and a hard place, where they are forced to choose between their EU law and ECHR obligations may lead to disregard and non-enforcement of Strasbourg judgments, which again – given the soft nature of the Strasbourg mechanism, which to a large extent depends on the voluntary compliance of states – may have devastating consequences for European human rights. Taking into consideration the potential damage done to the multi-layered European system of fundamental rights protection, mutual recognition-based laws must be suspended with regard to countries that are rule of law violators until values are restored.

### 3.2. EU FIRST PRINCIPLES *VERSUS* EU VALUES

In one way or another rule of law decline in one state destroys the very foundation of EU law. Some governments are packing their constitutional courts with judges loyal to the government, and at the same time cut back the powers of that very same court. In Hungary, institutional changes allow the violation of the independence of the judiciary, the nominating practices of the President of the Judicial Office, *ad hominem* legislation to fire and hire the Presidents of the Supreme Court, or the system of case allocation, which has a high risk of arbitrary assignment of cases. This will result in non-independent courts deciding cases including the ones with a cross-border element.<sup>62</sup> The threat of disciplinary proceedings will result in a climate of fear and self-censorship of judges who will not comply with their rights and sometimes even obligation to turn to the CJEU for clarification if the meaning of a certain piece of EU law is unclear, which will jeopardize “the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism.”<sup>63</sup>

62 Belov, M. (ed.), 2019, *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven International Publishing. See in particular the chapters by Tanasescu, S., 2019, Can Constitutional Courts Become Populist?; Gárdos-Orosz, F., 2019, Challenges to Constitutional Adjudication in Hungary after 2010 and Szente, Z., 2019, Subverting Judicial Independence in the New Authoritarian Regimes: Comparing Polish and Hungarian Judicial Reforms.

63 Case C-614/14, *Atanas Ognyanov*, 5 July 2016, ECLI:EU:C:2016:514, para. 25. See also Case C-8/19 PPU *RH* 12 February 2019, ECLI:EU:C:2019:110. However, in a similar case, *Miasto Łowicz* the CJEU declined to go into the merits and declared the reference to be inadmissible for the lack of necessity. According to the judgment the questions referred to the CJEU are of a general nature, and do not concern an

Once constitutional courts are captured, governments will make a strategic use of them so as to defend the autocratic constitutional order and any specific measure against any EU or national ‘resistance’. Captured courts can become very helpful from the autocrats’ viewpoint to fight off external criticism and intervention, especially that from the EU, and give a veneer of legality to any government policy destroying national checks and balances.<sup>64</sup> They may question the principle of primacy in general, like in the case of the Polish Constitutional Tribunal, or with regard to specific laws and CJEU judgments, as suggested by the Hungarian Minister of Justice in her motion to the Hungarian Constitutional Court.<sup>65</sup>

Whatever technique is used to destroy judicial independence, and whichever path captured courts take to justify and rubber stamp violations of the rule of law, the value decline and especially judicial capture, dissolves the trust that is the basis of mutual recognition-based instruments, thus the underlying idea behind a whole set of EU laws will vanish. Once a Member State’s judiciary suffers from systemic governmental attacks on judicial independence, mutual trust must be declared to be terminated, at least until the rule of law is restored. Such a declaration should preferably take place via political EU institutions. A negative assessment of the rule of law health status in a given member state (based for example of the Commission’s Annual Rule of Law Reports<sup>66</sup> or any other monitoring tool) should lead not only to sanctions, but also to the suspension of legal instruments based on the presumption that EU member countries adhere to Article 2 TEU values. Revoking trust and suspending mutual recognition-based legal instruments in general, even temporarily, is a drastic step, and so far EU institutions are apparently not prepared to take it – although such academic suggestions<sup>67</sup> have been taken over by political actors as

---

interpretation of EU law which would be needed for the resolution of the original disputes. Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, 26 March 2020, ECLI:EU:C:2020:234. See also CJEU, case C-564/19, *IS* (Illégalité de l’ordonnance de renvoi), Judgment of 23 November 2021, ECLI:EU:C:2021:949.

64 Bárd, P., Pech, L., 2019, How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The ‘Hungarian Model’, *RECONNECT Working Paper*, No. 4, (<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>).

65 See the motion of 25 February 2021, questioning the compatibility of the CJEU Case C-808/18 with the Hungarian Fundamental Law, (public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/\$FILE/X\_477\_0\_2021\_indítvány\_anonim.pdf).

66 2021 Rule of Law Report, ([https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en)).

67 Bárd, P., Śledzińska-Simon, A., 2019, p. 6.

well.<sup>68</sup> So, the CJEU is forced into performing the job political institutions should take accountability for. It is apparent from the above analysis and the CJEU's insistence on the *LM*-test that Luxembourg is unwilling to take over the role of other EU institutions – not least because of a fear that a declaration of total judicial capture in Poland would mean that all Polish courts are non-courts for the sake of EU law, and thus they would be deprived of sending preliminary references to the CJEU. This in turn does not sufficiently consider the devastating consequences of a systemic rule of law decline for the individual. In the absence of EU institutions' willingness to generally suspend trust, such a general suspension of mutual trust could be declared by member states' courts. This would risk the fragmentation of EU law, which is suboptimal, but still better than forcing national courts to perform the *LM* test on a case-by-case basis and – because of the difficulty of satisfying its second prong – potentially become complicit in individual rights violations, beyond creating a direct conflict with the ECHR as explained in the preceding chapter. In order to avoid any similar future debate about executing courts' powers to sufficiently consider human rights exception to mutual recognition-based instruments, the Framework Decision on the European Arrest Warrant should preferably be amended and any mutual recognition-based law adopted in the future should incorporate human rights as a ground for refusal. The Framework Decision on the European Investigation Order,<sup>69</sup> enabling the exchange of evidence and mutual legal assistance between EU member states' authorities, serves as a good practice in this regard, and should be mainstreamed. The European Investigation Order provides irrefutable proof that “[m]utual recognition and fundamental rights/proportionality exceptions are not a contradiction in terms. They can go like hands holding one another in the EU legal system.<sup>[70]</sup> [...] The EIO ‘benchmark’ in EU criminal justice cooperation should therefore be streamlined across the board of European legal acts in the same domain.”<sup>71</sup>

68 European Parliament, 2020, *Report on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, 29 September 2020, 2020/2072(INL), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Michal Šimečka.

69 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ L* 130, 1. 5. 2014, pp. 1–36.

70 Ballegooij, W. van, 2015, *The Nature of Mutual Recognition in European Law: Reexamining the Notion from an Individual Rights Perspective with a View to its Further Development in the Criminal Justice Area*, Maastricht, Intersentia.

71 Carrera, S., Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach in: Bárd, P., 2015, *The European Arrest Warrant in Hungary*, Budapest, OKRI, p. 133.

#### 4. CONCLUSION

Rule of law is a value *per se*, and is thus worthy of protection. But beyond that, a state's departure from European consensus on rule of law standards will have additional detrimental consequences for EU law specifically. If Members of the European Parliament were voted in unfairly in a country where elections are not clean and where voters have no access to information to make informed choices, this will delegitimize the EU's decision-making mechanism and all legal instruments adopted. Another problem occurs when rule of law violations are becoming contagious, which will inevitably happen if EU institutions and democratic Member States fail to respond to backsliding. Furthermore, once the values of Article 2 TEU are not respected, the essential presumptions behind the core of the Union do not hold any more. The single market and an investment-friendly environment may equally be jeopardized. But as shown on the above pages, the effects of rule of law backsliding, attacks on judicial independence and the related decline in fundamental rights will most prominently result in negative consequences in the field of cross-border judicial cooperation in criminal matters. Criminal cases are canaries in the coal mine,<sup>72</sup> where the consequences of rule of law backsliding show first: rebuttal of the presumption of trust in criminal cases will have inevitable consequences for individual rights. Due to the nature of criminal law, recognition of judgments rendered by non-independent courts will automatically result in a Member State becoming complicit in fair trial rights violations of the suspect. This again will lead to condemnations by the Strasbourg court, not only of the state of the captured court trying someone, or the state not ensuring prison conditions in line with the prohibition of inhuman treatment and punishment, but also the executing state cooperating with human rights violators. In order to prevent Strasbourg judgments holding Member States responsible for violating the ECHR and in general becoming complicit in human rights violations, democratic states' courts may resist EU law obligations flowing from mutual recognition based laws, and thereby question not only mutual trust, but also the primacy of EU law on fundamental rights grounds. Therefore, it is of existential importance for the EU to reconcile values with First Principles, or in other words, attach consequences to values deficiencies for the domain of mutual recognition-based law, and openly acknowledge the end of the era of mutual trust and suspend mutual recognition-based laws *vis-à-vis* countries violating Article 2 TEU values, until the rule of law is restored.

---

72 I am grateful to R. Daniel Kelemen for making this point when cooperating in relation to an actual surrender case. See also Kelemen, R. D., 2019, Is differentiation possible in rule of law?, *Comparative European Politics*, Vol. 17, pp. 246–260.

## BIBLIOGRAPHY

1. Ballegooij, W. van, Bárd, P., 2016, Mutual Recognition and Individual Rights, Did the Court Get It Right?, *New Journal of European Criminal Law*, Vol. 7, No. 4.
2. Ballegooij, W. van, 2015, *The Nature of Mutual Recognition in European Law: Re-examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area*, Maastricht, Intersentia.
3. Bárd, P., Bodnar, A., 2021, The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust, *CEPS Policy Insights*, 15.
4. Bárd, P., Śledzińska-Simon, A., 2019, Rule of Law Infringement Procedures – A Proposal to Extend the EU's Rule of Law Toolbox, *CEPS Papers in Liberty and Security in Europe*, 9.
5. Bárd, P., Ballegooij, W. van, 2018, Judicial Independence as a Pre-condition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*, *New Journal of European Criminal Law*, Vol. 9, No. 3.
6. Bárd, P. et. al., 2016, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels, CEPS.
7. Bayer, J. et. al., 2019, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States*, Brussels, European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs.
8. Belov, M. (ed.), *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven International Publishing.
9. Bugarić, B., 2014, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, *LEQS Paper*, 79.
10. Carrera, S., Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach in: Bárd, P., 2015, *The European Arrest Warrant in Hungary*, Budapest, OKRI.
11. Carrera, S., Guild, E., Hernanz, N., 2013, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, Brussels, CEPS.
12. Closa, C., Kochenov, D., Weiler, J. H. H., 2014, Reinforcing Rule of Law Oversight in the European Union, *Robert Schuman Centre for Advanced Studies Research Paper*, 25.
13. Halmai, G., 2018, The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States, *EUI Department of Law Research Paper*, 6.
14. Hassemer, W., 2004, Strafrecht in einem europäischen Verfassungsvertrag, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 116, No. 2.
15. Kelemen, R. D., 2019, Is Differentiation Possible in Rule of Law?, *Comparative European Politics*, Vol. 17, pp. 246–260.
16. Koncewicz, T. T., The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First Principles in: Szczepanowska-Kozłowska, K. (ed.), 2020, *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin*, Warsaw, C. H. Beck.

17. Krommendijk J., Vries, G. de, 2021, Do Luxembourg and Strasbourg Trust Each Other? The CJEU's engagement with the jurisprudence of the ECtHR in AFSJ cases concerning mutual trust since 2017, presented at the *ECPR General Conference*, 3 September.
18. Müller, J-W., 2015, Should the EU Protect Democracy and the Rule of Law inside Member States, *European Law Journal*, Vol. 21, No. 2.
19. Pech, L. *et al.*, 2019, Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid. RECONNECT – *Reconciling Europe with its Citizens through Democracy and Rule of Law*, Reflection Paper No. 1.
20. Pech, L., Scheppele, K. L., 2017, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, Vol. 19.
21. Scheppele, K. L., Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures, in: Closa, C., Kochenov, D. (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP.
22. Sikk, A., 2020, *BTI 2020, Trouble at the Top, Regional Report East-Central and Southeast Europe*, Gütersloh, Bertelsman Stiftung.
23. V-Dem Institute, 2020, *Autocratization Surges—Resistance Grows, V-Dem Annual Democracy Report*, Gothenburg, V-Dem Institute.

## LEGAL ACTS

1. Treaty on the European Union, OJ C 326, 26.10.2012, pp. 47–390.
2. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
3. European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP) OJ C 445, 29.10.2021, pp. 15–17.
4. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433L, 22. 12. 2020, pp. 1–10.
5. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1. 5. 2014, pp. 1–36.
6. Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20. 12. 2013.
7. 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18. 7. 2002, pp. 1–20.

## CASE LAW

1. ECtHR, *XERO FLOR w POLSCE sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.
2. ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgment of 25 March 2021.
3. ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, Judgment of 9 July 2019.
4. ECtHR, *Pirozzi v. Belgium*, no. 21055/11, Judgment of 17 April 2018.
5. ECtHR *Avotiņš v. Latvia*, no. 17502/07, Judgment of 23 May 2016.
6. ECtHR, *Michaud v. France*, no. 12323/11, Judgment of 6 December 2012.
7. ECtHR, *Stapleton v. Ireland*, no. 56588/07, Judgment of 4 May 2010.
8. ECtHR, *Bosphorus v. Ireland*, no. 45036/98, Judgment of 30 June 2006.
9. CJEU, case C-657/21, *Parliament v. Commission*, pending.
10. CJEU, case C-204/21, *Commission v. Poland*, pending.
11. CJEU, case C-156/21, *Hungary v. Parliament and Council*, 26 March 2021, pending.
12. CJEU, case C-157/21 *Hungary v. Parliament and Council*, 26 March 2021, pending.
13. CJEU, case C-791/19, *Commission v. Poland* (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596.
14. CJEU, case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire émission) L and P*, 17 December 2020, ECLI:EU:C:2020:1033.
15. CJEU, case C-66/18, *Commission v. Hungary* (Higher Education), 6 October 2020, ECLI:EU:C:2020:792.
16. CJEU, joined cases C-558/18 and C-563/18 *Miasto Łowicz*, 26 March 2020, ECLI:EU:C:2020:234.
17. CJEU, case C-8/19 PPU *RH*, 12 February 2019, ECLI:EU:C:2019:110.
18. CJEU, case C-216/18 PPU *LM Minister for Justice and Equality* (Deficiencies in the system of justice), 25 July 2018, ECLI:EU:C:2018:586.
19. CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses* (Portuguese Judges) 27 February 2018, EU:C:2018:117.
20. CJEU, case C-614/14, *Atanas Ognyanov*, 5 July 2016, ECLI:EU:C:2016:514.
21. CJEU, joined cases C-404/15 and C-659/15 PPU – *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198.
22. CJEU, case *Åkerberg Fransson*, 7 May 2013, C-617/10, ECLI:EU:C:2013:105.
23. CJEU, case C-294/83, *Les Verts*, 23 April 1986, EU:C:1986:166.
24. Hungarian Constitutional Court, motion of 25 February 2021, pending, public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/\$-FILE/X\_477\_0\_2021\_inditvány\_anonim.pdf.
25. Polish Constitutional Court, judgment K6/21, 24 November 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>.
26. Polish Constitutional Court, judgment K3/21, 7 October 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

## INTERNET SOURCES

1. 2021 Rule of Law Report, ([https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en), last visited: 19. 11. 2021).
2. Ballegooij, W. van, Bárd, P., 2018, The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU, *VerfBlog*, (<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, last visited: 19. 11. 2021).
3. Bárd, P., 2021, The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS, *VerfBlog*, (<https://verfassungsblog.de/the-sanctity-of-preliminary-references/>, 26. 11. 2021).
4. Bárd, P., Pech, L., 2019, How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The ‘Hungarian Model’, *RECONNECT Working Paper*, No. 4, (<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>, last visited: 19. 11. 2021).
5. BTI 2020 Infographics, (<https://www.bti-project.org/en/press.html>, last visited: 19. 11. 2021).
6. BTI, The Transformation Index, (<https://www.bti-project.org/en/home.html?&cb=00000>, last visited: 19. 11. 2021).
7. Butler, I., 2018, *Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework: Conditionality of EU funds and a Financial Instrument to Support NGOs*, Civil Liberties Union for Europe, (<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>, last visited: 19. 11. 2021).
8. Freedom House, (<https://freedomhouse.org/countries/freedom-world/scores>, 19. 11. 2021, last visited: 19. 11. 2021).
9. Grabowska-Moroz, B., 2021, Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v. Poland, *Strasbourg Observers*, (<https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/>, last visited: 19. 11. 2021).
10. Kelemen, R. D., Scheppele, K. L., 2018, How to Stop Funding Autocracy in the EU, *VerfBlog*, (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>, last visited: 19. 11. 2021).
11. Makszimov, V., 2011, Hungary Drops in Freedom House report, *Euractiv*, ([https://www.euractiv.com/section/politics/short\\_news/hungary-drops-in-freedom-house-report/](https://www.euractiv.com/section/politics/short_news/hungary-drops-in-freedom-house-report/), last visited: 19. 11. 2021).
12. Pech, L., 2021, Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas, *RECONNECT Policy Brief*, ([https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21\\_update.pdf](https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf), last visited: 19. 11. 2021).
13. Pech, L., Kochenov, D., 2021, Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the

- Portuguese Judges Case, *SIEPS*, No. 3, ([https://www.sieps.se/globalassets/publikationer/2021/sieps-2021\\_3-eng-web.pdf?](https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf?), last visited: 19. 11. 2021).
14. Pech, L., Wójcik, A., 2018, “A Bad Workman Always Blames His Tools”: an Interview with Laurent Pech, *VerfBlog*, (<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>, last visited: 19. 11. 2021).
  15. Scheppele, K. L., Kelemen, R. D., Morijn, J., 2021, *The EU Commission has to Cut Funding to Hungary: The Legal Case, Report*, Brussels, Greens/EFA Group, European Parliament, ([https://danielfreund.eu/wp-content/uploads/2021/07/220707\\_RoLCR\\_Report\\_digital.pdf](https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf), last visited: 19. 11. 2021).
  16. The speech by Michael Ignatieff, Professor and then Rector and President of the Central European University chased out of Hungary by the government in the middle of the legal and political turmoil around the university’s presence in the country, ([https://www.youtube.com/watch?v=FoMd\\_Bxn5rg&feature=youtu.be&fbclid=IwAR2uHR\\_3m4w5DbB1ndIBRbvYHfHT\\_eIB9\\_V9kaaXvfi7\\_X16d-DYclajnDEg](https://www.youtube.com/watch?v=FoMd_Bxn5rg&feature=youtu.be&fbclid=IwAR2uHR_3m4w5DbB1ndIBRbvYHfHT_eIB9_V9kaaXvfi7_X16d-DYclajnDEg), last visited: 19. 11. 2021).
  17. UCL European Institute, 2020, Curing the virus of autocracy in Europe: Q+A with Daniel Kelemen, *UCL Europe Blog*, <https://ucluropeblog.com/2020/12/07/curing-the-virus-of-autocracy-in-europe-qa-with-daniel-kelemen/>, last visited: 19. 11. 2021).
  18. V-Dem Institute, (<https://www.v-dem.net/en/>, last visited: 19. 11. 2021).
  19. Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő), (<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>, last visited: 19. 11. 2021).
  20. WJP Rule of Law Index 2020, (<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>, last visited: 19. 11. 2021).

## KANARINCI U RUDNIKU UGLJA: URUŠAVANJE VLADAVINE PRAVA I UZAJAMNO POVERENJE

Petra Bárd

APSTRAKT

Urušavanje vrednosti u Evropskoj uniji ima višestruke posledice. Ono ugrožava samu suštinu Evrope kao zajednice vrednosti. Istovremeno, ono ugrožava i pravna načela kao što je uzajamno priznavanje sudskih odluka zasnovano na uzajamnom poverenju koje počiva na pretpostavci da sve države članice pružaju zaštitu vladavini prava i osnovnih sloboda. Jednom kada se to poverenje naruši, pravosudni organi država članica počće da odbijaju da saraduju i uzajamno priznaju presude, kako ne bi postali saučesnici u kršenju individualnih prava i kako ne bi povredili Evropsku konvenciju za zaštitu ljudskih prava i osnovnih sloboda. Ovaj rad zastupa stav da pravo EU mora da dozvoli takav razvoj događaja i omogućí suspenziju

pretpostavke uzajamnog poverenja ne samo u pojedinačnim slučajevima, kao što se danas dešava u praksi, već uopšte kada su u pitanju države članice u kojim je urušen sistem vladavine prava, kako bi se dala podrška kulturi zaštite osnovnih prava EU i ekvivalentnosti prava EU sa režimom ljudskih prava iz navedene konvencije.

**Ključne reči:** vladavina prava, nezavisnost sudstva, ljudska prava, prava na pravično suđenje, uzajamno poverenje, uzajamno priznavanje, pravo EU, evropski nalog za hapšenje, Evropska konvencija o ljudskim pravima, „Bosforska pretpostavka”.

Article History:

Received: 21 November 2021

Accepted: 6 December 2021

*Dragoljub Popović\**

## CONSTITUTIONAL DESIGN AND DESTINY OF THE STATES: THE WEIMAR CONSTITUTION AND THE ST VITUS DAY CONSTITUTION IN COMPARATIVE PERSPECTIVE

***Abstract:** The Weimar Constitution of 1919 and the St Vitus Day Constitution of 1921 were quite different in many aspects. Their comparison is nevertheless of interest not only because it shows some influences of the older one to the younger, but also for the fact that it displays the line of developments of the two countries – Germany and Yugoslavia. If considered from the standpoint of parliamentary government, territorial organization of the two states and some other features the analysis of the respective constitutional developments leads to several conclusions. The two constitutions had their initial shortcomings, but those did not belong to the same area of constitutional law. In Germany they concerned the horizontal separation of powers, whereas in Yugoslavia they belonged to the vertical division of power. Both constitutions under survey ended up in dictatorships. In both countries, attempts were made in the course of history to remedy the initial shortcomings or constructive errors of the two constitutions. In Germany such attempts were successful, which on the contrary was not the case in Yugoslavia. Germany therefore became a well-functioning liberal democracy, while Yugoslavia failed and disappeared.*

**Key words:** Constitution, Weimar, St Vitus Day, Germany, Yugoslavia, comparison, developments.

### 1. INTRODUCTION: THE ROLE OF CONSTITUTIONAL DESIGN

Constitutional designs are most certainly influential on the destiny of states. Whether they are always decisive can be however doubtful. The purpose of this little study will therefore be to explore how and to what extent the constitutional designs determined the political and constitutional history of two countries – Germany and Yugoslavia. Some elements

---

\* A former Judge of the European Court of Human Rights, Professor of Law (retired), Union University Law School Belgrade; e-mail: dragoljubpopovic@aol.com

of the constitutional settlements were considered by the academics to be constructive errors and assessed accordingly. In both countries there were efforts to overcome such errors in construction.

It may seem at first glance that the two constitutions adopted after World War I in the two countries were completely different and quite remote in many important aspects. Their differences were indeed profound, but the two constitution texts had nevertheless significant traits in common and showed influences of the older, German text, on the younger. This paper will deal with the issue of construction errors in the two constitutional designs, as well as with the efforts to repair the constitutional edifice in the respective states. Those errors and attempts to overcome them marked the political developments and the constitutional history of the two countries, leading to divergent outcomes. The topic is going to be researched in the light of the most recent scholarship, however integrated with the conclusions of classical academic contributions in the field.

## 2. DIFFERENCES AND INFLUENCES

The Constitution of the German Reich of 11 August 1919, called the Weimar Constitution after the city of its adoption, and the Constitution of the Kingdom of the Serbs, Croats and Slovenes, adopted on St Vitus Day, 28 June 1921 and therefore usually known as the St Vitus Day Constitution are marked by striking differences.<sup>1</sup> The Weimar Constitution instituted a republic, whereas the St Vitus Day Constitution provided for a monarchy. The former was passed in a country which had existed in its unified form of modern time for almost half a century, while the latter was a constitution of a new born state, created only towards the end of 1918.

Despite these profound differences of the two constitutions there were provisions evidencing the influence of the German constitution text on the drafters of the other constitution. Such an example are the provisions on fundamental rights, which find place in articles 109–165 WR, corresponding to the articles 22–44 VU. For instance, Article 153 WR can be compared to Article 37 VU. Both provide on constitutional guarantees of property. The beginning of Article 153 WR reads, “Property shall be guaranteed by the constitution.”<sup>2</sup> This corresponds to the introductory stance

---

1 WR will be used as the abbreviation for the Weimar Constitution (Weimarer Reichsverfassung) and VU for the Constitution of St Vitus Day (Vidovdanski Ustav).

2 The *Weimar Constitution* – Constitution of the German Reich, German National Assembly, translated by Howard Lee McBain and Lindsay Rogers ([https://en.wikisource.org/wiki/Weimar\\_constitution](https://en.wikisource.org/wiki/Weimar_constitution), 1. 10. 2021).

of Article 37 VU: “Svojina je zajamčena.”<sup>3</sup> The provisions are concordant in putting forward two more ideas, namely that the property imposes obligations, as well as that its nature and limits shall be prescribed by law.

Another example of immediate influence of the older constitution text on the younger concerns the protection of labour. “Labour shall be under the special protection of the Reich”, reads Article 157 WR to which corresponds the beginning of Article 23 VU: “Radna snaga stoji pod zaštitom države”. Including this among the provisions on fundamental rights was a novelty. Serbian constitutions of the nineteenth and the beginning of the twentieth century had never had such a guarantee. Its introduction in the constitution of the newly born kingdom, of which Serbia was a part, brings evidence of an immediate influence of the Weimar Constitution on the Constitution of St Vitus Day.

Between the two extremes, clear differences on one side and immediate influences on the other, the two constitutions have features in parallel which call for comparison. This paper will focus on such comparable aspects that are of primordial interest for constitutional developments of the Kingdom of the Serbs, Croats and Slovenes which changed its name into Yugoslavia as of 1929. These aspects encompass the topics of nation and tribes (2), parliamentary government (3), territorial organization of the state (4), and last but not least the destiny of the two constitutions (5). The analysis to follow will display how the destiny of the two constitutions mirrors the destiny of the respective countries in which the constitutions were adopted. One of them managed to overcome the constitutional constructive errors, so as to become a prosperous liberal democracy, while the other failed and disappeared.

### 3. NATION AND TRIBES

The Weimar Constitution had a short preamble, beginning with the words “Das Deutsche Volk einig in Seinen Stämmen”. Translating into English McBain and Rogers avoided the word “Stämmen”, meaning literally tribes, so as to put “The German people united in every respect”. For the purpose of this paper the German original is of greatest interest, because it has a parallel if not in the text then certainly in the set of ideas guiding the St Vitus Day Constitution. Notably, at the time of adopting the constitution back in 1921 the Serbs, Croats and Slovenes were considered to be three tribes of one and the same nation, which strangely enough

3 Unless otherwise noted all translations in this text stem from its author. The Serbo-Croatian wording is almost a translation from the German original, which reads, “Das Eigentum wird von der Verfassung gewährleistet.”

remained without a name. The formula used by politicians, intellectuals and the public at large designated the nation as one but having three names. The expression “troimeni narod” was currently in use, which would correspond in a somewhat clumsy translation to a “three named nation” in English. The St Vitus Day Constitution was based on the assumption prevailing in the Constituent Assembly that the Serbs, Croats and Slovenes were three tribes of one and the same nation. The Constituent Assembly was indeed divided on the idea of nationhood and of giving a name to the nation and its nation state. Some of its members were in favour of creating a name, like Yugoslavs and respectively Yugoslavia for the country. Others however prevailed in their opposition to this approach considering it artificial, which resulted in the official name of the new state – Kingdom of the Serbs, Croats and Slovenes.<sup>4</sup>

Behind the problem of the country’s name stood the leading concept of international law after World War I, advocated by President Wilson, which put forward self-determination of the people. That was the general idea of the German constitution preamble – the German people, determined to restore and confirm the Reich, has given itself a democratic constitution. It has nevertheless been remarked in academia that the Wilsonian program was not thoroughly carried out, notably to the detriment of Germany.<sup>5</sup> Despite certain inconsistency in its application the self-determination of the people was a concept which was widely accepted and represented a rule to be followed.

The St Vitus Day Constitution didn’t have a preamble. The royal prerogative balanced the right of the people in a monarchy, but in spite of that the constitution was also laid down on the concept of self-determination of the people. The designed nation without a name was united by the provisions of the constitution as regards the symbols and the language. Article 2 VU provided for the symbols of the Kingdom that were composed of the ethnic symbols of the three ethnicities, whereas Article 3 VU designated the official language as Serbo-Croato-Slovene. In reality there was no such language, but the formula seemed convenient to the drafters of the constitution. The Serbs and the Croats spoke the same language, but that was by no means the case of Slovenes.<sup>6</sup> The expression was introduced to satisfy the desired national unity.

---

4 Jovanović, S., 1995, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca*, Beograd, pp. 89–90 (the first edition of the book appeared in 1924).

5 Kühne, J.-D., 2020, *Die Weimarer Reichsverfassung im Spiegel zeitgenössischer Betrachtung*, Baden-Baden, p. 20.

6 Jovanović, S., 1995, pp. 90–91; Pavlović, M., 2000, *Jugoslovenska država i pravo 1914–1941*, Kragujevac, p. 157. For the roots of the idea of a three named nation cf.

It has been remarked among scholars that the preamble of the Weimar Constitution was “a table of contents and not a program”.<sup>7</sup> According to the preamble the German nation adopted a constitution based on liberty and justice. However, the German national unity was not completely undisputed in the time of adopting the Weimar Constitution. It has been remarked in academia that Berlin, as a world metropole, was confronted with the population which had lived in separate German states for generations, so as to acquire regional, cultural and religious characteristic features.<sup>8</sup> Some scholars insisted on the wording of the preamble to the Weimar Constitution that the German people were united in their tribes – “einig in Seinen Stämmen”, which would mean that the unification process had not been fully completed and the unity fully achieved.<sup>9</sup>

In the case of St Vitus Day Constitution, the situation was more complex than in Germany. The three ethnicities that took a decision to form a common state were considered to be on the path of nation building. It was indeed a program, or design. “Merging of Serbs and Yugoslavs has just started, so that we shan’t be able to realize before the elapse of a good number of years whether the process of assimilation will end up in a victory of the Serbdom, or in its fusion with Croatianness and Slovenianness in Yugoslavism.” Those were the words of Slobodan Jovanović, constitutional lawyer and historian.<sup>10</sup> They fairly bring evidence of the state of mind in the social situation of the newly created state in the 1920s.

The unification of Germany of 1870 was a product of political events and a war, but it was laid down on the prevailing cultural identity and the language, common for all Germans. It was rooted in history, literature, sentiments and memory of the common past, despite significant regional differences and political frontiers that were crossing the German lands. The Serbs, Croats and Slovenes lacked many of these elements. Their history was not one and the same, their developments were divergent, especially for the Slovenes. To some extent the Croats and the Serbs had common sentiments and popular literature, as well as the memory of living together in some parts of the Habsburg Monarchy. They speak the same language, however different from the Slovene. Nation building of Southern Slavs was a noble idea, mostly spread among intellectuals, be-

Trgovčević, Lj., 2005, *Serbien und die südslawische Frage bis zur Entstehung des Königreichs der Serben, Kroaten und Slowenen (SHS)*, *Österreichische Osthefte* 47/1–4, pp. 20–21.

7 Wittmayer, L., 2014, *Die Weimarer Reichsverfassung*, Nexx Verlag, p. 40 (the book was first published in 1922).

8 Fabio, U. di, 2018, *Die Weimarer Verfassung – Aufbruch und Scheitern*, München, p. 88.

9 Wittmayer, L., 2014, pp. 102–103 with reference to Poetzsch.

10 Jovanović, S., 1995, p. 39.

ginning with the first half of the nineteenth century. Those were elements providing optimism for a construction of a nation of Yugoslavs. What the optimistic attitude towards Yugoslavism failed to observe at the time of formation of the Kingdom of the Serbs, Croats and Slovenes was the fact that the nation building had already taken place within each of the three ethnicities. The idea of a Yugoslav nation was somewhat belated and belonged to the set of ideas of the nineteenth century.<sup>11</sup>

The politicians and constitution drafters were driven by circumstances. Each of the three ethnicities had a certain interest in forming the state in common with the other two. The Serbs tended to achieve a situation in which all Serbs would live in one country and therefore wanted a union with the former provinces of Austria-Hungary. The Slovenes and the Croats feared Italian territorial aspirations because the territories they inhabited belonged to Austria-Hungary, a country that lost the war against the allies, one of which was Italy. That was what made them prefer a union with Serbia, a country which was on the winning side in World War One, instead of remaining alone to claim self-determination of their own. In such a kaleidoscope of trends, tensions, desires, sentiments and intentions the idea of unity and nation building managed to prevail, however by a modest margin in the Constituent Assembly. It had to be forged through the institutions of St Vitus Day Constitution. The kernel of those institutions was the parliamentary government.

#### 4. PARLIAMENTARY GOVERNMENT

The parliamentary form of government was adopted in both constitutions discussed in this paper, notably with considerable distinctions. The German Reich was a republic, while the Kingdom of the Serbs, Croats and Slovenes was a monarchy. These circumstances affected the mechanisms of parliamentary government in the two countries. However, it was not the only point of distinction. The Weimar Constitution provided for the organization of power which stood between the presidential and parliamentary forms of government.<sup>12</sup> Only the latter will be of interest here.

The parliamentary government of the Weimar Constitution has to some extent a parallel in the form of government of St Vitus Day Constitution. The main element of similarity is the one chamber parliament. This calls for explanation and analysis of the relevant provisions of the Weimar Constitution. Article 20 WR provides for Reichstag, “composed

---

11 Trgovčević, Lj., 2005, p. 230.

12 Fabio, U. di, 2018, p. 17.

of the representatives of the German people”, while Article 60 WR reads, “A Reichsrat shall be established to represent the German states in national legislation and administration”. The two provisions taken together give the impression of a two-chamber parliament of a federation. The impression is nevertheless incorrect, because the Weimar Constitution did not introduce a federal settlement. The German provinces (Länder) did not participate as such in the decision-making process at the level of the Reich.<sup>13</sup> For traditional reasons the historical provinces were maintained, but they lacked the status of federated states. The system that was in place under the Weimar Constitution has been described in academia as unitary, or unitarist federation.<sup>14</sup> The legislative power was vested in the Reichstag alone. Reichsrat was not a chamber of parliament and its assent in the legislative procedure was required out of courtesy.<sup>15</sup>

The St Vitus Day Constitution provided for one chamber legislative body – the National Assembly. Such a settlement was the outcome of the principal stance of the majority in the Constituent Assembly, formed by two political parties – the radicals and the democrats. Both parties had mostly Serbs as supporters. However, entrenching the issue of the organization of power was closely connected to the territorial organization of the state. Remarkably, some of the draft constitutions prepared by parties other than radicals and democrats, as well as by some individuals, envisaged a two-chamber legislative body. That was mostly, but not exclusively, the case of the drafts produced by the parties that enjoyed support among the Croats and Slovenes. Notably the draft made by Stojan Protić, a prominent radical and the first prime minister of the new kingdom, also provided for a two-chamber parliament. Protić was inspired by the Belgian constitution.<sup>16</sup> The reason which guided the majority in the Constituent Assembly of the Kingdom of the Serbs, Croats, and Slovenes to adopt the concept of unitary state was essentially the same as the one of the founding fathers of the Weimar Constitution. It was the fear of separatism, which may threaten to destroy not only a certain constitutional settlement, but also the state itself. The idea of nation state appeared to be embodied in unitarism, hostile to subnational identities.

13 Wittmayer, L., 2014, pp. 138, 142–146.

14 Cf. for unitary state (Einheitsstaat) Menger, C. F., 1990, *Deutsche Verfassungsgeschichte der Neuzeit*, Heidelberg, p. 169; for unitaristic federation (unitarischer Föderalismus) Kühne, J.-D., 2020, p. 24.

15 Wittmayer, L., 2014, p. 326 with reference to Preuss, the father of the constitution, that the system was unicameral; and p. 328 for the assent out of courtesy.

16 See Jovanović, S., 1995, pp. 72–81 and Pavlović, M., 2000, pp. 132–144 for constitution drafts in general; and Pavlović, M., 2000, p. 134 for the Belgian constitution as a source of inspiration.

## 5. TERRITORIAL ORGANIZATION OF STATE

### 5.1. THE REICH AND THE STATES

While the provisions on parliamentary form of government stand in parallel because of the existence of one chamber parliaments in both constitutions, the differences arise as regards the territorial organizations of the two countries. The place of the provisions on the territorial organization of the Reich creates the difference already at first glance. Those provisions are at the beginning of the text of the constitution, in articles 1–19 WR, under the title “The Reich and the States”. Once again, the impression is that the Reich is a federation. The Reich’s power to legislate is regulated by enumeration in Article 7 WR. Since there is national legislation and the one of the states Article 13 WR provides that “national laws are superior to the laws of the states”. The alteration of state boundaries could occur according to Article 18 WR only “by virtue of national law modifying the constitution”.

However, Article 15 WR provided that the national government was competent to supervise the execution of national laws and to provide guidelines in that regard. In case of a dispute between the national and state authorities concerning execution of national laws (Art. 15 WR), as well as in case of constitutional controversies (Art. 19 WR) the final decision was with the courts of law. Many elements of the constitutional settlement regarding relations between the Reich and the states were indeed federalist in nature. It was mostly out of fear of dissolution of the country, and in order to suppress separatism that the constitution drafters adopted the concept of unitary state. As remarked in academia, under the Weimar Constitution Germany was not properly unitary, but rather a unitarist federation.<sup>17</sup>

### 5.2. FROM THIRTY THREE UNITS TO NINE AND BEYOND

If compared to the title devoted to the Reich and the states the provisions on territorial units in St Vitus Day Constitution displayed a striking difference. These provisions found their place in Articles 95 to 101 VU, which fell within the title regulating the administrative power. Article 95.1 read, “The administration of the Kingdom shall be carried out in regions, districts, counties and municipalities.” The same article of the constitution provided that a region could not have more than 800.000 inhabitants, and also that the division of the country into regions should apply according to natural, social and economic circumstances.

---

17 Kühne, J-D., 2020, p. 24.

The formation of regions should have applied by law. However, among transitory provisions of St Vitus Day Constitution there was Article 135 VU which included a deadline for the adoption of the respective statute. It also provided for the situation in which the government and the parliament could not meet the deadline. In the latter case there were some limits for the government. Should the government fail to introduce a bill on the formation of regions within four months from the adoption of the constitution and the parliament would not be able to legislate in three months from the introduction of the bill the government was entitled to pass a decree on the issue. However, in that case certain restrictions were to apply. To expose on the restrictions Article 135 VU included the names of traditional territories of which the new Kingdom was composed: (1) In Croatia and Slovenia four regions shall be formed; (2) Montenegro in its boundaries of 1913 including the county of Boka Kotorska, but excluding the counties of Pljevlja and Bijelo Polje shall be one region; and (3) Bosnia and Herzegovina shall be divided into regions within the existing boundaries (“u svojim sadašnjim granicama”). The deadline posed by Article 135 VU was not met and the issue of formation of regions was entrenched by a government decree, which had a force of statute because it could be repealed or amended only in the legislative procedure. The government decree was issued on 26 April 1922.<sup>18</sup>

According to the 1922 decree the Kingdom of the Serbs, Croats and Slovenes consisted of thirty three regions. Croatia was divided in four regions, whereas Slovenia was divided in two. Dalmatia, which is nowadays a part of Croatia, was divided in two regions. Vojvodina, which is nowadays a part of Serbia, was one region. The territory of the Kingdom of Serbia before World War One was divided in seventeen regions, while Montenegro was one. In Bosnia and Herzegovina former districts were promoted to become regions.<sup>19</sup> The regions enjoyed autonomy based on constitutional provisions. Article 96 VU provided for the scope of autonomous competence and Article 97 for the autonomous budget. By virtue of Article 99 VU the regions were entitled to legislate, however the pieces of their legislation were not given the name of laws, but of decrees. Article 98 provided for regional authorities. They were Regional Assembly and Regional Council. The Assembly was elected by the citizens, while the Council was elected by the Assembly. Apart from those there was a governor (veliki župan) as a representative of the central government in the region.<sup>20</sup>

18 Jovanović, S., 1995, p. 455.

19 Jovanović, S., 1995, pp. 455–456, Pavlović, M., 2000, pp. 164–167.

20 Jovanović, S., 1995, pp. 456–461, Pavlović, M., 2000, p. 162.

The constitutional status of regions in the Kingdom of the Serbs, Croats and Slovenes if compared to those of the states in the German Reich under the Weimar Constitution shows the difference of the two countries. The Kingdom was a unitary state, whereas the Reich was a unitarist federation and only in the last resort of legal analysis a unitary state, because it lacked the essential element of a federation, *i.e.* the participation of the federated units as such in the decision making process. Notably Germany had already been a federated monarchy, as of 1871. The territorial units within the Reich were rooted in a long tradition dating back to the Middle Ages. That was not the case with the new formed Kingdom in the Balkans. The territories it was composed of relied only partly on traditions. That was for instance the case of the Kingdom of Serbia, or the Kingdom of Montenegro, or of Croatia under the settlement of 1868 made within the Hungarian part of the Habsburg Monarchy. To some extent that was the case of Dalmatia as well, having been a dominion of the Austrian Crown. Other territories, like Bosnia and Herzegovina for example, had neither been independent states in modern era or had lacked a full status of a Habsburg Crown dominion. That also applies to Slovenian lands, as well as to Vojvodina and some parts of Croatia.

Among many intermingled elements influencing constitutional developments of the new Kingdom, born in December 1918, it is the evolution of territorial organization of the country that probably best shows the mainstream of its history. In brief, the parliamentary government of St Vitus Day Constitution failed because of the high political tensions between the Serbs and the Croats. The tensions reached their peak in 1928, when shooting in the National Assembly occurred. The leader of the most influential Croatian political party was murdered in parliament, while in session. The murderer was a Serb from Montenegro. The Crown reacted by suspending the constitution and introducing royal dictatorship on 6 January 1929.<sup>21</sup> Under the dictatorship the country changed its name into Kingdom of Yugoslavia. The alteration of the name was in line with the king's idea of integral Yugoslavism, which was then favored by the Crown and became the official ideology. The idea was reflected in the new territorial organization of the country, however in a controversial way.

On the one hand the Crown favored integral Yugoslavism, which was aimed to pose foundations of a nation state of the Yugoslavs, while on the other the territorial organization of the state was reshaped so as to meet some of the Slovenian and Croatian political demands. The Crown

---

21 Pavlović, M., 2000, pp. 200–212 for the event in the National Assembly and its consequences. For the introduction of royal dictatorship cf. Mirković, Z., 2017, *Srpska pravna istorija*, Beograd, pp. 228–231.

reached out to those ethnicities, but the reform stopped half way. The new legislation introduced in June 1929 abolished the regions and provided for three types of territorial units. From bottom up they were municipalities, counties and banovinas (in singular: banovina).<sup>22</sup> The term banovina stems from Croatian political history and it was aimed to enhance the melting pot and the formation of true Yugoslavs. There were nine banovinas and apart from those a special administrative unit for the capital city of Belgrade. Following the principal idea of creating a nation the territories of the banovinas did not correspond to the ethnic boundaries. Neither were the banovinas given the name of the three recognized ethnicities forming the population of the country. The banovinas were named after rivers which marked their territories in geographical terms.

In the West of the country lay the Drava banovina, with the seat of its administration in Ljubljana. That was the only one among the new territorial units which covered the ethnic territory of one of the recognized ethnicities, because all of the Slovenes lived in that unit. The Croats had the majority in two banovinas. One was the Sava banovina with the seat in Zagreb and the other was Primorska (meaning: littoral), which had its seat in Split. Primorska was the only banovina that escaped the rule of being named after a river. The Vrbas banovina had a seat in Banja Luka, whereas the Drina banovina had a seat in Sarajevo. The latter unit spread its territory on both banks of the Drina river. The Zeta banovina had a seat in Cetinje. Its territory mostly covered the pre-war Kingdom of Montenegro. In the South-East of the country lay the Vardar banovina, which had its seat in Skoplje. To the north of it was the Morava banovina, with the seat in Niš and in the North-East of the country was the Danube banovina with the seat in Novi Sad, spreading its territory on both banks of the Danube. Between the Morava and the Danube banovinas the capital city of Belgrade was situated, with its own administration.

This territorial organization survived the royal dictatorship, which ended in 1931, when the king Aleksandar I gave a constitution to the country. The lengthy Article 83 of the 1931 Constitution provided in detail on the boundaries of the nine banovinas thus making unable the introduction of any border change by way of legislation. Articles 84–95 provided for the organization of power within a banovina. The banovina authorities were Ban, Banovina Council (banovinsko veće) and Banovina Committee (banovinski odbor). Ban was appointed by the Crown to represent the central government, the Council was a representative body, elected by the citizens with a four year term of office, while the Committee was appointed by the Council, to serve as executive organ.

---

22 Jevtić, D., in: Jevtić, D., Popović, D. (eds.), 2012, *Narodna pravna istorija*, Beograd, pp. 273–275; Pavlović, M., 2000, pp. 219–223.

The territorial organization of the Kingdom of Yugoslavia, introduced in 1929 and given status of constitutional provisions in 1931 remained in place for a decade. It was reformed in 1939 on the grounds of a Serbo-Croatian agreement. King Aleksandar I who had introduced the settlement was murdered in October 1934, while in visit to France, in Marseille. As of that date a regency ruled in the name of king Peter II who was a minor. The key figure of the three persons regency was prince Pavle, a cousin of the assassinated king.

Prince Pavle took a realistic stand towards the issue of the state's constitutional settlement, abandoning the idea of the nation building aimed at creation of a Yugoslav nation. He encouraged negotiations between Croatian and Serbian leading politicians instead. Their aim was to achieve unity within the state on a new basis, *i.e.* by introducing elements of federalism in the state organization. The negotiations were complex, lasted for months and eventually resulted in a compromise, the kernel of which was a fundamental reorganization of the Kingdom of Yugoslavia. Since the topic encompassed sensitive constitutional issues the most prominent lawyers on both sides, Croatian and Serbian, assisted the political leaders.<sup>23</sup> The politicians reached an agreement in August 1939 to which the legal experts provided formulations introducing reform of the territorial organization of the Kingdom. The essence of the reform was the formation of Croatian banovina. It was for the first time that a banovina was named after one of the ethnicities inhabiting Yugoslavia. The Croatian banovina was formed by way of unification of the two previously existing banovinas with the Croatian majority of population, to which eight limitrophe counties having the same majority were added.<sup>24</sup> Once the Croatian banovina was created it became clear that the territory to the west of it was Slovenian, whereas the one laying to the east of it was Serbian. A draft was prepared to organize the Serbian territory within the Kingdom as one banovina under the name Serbian Lands.<sup>25</sup> A trialistic federalism was at the doorstep in Yugoslavia when the World War II broke out.

### 5.3. GERMAN DEVELOPMENTS

The turning point of constitutional developments in Germany occurred at the end of January 1933 when the President of the Reich entrusted Hitler, the leader of the Nazi Party (NSDAP) to form a cabinet. In a

---

23 On the negotiations from the standpoint of one of the experts cf. Konstantinović, M., 1998, *Politika sporazuma*, Novi Sad, pp. 11–46.

24 Pavlović, M., 2000, pp. 337–339; Mirković, Z., 2017, pp. 233–234; Jevtić, D., 2012, pp. 299–301.

25 Konstantinović, M., 1998, pp. 578–579.

couple of months the new cabinet thoroughly destroyed the parliamentary form of government of the Weimar Constitution and introduced dictatorship. Within that framework the position of the states/Länder was altered. Slight changes in regard to borders of states took place, but those were of minor importance. Despite the fact that the states were formally maintained the Nazi regime divided Germany into new territorial units, called gaus (in German Gau in singular, Gaue in plural).<sup>26</sup> Their number grew as time went on, so as to overcome forty. The states became insignificant because the administration of the country was performed through the new units efficiently submitted to the Nazi Party supervision. Each Gau was headed by a Gauleiter who was a high-ranking Nazi Party official. Germany thus became a proper unitary state.

When Nazi Germany crashed and unconditionally surrendered in 1945 the country was divided into occupation zones conferred to the four allied powers that won the war. As of 1948 the three Western occupying forces, the United States, Great Britain and France launched the process of transferring powers to the Germans, which led to the formation of the Federal Republic of Germany. In the former Soviet occupation zone in the eastern part of the country the German Democratic Republic was formed. The Federal Republic of Germany adopted its constitution in May 1949. The constitution was given the name of Basic Law/Grundgesetz.<sup>27</sup> It provided for a federal structure and was maintained after the reunification of Germany in 1990 as the constitution for the entire country.

#### 5.4. YUGOSLAVIAN DEVELOPMENTS

Yugoslavia had ceased existing during World War II, but the country was renewed after the war. During the war along with the struggle for liberation against the enemy, a civil war took place between revolutionary communists and loyalists faithful to the monarchy. The former won in the civil war and established a communist federation in the form of popular republic.<sup>28</sup> The federal political settlement had been set up already during the struggle for liberation of the country and before the republic was introduced in Yugoslavia and its first post-World War II constitution adopted. The reason for this can be found in one of the fundamental ideas of the communist policy. Organizing Yugoslavia as a federation was put forward as the solution to the problem of internal, ethnically rooted tensions within

---

26 Menger, C. F., 1990, pp. 186–187.

27 Menger, C. F., 1990, pp. 203–205; on the background of the Basic Law in brief cf. Popović, D., 2019, *Comparative Government*, Cheltenham UK, Northampton MA, USA, pp. 66–68.

28 Marinković, T., 2019, *Serbia, Alphen aan den Rijn*, pp. 58–59.

the country. Notably, some more ethnic groups were recognized, along with the Serbs, Croats and Slovenes. Right after World War II they were Macedonians and Montenegrins. All ethnicities were equal and the coat of arms of the republic represented them in five torches forming one and unique flame. In course of time however, it has become clear that there was a significant group of population that could also claim recognition within the constitutional system of the ethnic federation. As of the 1960s one more group was recognized as equal with the previously mentioned five. Those were Bosnian Muslims, a group that was officially recognized under the name Muslims (Muslimani). The name nevertheless was by no means designed to stress a religious element characterizing the group. It was used in a somewhat inappropriate manner to stand for the group's ethnicity.<sup>29</sup> The evolution of the communist federation in Yugoslavia showed constitutional instability in spite of a mostly personalized government of the strong man of the regime. The regime even managed to last for a decade after the strong man passed away, but then eventually crashed in a bloodshed and a fratricidal war in the 1990s.

## 6. DESTINY

### 6.1. THE APPROACH

Turning to the destiny of the two constitutions that have been compared in this paper it comes to one's mind that there may have been constructive errors inherent in those two, which decisively influenced not only their destiny, but to a certain extent also the evolution of the two countries – Germany and Yugoslavia. There are similarities in regard to the end of the two constitutions. Both were succeeded by dictatorships. There was a difference in form however. The Weimar Constitution has never been repealed. As of 1933 it was drowned in new legislation that introduced the dictatorship of the Nazi Party. On the contrary, the St Vitus Day Constitution was formally suspended when king Aleksandar I introduced royal dictatorship in 1929. The issue of a constructive error in the Weimar Constitution as the reason for its failure has been treated among German scholars. Some of them labeled the issue as such, whereas others tried to consider the failure on a broader basis. They went beyond the text of the constitution so as to take into account the implementation of its provisions. Nevertheless, even following the latter approach one cannot escape the question of constructive errors, because the implementation of the constitution was simply based on the text of its provisions.

---

29 Popović, D., 2003, *Le fédéralisme de l'ancienne Yougoslavie revisité. Qu'est-ce qui n'a pas fonctionné?*, *Revue Internationale de politique comparée*, Vol. 10/1, pp. 43, 48–49.

## 6.2. THE WEIMAR CONSTITUTION: ERRORS AND CORRECTIONS

Considering the deficiencies of the Weimar Constitution on a broader basis and especially the decline of the support in the electorate to the political parties that were faithful to the constitution Kühne refers to a remark of a Prussian politician who expressed wonderment that the constitution had managed to last until 1933.<sup>30</sup> The same scholar put forward what he labeled as intrinsic weak points of the constitution. The most outstanding among those was in his view the cohabitation in case of a political divergence between the head of state and the coalition government, like the one which existed under Hindenburg's presidency. The constitutional provisions regulating such a situation were in the author's opinion incomplete or full of gaps (*lückenhaft*).<sup>31</sup> This goes along the line of reasoning adopted by Di Fabio, who also insists on the shortcomings of the constitutional settlement at its origin, situating them in the organization of power. In his view the main problem of the Weimar Constitution was indeed inherited from the previous German constitutional regime, which was in place under the monarchy. Di Fabio put it explicitly that the constitutional error had been conceived in the German Empire/*Kaiserreich*. Notably, according to the constitutional settlement of 1871 the cabinet of the Empire stood between the Parliament and the Crown. The Emperor had a say in political matters, such as for instance on war and peace, on the armament, foreign affairs, but also in social policies.<sup>32</sup> That pattern of relations of the state organs was substantially reproduced in the Weimar Constitution, with the sole difference that the Reichspräsident replaced the Emperor. The chancellor as prime minister was not only accountable to the Reichstag, but was also the Reichspräsident's chancellor, the circumstance which brought a significant ambivalence to his position. The two scholarly opinions just mentioned have a common ground. They find the deficiency of the Weimar Constitution in the horizontal separation of powers. It can be argued at this point that the German constitutional history showed developments which led to the rectification of the weak point of the Weimar Constitution. It occurred with the adoption of the Basic Law/*Grundgesetz* providing for a constructive motion of censure, which stabilized the executive and removed the ambivalence existing in the chancellor's position while the Weimar Constitution was in force.

---

30 Kühne, J-D., 2020, p. 28.

31 *Ibid.*, p. 29.

32 Fabio, U. di, 2018, p. 74.

### 6.3. THE ST VITUS DAY CONSTITUTION: CORRECTION ATTEMPTS

The Yugoslavian evolution was different from the German constitutional developments. The horizontal separation of powers provided for by the St Vitus Day Constitution was probably the most advanced form of parliamentary government in the entire history of Yugoslavia. This may be surprising given the fact that the constitution was suspended after a horrible, violent incident which took place in Parliament while it was in session. A thoroughly parliamentary regime has never been restored in the country. The failure of the St Vitus Day Constitution however, lay outside its provisions on parliamentary government.

The constitution's construction error was not rooted in the horizontal separation of powers, but quite the contrary in the vertical division of power. From the very beginning *i.e.* as of the unification of South Slavs in the Kingdom of the Serbs, Croats and Slovenes, there was a fundamental dilemma concerning the territorial organization of the kingdom. The main question was whether the country should be a unitary state or organized as a federation. The former model was adopted in the St Vitus Day Constitution. The latter, being always perceived as an ethnic federation, met opposition of those who claimed that it would lead to the destruction of the state, because of the idea to found a federation on ethnicity. An earlier attempt to introduce a federal structure in Yugoslavia occurred under the monarchy on the eve of World War II. It was based on the agreement concluded between the Serbian and Croatian political leaders, which resulted in a constitutional reform, but remained unaccomplished.

Federalism was introduced in Yugoslavia under the communist regime at the end of World War II. It was an outstanding feature of the revolutionary constitutional settlement within the framework of a people's republic, but the system nevertheless eventually proved a failure in the outcome. The most prominent Yugoslav constitutional lawyer Slobodan Jovanović assessed the feasibility of federalism in Yugoslavia at the beginning of the country's constitutional developments and once the federalism was introduced, soon after its introduction. Back in the 1920s analyzing the prospects of introducing federalism in Yugoslavia Jovanović commented on the prerequisites for such a constitutional settlement. One federalist role model was Germany with the preponderance of a strong militarized state enjoying hegemony within the federation, and the other was the USA with the strong centralized political parties as pillars of the political system. Jovanović identified neither of the prerequisites characterizing the role models that might serve the task of accommodating federalism in Yu-

goslavia. There was no military organized hegemon state, nor were there centralized political parties with the influence in the entire country. The author therefore remained skeptical as regards the introduction and prospects of federalism. Decades later, observing from the exile after World War II, Jovanović labeled the communist federation as an “experiment” in the one party political system.<sup>33</sup> This would mean that albeit outside of liberal democracy one of the abovementioned requirements was nevertheless fulfilled. There was a strong and centralized communist party to enforce federalism. Commenting on Jovanović’s opinion Pavković remarked that the system crashed when slowly, in the course of time the communist party lost its highly centralized character and was replaced by the communist parties of federated republics. They only preserved the common name, which served as a cover and an ideological label of the political and constitutional settlement.<sup>34</sup>

The dissolution of the unique and centralized communist party by way of strengthening its components was reflected in constitutional developments. The crucial phase of the entire evolution took place while the 1963 Constitution of Yugoslavia was in force. That constitution was an example of constitution making without nation building. It was first melted in numerous constitutional amendments and subsequently replaced by the 1974 Constitution which considerably reduced powers of the federal authorities, transformed the state into a confederation and eventually led to the dismantling of Yugoslavia.<sup>35</sup>

In his voluminous book on the Weimar Constitution, which appeared in the 1920s and has been already mentioned in this paper, Wittmayer compared the German constitution with the constitutional settlements in the USA and Switzerland. The author presented one of his conclusions as a “paradoxical formula”. Its essence may be reproduced as follows: “The stronger the federalist idea [...] the less of a federation [...] until it becomes a confederation.”<sup>36</sup> The Wittmayer’s formula seems to have predicted the history of Yugoslavia. Once the federation was introduced it could not resist the centrifugal force of its components, which was growing in the

33 On Jovanović’s opinion cf. Pavković, A., 2008, *Slobodan Jovanović – jedan nesentimentalan pristup politici*, Beograd, p. 356.

34 *Ibid.*, p. 357.

35 Marinković, T., 2019, pp. 67–69; Marković, R., 2020, *Ustavno pravo*, Beograd, pp. 142–145; Popović, D., Ustav Republike Srbije od 2006. u istorijskoj perspektivi, in: Ilić, T., Božić, M. (eds), 2020, *NOMOPHYLAX, Zbornik radova u čast Srđana Šarkića*, Beograd, pp. 607–608.

36 Wittmayer, L., 2014, p. 149; Wittmayer’s formula also matches the evolution of Belgium, a country that initially was a decentralized unitary state, which was transformed into a regionalized state, then a federation and later on into a confederation.

course of time. A rigid and ethnically based communist federation was introduced in the beginning. The country was subsequently subject to transformation under the pretext of improving the federal settlement by introducing more decentralization, which indeed served the purpose of enhancing powers of the elites in the federated republics. These elites managed to introduce a confederal constitutional settlement and eventually dismantle the country.<sup>37</sup> Federalism in communist Yugoslavia turned out to be inefficient and unable to put an end to the inter-ethnic tensions it was supposed to soothe.

## 7. IN THE GUISE OF CONCLUSION

Both constitutions compared in this paper encompassed constructive errors, but those did not belong to the same area of constitutional law. The Weimar Constitution had a shortcoming in the horizontal separation of powers, whereas in the St Vitus Day Constitution it was in the vertical division of powers. The constitutional developments of Germany and Yugoslavia showed trends aiming at overcoming the constructive errors by introducing alterations in the respective constitutional settlements. The alteration consisted of strengthening the executive in the parliamentary form of government and reshaping the position of the head of state in Germany. In Yugoslavia the crucial change was the introduction of federalism, although within a communist system. The German reform proved successful, whereas the transformation of the constitutional settlement was a failure in Yugoslavia. Therefore, two questions arise at this point as regards the latter country. Firstly, was the construction error of St Vitus Day Constitution irremediable? Secondly, if that was not the case, what could have been a remedy?

Answering the first question could by no means be in the affirmative. The unitary form of state was not the only possible option for the vertical division of power. Moreover, a federal constitutional settlement had been suggested in the time of drafting the St Vitus Day Constitution. The suggestions were mostly in favor of introducing a federal structure of the state based on ethnicity. Had a federation based on ethnicity an alternative model in Yugoslavia in those days? It could be hardly imaginable for various reasons.

The only plausible alternative to ethnic federation could have been to lay down the territorial organization of the state on the units it was

---

37 On dismantling the country and the formation of rump – Yugoslavia cf. Popović, D., 2021, *Constitutional History of Serbia*, Paderborn, pp. 220–223.

composed of. The territories that the country was composed of inherited borders created to meet requirements different from those the new kingdom was confronted with. In some cases such territories could not be properly defined in terms of frontiers between them. It was different in German lands, where the old monarchies had their traditional frontiers, separate evolutions, ruling dynasties and the like. Besides, some of the historical units in Yugoslavia were ethnically homogeneous, while others were contested between two ethnicities. The tensions within the country were ethnically rooted. The ethnicity was at stake and represented a challenge.

A path towards a model of state organization based on ethnicity was opened at the end of the Yugoslav monarchy but remained unachieved. That model was adopted and carried out later on under the communist rule in the country. Two more questions are therefore important from a historical perspective: a.) was the ethnic federation in principle a solution to the problem of ethnic tensions in Yugoslavia, and b.) why didn't it work?

Eminent scholars expressed unanimity giving replies to the first question on ethnic federation. In his memoirs posthumously edited by his son and published towards the end of the last century, professor Konstantinović, from the Law School of Belgrade University, and former justice minister, reported he had tackled the issue of post-war constitution of Yugoslavia in October 1944 while in exile in London. The occasion was of particular importance. He had a conversation with Šubašić, former ban of Croatian banovina and at the moment the prime minister of the royal government in exile. Šubašić was committed by the British to make a deal with Tito, who was most likely to win in the Yugoslav civil war. Tito exercised the military control of the situation in Yugoslavia, although the country was still partially occupied by the Germans. The idea of a political deal was to form a Yugoslav government of national unity, by a fusion of the exiled royal government and Titoist authorities in the country. Šubašić asked Konstantinović about his views on the post-war constitutional settlement of Yugoslavia, as regards "competence of federative autonomous units". Konstantinović wrote reproducing his own answer to the question, "three units, divided into several autonomous units with broad powers, and full self-government of villages".<sup>38</sup> The number of units forming Yugoslavia is not of primordial importance for the model advocated by Konstantinović. The conversation took place before the government of national unity formed in November 1944 accepted the idea of the Titoist National Liberation Movement to recognize more than three ethnic groups. The essential was the concept of ethnic federation, which was clearly supported by Konstantinović, a renowned professor of law and a pre-war minister of justice.

---

38 Konstantinović, M., 1998, p. 451.

Slobodan Jovanović expressed the view that introducing federalism in Yugoslavia both on the eve of World War II and after that war were indeed experiments. His opinion was that the centralism of the organization of power had by no means provided strength to the country. In a lecture of 1939, his suggestion was to give up the idea of Yugoslav nation building and to favor liberal nationalisms of the Serbs and Croats, in an atmosphere of a rational approach of both groups to the question of constitutional settlement of Yugoslavia.<sup>39</sup> Jovanović did not live to see the disintegration of the country in the 1990s, but his view nevertheless seems to be justified.

Decades after Jovanović passed away Pavković published a voluminous study analyzing the stance advocated by the famous professor who ended his life in exile. The title of Pavković's essay shows the essence of both Jovanović's and Pavković's opinions – *An Unsentimental Approach to Politics*. Yugoslavia could have survived had it been organized on strictly rational premises, which regrettably lacked throughout its history. Liberal nationalism may be subject to criticism. However, despite all deficiencies it was fruitfully combined in modern times with a pattern of organization which emerged in Europe at the supranational level. Such a model might have proved successful within the Yugoslav framework had there been enough enthusiasm in favor of a rational approach to politics. On the contrary, the sentiments prevailed providing the main reason for the dismantling of Yugoslavia.

At the very end of this paper something should be added to explain the failure of Yugoslavia. The statement that the lack of rational approach to the constitutional issues was catastrophic for the country deserves a little note. A survival of the communist federation after a possible shift of regime in the 1990s was imaginable. The dismantling of the country could probably have been avoided. The problem however was in the founding principles of federalism, as practiced in the communist regime. Notably, a proper ethnic federation could have been preserved, had Yugoslavia had such a model carried out thoroughly. Once six ethnic groups were recognized as of the 1960s the problem consisted in the fact that not all of them were properly given their territories. Bosnia and Herzegovina did not fit the pattern of a homeland for one of the ethnicities, for it was multiethnic from the beginning and remained such. In addition to this there has never been an adequate response to the question of the status of internal minorities *i.e.*, inhabitants of one ethnicity living on the territory of another.<sup>40</sup> In other words, to be able to survive Yugoslavia needed a much more complex structure than the one which had been introduced under the communist

---

39 On Jovanović's opinion cf. Pavković, A., 2008, pp. 357–361.

40 Popović, D., 2003, p. 48.

rule immediately after World War II. Konstantinović was therefore right in 1944 to point out to Šubašić that the principal constituent units of the federation should include autonomous units within them.

## BIBLIOGRAPHY

1. Fabio, U. di, 2018, *Die Weimarer Verfassung – Aufbruch und Scheitern*, München.
2. Jevtić, D., Popović, D., 2012, *Narodna pravna istorija*, Beograd.
3. Jovanović, S., 1995, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca*, Beograd.
4. Konstantinović, M., 1998, *Politika sporazuma*, Novi Sad.
5. Kühne, J.-D., 2020, *Die Weimarer Reichsverfassung im Spiegel zeitgenössischer Betrachtung*, Baden-Baden.
6. Marinković, T., 2019, *Serbia, Alphen aan den Rijn*.
7. Marković, R., 2020, *Ustavno pravo*, Beograd.
8. Menger, C. F., 1990, *Deutsche Verfassungsgeschichte der Neuzeit*, Heidelberg.
9. Mirković, Z., 2017, *Srpska pravna istorija*, Beograd.
10. Pavković, A., 2008, *Slobodan Jovanović – jedan nesentimentalan pristup politici*, Beograd.
11. Pavlović, M., 2000, *Jugoslovenska država i pravo 1914–1941*, Kragujevac.
12. Popović, D., 2003, Le fédéralisme de l'ancienne Yougoslavie revisité. Qu'est-ce qui n'a pas fonctionné?, *Revue Internationale de politique comparée*, Vol. 10/1.
13. Popović, D., 2019, *Comparative Government*, Cheltenham UK, Northampton MA, USA.
14. Popović, D., 2021, *Constitutional History of Serbia*, Paderborn.
15. Popović, D., Ustav Republike Srbije od 2006. u istorijskoj perspektivi, in: Ilić, T., Božić, M. (eds.), 2020, *NOMOPHYLAX, Zbornik radova u čast Srdana Šarkića*, Beograd.
16. Trgovčević, Lj., 2005, Serbien und die südslawische Frage bis zur Entstehung des Königreichs der Serben, Kroaten und Slowenen (SHS), *Österreichische Osthefte* 47/1–4.
17. Wittmayer, L., 2014, *Die Weimarer Reichsverfassung*, Nexx Verlag.

## INTERNET SOURCES

1. The Weimar Constitution – Constitution of the German Reich, German National Assembly, translated by Howard Lee McBain and Lindsay Rogers ([https://en.wikisource.org/wiki/Weimar\\_constitution](https://en.wikisource.org/wiki/Weimar_constitution), 1.10.2021).

USTAVNO UREĐENJE I SUDBINA DRŽAVA:  
VAJMARSKI I VIDOVDANSKI USTAV  
U UPOREDNOJ PERSPEKTIVI

Dragoljub Popović

APSTRAKT

Vajmarski ustav iz 1919. i Vidovdanski ustav iz 1921. bili su prilično različiti u mnogim aspektima. Njihovo poređenje je, međutim, od interesa ne samo zato što pokazuje neke uticaje starijeg ustava na mlađi, već i zbog činjenice da prikazuje liniju razvoja dve zemlje – Nemačke i Jugoslavije. Ako se posmatra sa stanovišta parlamentarne vlade, teritorijalne organizacije dve države i nekih drugih karakteristika, analiza odgovarajućih ustavnih dešavanja dovodi do nekoliko zaključaka. Dva ustava su imala početne nedostatke, ali oni nisu pripadali istoj oblasti ustavnog prava. U Nemačkoj su se ticali horizontalne podele vlasti, dok su se u Jugoslaviji odnosili na vertikalnu podelu vlasti. Oba ispitana ustava završila su u diktaturi. U obe zemlje tokom istorije bilo je pokušaja ispravke početnih nedostataka ili konstruktivnih grešaka u dva ustava. U Nemačkoj su takvi pokušaji bili uspešni, dok to nije bio slučaj u Jugoslaviji. Nemačka je zato uspela da postane liberalna demokratija koja dobro funkcioniše, dok je Jugoslavija nestala kao država.

**Ključne reči:** Ustav, Vajmar, Vidovdan, Nemačka, Jugoslavija, poređenje, razvoj.

Article History

Received: 29 September 2021

Accepted: 6 December 2021

Marko Božić\*

## THE LAW UNVEILED: ON BURKA BAN, KANZELPARAGRAPH AND MILITANT SECULARISM IN THE SOCIALIST YUGOSLAVIA

**Abstract:** *Despite being closely examined from the perspective of its political background, the 1950 Yugoslav burka ban as a legal text remained until now beyond interests of historians of law. Exposing this Yugoslav law to a strictly normative analysis and comparison with analogous contemporary bans, this paper delivers the findings that largely exceeded the results of historical studies done so far. Though a brief text, the Yugoslav burka ban was a composite legislation that surely contained full-face veil ban, but also penalized criminal acts against unveiling and introduced an embryo to the future socialist Kanzelparagraph i.e., pulpit law as well. Openly aiming to break a religiously inspired behavior, its militant advocacy was only apparently distinct from a more neutral wording of the present-day veil-bans. A thorough analysis of its ideological foundation, however, indicates a crucial common feature with the modern laical legislation: the paternalistic state action excluding religion as such from the open public space and free debate. As such, the legacy of the Yugoslav socialist burka ban contributes to better understanding of militant secularism as surely a modern, but not a new controversy.*

**Key words:** Burka Ban, Kanzelparagraph, socialist Yugoslavia, socialist secularism, militant secularism.

### 1. INTRODUCTION

On 2021 referendum the Swiss voted a general full facial covering ban in public places. Although the proposal did not specifically mention any kind of Islamic garments such as burka or niqab, the related public debate

---

\* Associate Professor, Union University Law School Belgrade; e-mail: marko.bozic@pravnofakultet.rs

The paper is the result of the author's research study conducted at Centre d'études turques, ottomanes, balkaniques et centrasiatiques (CETOBAC), CNRS, Paris, France during the summer of 2021. The author would hereby like to express his special gratitude to Mr. Marc Aymes, the CETOBAC Director, and Ms. Nathalie Clayer, its Research Member.

was focusing foremost on the Muslim full-face veil. By voting yes, Switzerland has joined the growing club of European nations with the similar legislations, laical France and Belgium heading the list that includes mostly western European countries, but also many regions and municipalities spread all over the Old Continent.<sup>1</sup>

The present-day burka ban is not a new phenomenon, though. In pursuit of modernization, usually assimilated to westernization, the secular regimes in majoritarian Muslim nations such as Atatürk's Turkey, Reza Shah Pahlavi's Iran or King Zog's Albania led campaigns and undertook administrative measures against traditional woman dress in the interwar period. In the eyes of those regimes the full-face veil was a sign of backwardness, associated to female submission and seclusion, while the unveiling was promoted as a path to women's emancipation, but also as a national cause. As a part of struggle for communist revolutionary transformation, a series of similar anti-veiling campaigns were launched from 1920s in Soviet Central Asia and the Caucasus, and after 1945 in the Balkans.<sup>2</sup> Although ideologically different, all those political regimes, whether nationalist or communist, were opposed to what they viewed as the reactionary forces of Islam and its backward traditions, and all wished to create a new and modern woman, unveiled, educated and integrated into the modern society and workforce.<sup>3</sup>

But, how much does the contemporary burka ban controversy really have in common with that past politics and to what extent can their legacy compare to the analogue present-day legislation? The lack of legal regulation in most of these dominantly Muslim countries, *i.e.*, the absence of formal rules forcing woman to unveil, makes any fact-based comparison less likely.<sup>4</sup> If there are important studies related to this topic, they mostly

---

1 France and Belgium voted nationwide face-covering bans in all public places during 2011. After both prohibitions obtained their court approvals from the ECtHR, first in 2014, then again in 2017, a wave of similar legislations hit Europe during the late 2010s: first Bulgaria in 2016, then Austria in 2017, Denmark and the Netherlands during 2018, and finally Switzerland in 2021, adopted their national full-face bans as well. Beside these nationwide bans, there are many, either regional (in Italy or Spain) or partial restrictions of face covering limited only to specific public places, institutions, etc. (Germany, Luxembourg, Bosnia and Herzegovina or Kosovo).

2 Cronin, S., Introduction: coercion or empowerment? Anti-veiling campaigns: a comparative perspective, in: Cronin, S., (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, Modernism and the Politics of Dress*, New York, Routledge, p. 3.

3 *Ibid.*

4 Most of these regimes resorted rather to the intensive propaganda campaigns than to sartorial laws. There are some exceptions, however: Atatürk's Turkey voted the Hat Law forbidding the fez in 1925 and local councils issued sporadic bans of the *peçe* and *çarşaf*. The authorities in Soviet Azerbaijan enacted directives that partially

concern the examination of government policies or discourse analysis, rarely the scrutiny of normative aspect or judiciary dimension of these affairs. Therefore, the case of the socialist Yugoslav legislation seems inasmuch unique and valuable, but has not been explored enough. Closely inspected from the perspective of its political background,<sup>5</sup> the 1950 Yugoslav burka ban as a legal text remained until now beyond interests of historians of law, socialism, region or religion offering an excellent opportunity to this research paper.

Exposing the Yugoslav law to a normative analysis, this study delivers the findings that largely exceeded the results of historical analysis done so far. Though a brief text, the Yugoslav burka ban was a composite legislation that contained a set of penalties aiming to break a religiously inspired disobedience to the new revolutionary order under construction: it obviously enacted the full-face veil ban, but also penalized different criminal acts against unveiling and introduced an embryo to the future socialist pulpit law as well.<sup>6</sup> More complex than it appears, the analyzed Yugoslav

banned full-face veil in schools or movie theatres. (For more on this, see: Kamp, M., Women-initiated unveiling: state-led campaigns in Uzbekistan and Azerbaijan, in: Cronin, S., (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, modernism and the politics of dress*, New York, Routledge, pp. 205–228). For pros and cons of outlawing the full-face veil during so-called *Hujum* large-scale campaign in Soviet Central Asia, see: Massell, J. G., 1974, *The Surrogate Proletariat – Moslem Women and Revolutionary Strategies in Soviet Central Asia, 1919–1929*, Princeton, Princeton University Press, pp. 348–352. In fact, the unique majoritarian Muslim country that voted nationwide burka ban was Kingdom of Albania in 1937. For more on this topic, see: Clayer, N., Behind the veil: the reform of Islam in Interwar Albania or search for a ‘modern’ and ‘European’ Islam, in: Cronin, S., (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, modernism and the politics of dress*, p. 234.

- 5 E.g., Ballinger P., Ghodsee, K., 2011, Socialist Secularism. Religion, Modernity, and Muslim Women’s Emancipation in Bulgaria and Yugoslavia, 1945–1991, *Aspasia*, Vol. 5, No. 1, pp. 6–27; Simić, I., The Veil Lifting Campaign, in: Simić, I., 2018, *Soviet Influences on Postwar Yugoslav Gender Policies*, Palgrave Macmillan, pp. 155–182; Hadžiristić, T., 2017, Unveiling Muslim Women in Socialist Yugoslavia: The Body between Socialism, Secularism, and Colonialism, *Religion & Gender*, Vol. 7, No. 2, pp. 184–203. There are several thoroughly conducted studies dealing with the course and outcomes of the anti-veiling campaign in different regions of Yugoslavia. For Bosnia, see: Jahić, A., Revolucija i emancipacija, in: Jahić, A., 2017, *Muslimansko žensko pitanje u Bosni i Hercegovini (1908–1950)*, Zagreb, Bošnjačko nacionalno vijeće za grad Zagreb, pp. 427–497; For Montenegro, see: Folić, Z., 1999, Skidanje zara i feredže u Crnoj Gori 1947–1953, *Istorijski zapisi*, Vol. 72, No. 3–4, pp. 73–90; For Serbia, see: Kačar S., 1999, Sudari svjetova (o akciji skidanja zara i feredže u Sandžaku), *Almanah*, Vol. 2, No. 7–8, pp. 31–44.
- 6 It is likely that Yugoslav legislation was designed under a certain influence of this 13 years older Albanian model. According to Nathalie Clayer, the Albanian full-face veil ban voted on 8 March 1937 under the title *Law on the Ban on Face Covering*, “stipulated that it was forbidden for a woman to cover her face, totally or partially, with any

law of 1950 discloses a broader political agenda that is hidden behind it: a militant secularism of the young socialist state that did not hesitate to subdue the religion in order to ensure its own prosperity.

## 2. THE YUGOSLAV LAWS

Strictly speaking, there has never been anything as the Yugoslav burka ban. As a federation, the socialist Yugoslavia was formed of six federated states, so called ‘republics’, and only four of them – first Bosnia in late September, then Montenegro in November 1950, and finally Macedonia and Serbia in January 1951, voted their state legislation forbidding the full-face veil in public.<sup>7</sup> No similar federal, *i.e.*, Yugoslav nationwide legislation had been voted at any time before or afterwards. On the other hand, no federal legislation abrogated these statutes either, formally still binding today.

Nevertheless, the fact that all four legislations shared the similar, almost identical form and substance, justifies their Yugoslav label: less an expression of the state particularism, but a coordinated response to the common challenge. It is already the identical choice of their titles –*Law on Ban of Wearing the Zar and the Feredža*<sup>8</sup> that indicates a joined cultural and historical background of the Ottoman Balkans.<sup>9</sup> The structure of all

---

kind of veil. Offenders, as well as the husbands, fathers, or guardians who had not exerted their authority and those who were making propaganda in favor of the veil, incurred a fine.” Clayer, N., 2014, p. 234. This hypothesis seems as much plausible since the Yugoslav unveiling campaign started first in Kosovo, in late 1945.

- 7 Zakon o zabrani nošenja zara i feredže [Law on Ban of Wearing the *Zar* and the *Feredža*], *Službeni list NR Bosne i Hercegovine* [Official Gazette of PR Bosnia and Hercegovina], No. 32/50, p. 427; Закон о забрани ношења зара и фереџе [Law on Ban of Wearing the *Zar* and the *Feredža*], *Службени листи НР Црне Горе* [Official Gazette of PR Montenegro], No. 31/50, p. 229; Закон о забрани ношења зара и фереџе [Law on Ban of Wearing the *Zar* and the *Feredža*], *Службени гласник НР Србије* [Official Gazette of PR Serbia], No. 4/51, pp. 84 and 85; Закон за забрана да се носи зар и фереџе [Law on Ban of Wearing the *Zar* and the *Feredža*], *Службени весник на НР Македонија* [Official Gazette of PR Macedonia], No. 1/51, p. 1.
- 8 It is interesting to notice that the same semantics were adopted by the Macedonian legislator regardless of the fact that these garments in Macedonia were traditionally known as *čaršaf* and *peča*.
- 9 Not quite similar to the burka of the Afghan origin, the Balkans’ *zar* [from the Turkish word *zar* that derived from the Arabic word *izār*] and *feredža* [from the Turkish word *ferace* that derived from the Arabic word *fārāḡiyā* developed in its turn from *fārāḡ* – consolation] designated a fabric cloak or hooded coat. Interestingly enough, it seems that there is no consent what those garments were really like. Škaljić, A., 1985, *Turcizmi u srpskohrvatskom-hrvatskosrpskom jeziku*, Sarajevo, Svjetlost, pp. 279–647; Klajn, I., Šipka, M., 2006, *Veliki rečnik stranih reči i izraza*, Novi Sad, Prometej, pp. 473 and 1314; Kačar S., 1999, pp. 32–33.

four legal acts is almost the same: a brief, paragraph-long prolegomenon explaining the legislator's drivers precedes the two general prohibitions – wearing the full-face veil (Art. 1), and forcing or persuading woman to wear the full-face veil (Art. 2). The core of the law, however, is four penalties coming from these two prohibitions: two infractions and two criminal offenses (Arts. 3 and 4), each of them deserving an analysis. Finally, all four legislations contained series of closing articles (Arts. 5–7) that established criminal jurisdiction over criminal cases envisaged by the law and set a law vacation of 30 days. The slight differences related to nomotechnique (the rules regarding the criminal jurisdiction were divided in two distinctive articles by the Bosnian, Montenegrin and Macedonian, however they were merged in a single article by the Serbian legislator), semantics (especially in the Macedonian, less in the Montenegrin text) or runtime of law vacation (sixty instead of thirty days, in the Serbian case) did not affect the initial sense provided by the Bosnian statute as the first adopted one, thus, a model law.

## 2.1. PROLEGOMENON

Although all four Yugoslav statutes contained the similar prolegomena exposing legislator's aims in a brief and similar way, those introductory texts were not completely identical either in their form or substance. The first article in the Bosnian statute, as the first adopted one, set a model which was not strictly copied by the three other legislators. The Montenegrin National Assembly restated almost *ad verbatim* the Bosnian prolegomenon. However, they integrated it within the pertinent promulgation decree, not in the statute itself. Last voted, the Serbian statute adopted this Montenegrin nomotechnique, but considerably complemented the content of the Bosnian narrative. Regardless of these formal and substantive differences, all four prolegomena were justifying the purpose of the full-face veil ban in the same way: as an act of Muslim women's emancipation through the intervention of the paternalistic state.

### 2.1.1. An Explicit Goal: Muslim Women's Emancipation

Unlike the modern burka ban controversy, marked by a complex legal argumentation and political advocacy, the analogous Yugoslav law had a single and unique purpose: Muslim women's emancipation. The prolegomena of all four Yugoslav statutes univocally stated the three common goals this legal ban was about to achieve: the elimination of veil as centuries old sign of submission and backwardness in order to accomplish the full

gender equality,<sup>10</sup> the better accessibility of women to their constitutional rights<sup>11</sup> and the broader participation of women in social, cultural and economic life of the state. Similarly, all four introductory texts legitimized the legal ban as a due response of the socialist state to the manifested demands of people's masses, working collectives and mass organizations but also, in Serbian case, to the expressed will of political, dominantly Muslim, representatives of Autonomous Region of Kosovo and Metohija.

High on the list of declared goals, in all four texts, was the elimination of veil as a sign of cultural backwardness associated with the old patriarchal and religiously inspired social order that the postwar socialism-under-construction intended to liquidate. As the outward symbol, the veil relegated women strictly to home life<sup>12</sup> and it was closely identified with the female seclusion and segregation. Accordingly, the unveiling was the objective of a large-scale state-orchestrated campaign led by the Anti-Fascist Women's Front aiming to close the gap between the rights recognized by the new socialist constitution and the reality of everyday lives of women.<sup>13</sup> Faced with the limited success of the campaign that first started in Kosovo right after the liberation in 1945, and spread to Bosnia and Montenegro by the summer of 1947,<sup>14</sup> the state authorities decided to resort to legal coercion, *i.e.*, to outlaw wearing of the full-face veil as a reactionary clothing practice.

Seen as 'an intrinsic component'<sup>15</sup> or 'a measure'<sup>16</sup> of socialist modernization, women's emancipation and unveiling in the postwar Yugoslavia easily recall the main discursive elements and strategies that marked the contemporary burka ban debates, gender equality in the first place. However, on closer inspection, the Yugoslav legal text discloses a distinct logic

---

10 Naturally, in socialist Yugoslavia during the early 1950s there could have not been any mention of *gender equality*. Precisely, the Bosnian and the Montenegrin statutes referred to the women's equality, the Macedonian statute mentioned the equality of sexes, while the Serbian one stipulated "the equality between man and woman as a constitutional principle".

11 Actually, the Macedonian statute did not recognize this goal at all, while three other legislations defined it in significantly different way: While the Serbian statute stipulated "rights granted by legal and social order of our socialist fatherland", the Bosnian and the Montenegrin statute referred to "rights gained through the People's Liberation War and through the building of socialism".

12 Hadžiristić, T., 2017, p. 193.

13 *Ibid.*, p. 190.

14 Jahić, A., 2017, pp. 455 and 456; Folić, Z., 1999, p. 79.

15 Bonfiglioli, C., 2012, *Revolutionary Networks. Women's Political and Social Activism in Cold War Italy and Yugoslavia (1945–1957)*, doctoral dissertation, Utrecht University, p. 192.

16 Ballinger P., Ghodsee, K., 2011, p. 21.

of socialist modernization. A prominent place that all four prolegomena left for ‘economic life,’ ‘working collectives’ and ‘building of socialism’ refers primarily to women’s emancipation as an economic and not only a political issue. In the Marxist optic, determined by the invisible laws of dialectical materialism, *conditio humana* is a consequence of a man’s or woman’s position in the chain of control over resources and means of production: individuals are politically free inasmuch as they are economically emancipated. The new socialist state defined as the dictatorship of the proletariat granted the monopoly over political power to the working class from which the veiled Muslim women were excluded: unrecognizable under the veil, they could not undertake the working tasks nor take credits and assume any individual responsibilities.<sup>17</sup> To achieve their political subjectivity, Muslim women must join the labor force first.<sup>18</sup> It is no wonder then that many of women’s rights were dealt *via* labor laws<sup>19</sup> and that the postwar recovery planning was closely associated to the anti-veil campaign all over the country.<sup>20</sup>

The Muslim headscarf as an economic, rather than an exclusively political issue, was not the only distinctive point of the Yugoslav anti-veil politics and legislation. This discourse deviates from its contemporary and western counterpart so much so that these four prolegomena did not mention any other justifying political principle or social value but gender equality. More precisely, the socialist modernization did not enact full-veil ban in order to protect the public order, security or safety threatened by any kind of ‘weapon under burka’ terrorism.<sup>21</sup> Its aim was not the

17 In order to support their claims, the actors of the Yugoslav anti-veil campaign emphasized an urban background of covering a woman’s face that peasant women have never fully adopted since it disturbed them to perform daily tasks their livelihoods depended on (Hadžiristić, T, 2017, p. 193). The similar argument had been evoked in Russia long before the similar Soviet *Hujum* campaign took place in Central Asia (Kamp, M., 2014, p. 209) as well as by the Arab secularist movement from the end of 19<sup>th</sup> century in the Middle East (Behiery, V., 2014, A Short History of the (Muslim) Veil, *Implicit Religion*, Vol. 16, No. 4, pp. 421–422).

18 The manpower shortage in the years of post-war reconstruction provided a strong argument to this theoretical concept. Namely, the women contribution to the success of the ambitious Five-Year Plan of Tito’s government was an explicit motive of Yugoslav unveiling campaign whose actors claimed that the Plan “cannot be successful while tens of thousands of women remain veiled” (Hadžiristić, T., 2017, p. 193).

19 Milinović, D., Petakov, Z., 2010, *Partizanke: žene u Narodnooslobodilačkoj borbi*, Novi Sad, Cenzura & Rosa Luxemburg Stiftung, p. 80.

20 For Bosnia, see: Jahić, A., 2017, pp. 456–459. For Montenegro, see: Folić, Z., 1999, pp. 78, 81 and 84–86.

21 Seemingly, terrorism as an argument was not completely absent from the socialist case-law related to unveiling campaigns: during the late 1920s and the early 1930s, the Soviet courts in Central Asia qualified the acts committed by fundamentalists

protection of rights and freedoms of others, either. The presence of veiled women in communist Yugoslavia was not considered as an act of radical propaganda that exerted undue pressure on those who did not wear a veil. Certainly, the loud absence of these modern drivers could be easily explained by their affiliation to substantially different discourse of human rights and democracy. However, it also discloses something else: unlike some contemporary democracy that disputes the veil in order to protect its anchor values such as advanced gender equality, socialist Yugoslavia challenged the veil so as to establish the new values, including the gender equality that did not exist here any time before. In other words, while some western liberal democracies resort to burka ban to defend the freedom, supposedly under the threat coming from a tiny radicalized minority,<sup>22</sup> the people's democracies from the European East had been facing a widespread tradition and using the ban as an avenue towards the freedom yet to be gained. The Yugoslav ban was a matter of conquering, not defending the liberty. This asymmetry may explain both, the unquestionable success that the Yugoslav ban achieved in the early 1950s,<sup>23</sup> and the defectiveness of gender equality argument before ECtHR today.<sup>24</sup> On the other hand, it should not deceive a symmetric point too. Then and now as well, the bottom line of both politics was exactly the same: the paternalistic state going against the autonomy of an individual's free will.

---

against unveiled women as the crimes of counterrevolutionary terrorism. Northrop, D., 2004, *Veiled Empire, Gender & Power in Stalinist Central Asia*, Ithaca and London, Cornell University Press, pp. 257–258.

- 22 In all western states that voted nationwide ban in public space, the full-face veiling is a marginal phenomenon. For instance, the Belgium ban of 2011 targeted no more than 200 women. Similarly, the French law of 2010 regulated the practice of less than 2,000 women. In the Netherlands, no more than 300 women were thought to wear full-face veils when the ban was enacted in 2016. The Austrian ban was voted in 2017 albeit the number of women wearing it at that moment was no more than 150. Mancini, S., *European Law and the Veil: Muslim Women from Victims to Emblems of the Enemy*, in: Melloni, A., Cadeddu, F., (eds.), 2019, *Religious Literacy, Law and History. Perspectives on European Pluralistic Societies*, New York, Routledge, p. 129.
- 23 For more details on enforcement of the Yugoslav full-face ban, see: Karčić, F., 2013, *Primjena zakona o zabrani nošenja zara i feredže u Bosni i Hercegovini*, *Novi Muallim*, Vol. 14. No. 56, pp. 50–55; About the enforcement of Yugoslav full-face ban from the perspective of unveiled women, see: Kačar S., 2001, *Zarozavanje zara*, Podgorica, Almanah, or Kladničanin, F., 2020, *Peča*, Novi Pazar, Akademska inicijativa Forum 10.
- 24 The court rejected the women protective argument, claiming that “a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions (Article 8 ECHR on private life and Article 9 ECHR on religious freedom – EB), unless it was to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms” (*ECtHR, SAS v. France*, No. 43835/11, Judgement of 1 July 2014, [GB] para. 119).

### 2.1.2. An Implicit Means: Paternalistic Legislation

The liberal democratic paradigm sees personal autonomy as an ultimate condition of human wellbeing. Although it allows some exceptions such as the concept of militant democracy restraining the individual liberties of those who use them in a way to destroy liberal order, the liberal democracy in principle lets everybody free to make their life choices on personal convictions as long as it does not harm others. Hence, the gender equality can be widely used against another, but not against women's own decision to wear the face-veil voluntarily.<sup>25</sup> In attempt to remove this objection, the contemporary burka ban advocacy invokes the rights of others or public order as the arguments mentioned above. Aware of insufficiency of this reasoning,<sup>26</sup> some defenders of the contemporary full-face veil ban call on a laical, secular or, religiously neutral nature of modern state, public school or space.<sup>27</sup> It is precisely this argument that the socialist legislation implicitly invoked too.

The French term *laïcité*, derives from the Greek word *laos* which designates a people considered as an indivisible whole, *i.e.*, a republican nation who does not tolerate communitarian deviations. As Joan Wallach Scott brilliantly pointed out “The basis for French republican theory is the autonomous individual who exists prior to his or her choices of lifestyle, values, and politics; these are but external expressions of a fixed inner self, a self which by definition cannot relinquish its autonomy.”<sup>28</sup> What led French legislator to the full-face veil ban was the conviction that the veiled women were captives in a culture that held them against their will and that was

25 Barton, D., 2012, Is the French Burka Ban Compatible with International Human Rights Law Standards? *Essex Human Rights Review*, Vol. 9, No. 1, p. 16.

26 For the critical analysis of advocacy in favor of the burka ban in France, see *Ibid.* So far ECtHR has been more reserved regarding the use of public safety argument. The court ruled that the full-face ban was a disproportionate measure since public safety “could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud” (ECtHR, *S. A. S. v. France*, No. 43835/11, Judgement of 1 July 2014, [GC] para. 139). As for invoking of protection of the rights and freedom of others, see fn. 31 below.

27 Usually associated with France and other countries defined as laical or secular by their constitutions such as Belgium or Turkey, this kind of argument is more widespread than it is most often thought. For its use in the German legal discourse related to the Muslim veil controversy see: Möschel, M., *Veiled Issues in European Courts*, in: Calvi, G., Fadil, N., (eds.), 2011, *Politics of Diversity. Sexual and Religious Self-Fashioning in Contemporary and Historical Contexts*, Florence, European University Institute, Department for History and Civilization, pp. 6–8.

28 Wallach Scott, J., 2007, *The Politics of The Veil*, Princeton and Oxford, Princeton University Press, p. 127.

the responsibility of the Republic to set them free.<sup>29</sup> According to this paternalistic viewpoint, it is the society's responsibility to correct its ill-thinking members and protect a man's or woman's human dignity even if it goes against their own will. This state approach "[...] tries to liberate oppressed human beings from impositions of an ideology (e.g., religion or male dominance) in order to offer them another yoke that they should 'freely' accept (e.g., the values of the French Republic)".<sup>30</sup> Reluctant to public safety and gender equality arguments, the ECtHR curiously proved inclination to this kind of argumentation finding the ban 'socially protective' inasmuch as the full-face veiling undermines the French or Belgium standards of civility.<sup>31</sup>

To all appearances, neither the Yugoslav full-faced veil ban nor the socialist ideology which hides behind it, did incorporate any terms similar to this laical reasoning. The inner logic of the Marxist worldview, however, suggests another assumption. According to the mainstream of the Marxist theory there is no single man or woman who can possibly resist to the invisible hand of universal laws of dialectics shaping the human history since the dawn of the time. Therefore, the revolutionary socialist state on the mission toward women's emancipation was not a matter of voluntarism, but a result of historical determinism. In line of this, so-called scientific socialism, any resistance to socialist modernization is only a reactionary cramp that might slow down the progress of humankind but cannot really change the course of history. The Communist party as a social avant-garde and the law it promotes only catalyze the social process that has already been spontaneously running. Finally, a man or woman shall be free, if they must, against their own will.

## 2.2. PENALTIES

Following the prolegomenon, the main text of the law was composed, almost identically, in all four Yugoslav statutes. Firstly, it provided two

---

29 *Ibid.*

30 Barton, D., 2012, p. 18.

31 Mancini, S., 2019, p. 136. More precisely, the ECtHR interpreted the argument concerning the rights and freedoms of others in perspective of a wide margin of appreciation to the French and Belgium national authorities, a.k.a. the laical state concept. That is how so-called living *together* argument is accepted. According to the latter, the full-face veil is harmful to others since it "shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France" (ECtHR, *S. A. S. v. France*, No. 43835/11, Judgement of 1 July 2014, [GC] paras. 116–122; Or: "while it is controversial, and undeniably presents risks in terms of the promotion of tolerance in society, [the ban] can be considered as proportionate to the aim it serves, to know the preservation of the conditions of living together" (ECtHR, *Belcacemi and Oussar v. Belgique*, No. 37798/13, Judgement of 11 July 2017, para. 61).

general prohibitions – for wearing the veil and forcing or persuading a woman to wear the veil, next the law envisaged a series of penalties of different gravity: infraction consisted of wearing the veil and two criminal offenses that were defined as coercing women to wear the veil and doing propaganda in favor of this prohibited practice.

### 2.2.1. Wearing the Veil – a Political or a Religious Issue

Wearing the veil was prohibited by Art. 1 in all four statutes as an “interdiction of wearing the *zar* and *feredža* or of any other way of covering a woman’s face”. Two infractions provided by Art 3. derived from the prohibition. The first concerned the veiled woman herself, while the second involved all woman’s inmates who demanded from her to wear the veil. Both infractions were sanctioned in an identical way: alternatively, by up to three months of imprisonment, or by a medium fine of 20,000 dinars.

The diction of these two articles may suggest a conclusion that Yugoslav legislators in the early 1950s shared similar concerns that bother their present-day western counterparts as well: the above-mentioned prohibition did not focus only on the garments that semantically corresponded to a traditional Muslim woman’s attire – *zar* and *feredža*, but explicitly forbade every other way of covering of the woman’s face without exception. Actually, the French, as any other contemporary burka ban, does not refer to burka (or any other piece of clothing) at all and scrupulously avoids a wording that might give to law an anti-Islamic or, in general, an antireligious connotation: the object of prohibition is any kind of full-face covering as such, whatever might be its ideological meaning. In other words, the contemporary restriction of burka as a religious practice is only a side effect of a law of general application, not the specific aim of an arbitrary legislation: by carefully selecting the legal terms, modern legislators try to decline the assumptions for making discrimination on religious basis. Furthermore, to remove all doubt, the French legislator harmonized its action with the opinions of the Muslim religious authorities. The latter took a stand against an interpretation of the Islamic full-face veiling as a compulsory religious practice, and declared it to be a mere customary habit instead.<sup>32</sup> By referring to “every other way of covering a woman’s face” and by obtaining the supporting opinion from the national and local

---

32 Although firmly opposed to the legal ban, Mohammed Moussaoui, the head of the French Council of the Muslim Faith (CFCM), has supported taking steps to discourage the tiny minority of Muslim women from wearing the full-face veil. He has been repeating that the full-face veil is not a religious obligation and that is out of place in France.

Muslim religious authorities, the Yugoslav legislators apparently were trying the same strategy. Being less cautious though, they failed twice.

Unlike the French one, the wording of the Yugoslav ban was obviously aiming at a particular religious practice. Even though it referred to “every other way of covering a woman’s face”, the law specifically pointed out the *zar* and the *feredža* as evidently the Muslim clothing traditions. Besides, the legal prohibition explicitly deals only with covering of woman’s face, which, all along with the prolegomenon,<sup>33</sup> leads to the conclusion that the Yugoslav law, however, aimed at specific individuals – Muslim women.<sup>34</sup> Finally, this legislation was adopted only in the four Yugoslav republics with significant Muslim population, but neither in Slovenia nor Croatia.

The fact that the leadership of Muslim religious community in Yugoslavia undividedly denounced the full-face veiling as an anachronistic habit of foreign origin<sup>35</sup> maybe had a crucial impact for the later success

---

33 It is noteworthy that the prolegomenon of the Serbian statute mentions explicitly the support to the ban coming from the Muslim population regardless of its ethnic origin. In other words, the full-face veil ban was not a decision made by the Belgrade government but an aspiration of the Albanian, Bosniak, Roma and of some other Muslim minorities living in Serbia.

34 The fact that neither catholic nor orthodox women at the time wore the full-face veil, made impression on the Yugoslav Christian women to liberate their oppressed Muslim sisters. It gave ground to rethinking a postcolonial or an orientalist meaning of unveiling campaign in socialist Yugoslavia as inspired by the Western secularism struggling with the Eastern backwardness. However, as Tea Hadžiristić observed “Whereas the modernizing reforms in Iran and Turkey, for example, were concerned with assimilating into a modern European framework and a secular liberalism, those in Yugoslavia were not.” Furthermore, “discourses of progress and enlightenment were used by the socialists, these notions were, arguably, categorically different in that they did not strive to achieve Western-style secularism”. In Yugoslavia, the unveiling was both symbolic of progress and ideological goal – removing the veil, at least theoretically, would allow women to enter the labor force. Hadžiristić, T., 2017, p. 198.

35 After consolidation of the new socialist state, in the late summer of 1947, a new organization and leadership of the Yugoslav Muslim Religious Community were established too. Only two months after its inauguration, the new leadership composed of prewar liberal members of Muslim community with Ibrahim Fejić at the head, issued a missive announcing the freedom of woman’s choice to unveil her face in accordance with the Islamic code. Shortly afterwards, the similar official declarations were issued by the local Muslim authorities in Macedonia (Karčić, F., 2013, *Stavovi vodstva Islamske zajednice u Jugoslaviji povodom zabrane nošenja zara i feredže, Anali Guzi Husrev-begove biblioteke*, Vol. 42, No. 34, pp. 225–235) and Montenegro as well (Koprivica V., *Muslimani Crne Gore u Socijalističkoj Federativnoj Republici Jugoslaviji (1946–1990)*, in: Folić, Z., Koprivica V., Kurpejović, A., (eds.), 2015, *Istorija Muslimana Crne Gore 1918–2007*, Podgorica, Matica Muslimanska Crne Gore). This new interpretation of the veil being in line with the socialist modernization was only an aspect of broader reforms of the Muslim institutions including the abolishment of

of law enforcement.<sup>36</sup> However, it can hardly remove the objection on a clearly confessional aspect of the ban: in spite of that the majority of Muslim religious servants disapproved or, at least, did not encourage this attire wearing, there was always a certain minority of imams that openly demanded their congregation to observe the veil.<sup>37</sup> As a matter of fact, the Yugoslav law was much about to hush a refractory clergy that was not going to be kept quiet.

### 2.2.2. Promoting the Veil: A Step Towards the Yugoslav *Kanzelparagraph*

Article 2 of all four Yugoslav statutes prohibits forcing or persuading woman to wear the full-face veil or to cover her face as well as any action supporting the same clothing practice. Two criminal offenses provided by the Art. 4 derived from this prohibition. The first one concerns “all those who by using the force, threat, blackmail or any similar means support the wearing of the *zar* or the *feredža* or covering a woman’s face”<sup>38</sup> while the second one involves “all those who by abuse of religious feelings, use of

sharia courts and madrasa schools. This postwar remodeling of Islam was sustainable due to the fact that until 1989, the top leaders of the Yugoslav Muslim religious community were all Partisan veterans dedicated to Tito’s ideology of brotherhood and unity (Perica, V., 2002, *Balkan Idols: Religion and Nationalism in Yugoslav States*, Oxford, Oxford University Press, p. 74).

36 For more about a proactive role of local imams in the unveiling campaigns and enforcement of ban, see: Folić, Z., 1999, pp. 88–89; Kačar, S. 1999, pp. 40–41; For more details on enforcement of the ban, see in general: Karčić, F., 2013, *Primjena zakona o zabrani nošenja zara i feredže u Bosni i Hercegovini, Novi Muallim*, Vol. 14. No. 56, pp. 50–55.

37 The claim that the full-face veil is a cultural habit, and not a religious prescription of Sharia law, radically changes the legal context of whole controversy: the veil ceases to be an issue of religious liberty and, consequently of secularism. It also arises another, more fundamental, question on who decides what is a religiously inspired behavior that merits a protection: whether court has to protect every subjective religious behavior or only those behaviors that can pass some objective test, e. g. the confirmation of a religious authority that set dogmas and rites. “On the one hand, human rights law is open to claims based on the harm suffered by an individual, which is always subjective in nature. On the other hand, decision-making bodies need to protect themselves from abusive claims, and therefore cannot accept all subjective statements.” (Barton, D., 2012, p. 10). Since the ECtHR is generally reluctant to the subjective understanding of the personal claims (*E.g.: X v the United Kingdom*, No. 7291/75, Judgement of 4 October 1977), the official standpoint of the supreme Islam authority for a certain region or country could be used as a basis for dismissing the subjective claims. Curiously, this kind of reasoning has not been the part of the ECtHR veil-ban case-law so far.

38 As it was explained before, a specific form of this penalty, *i.e.*, the situation when the action of persuading woman to wear the full-face veil or to cover her face is per-

prejudices and backwardness, or in any other way do the propaganda in favor of wearing the *zar* or the *feredža* or covering a woman's face". Both criminal offenses were sanctioned alternatively by, up to two years of hard labor, or by a significant fine of 50,000 dinars.

Uncontroversial as a crime against individual liberty, the first of these two offenses was not clear enough in terms of its origin and implementation, though. Namely, there are reports on criminal court practice prior to the 1950 Yugoslav burka ban, proceeding and punishing the violent acts against woman's free choice to take off the veil.<sup>39</sup> These reports arise at least two questions. The fact that judiciary obviously could rely on the existing penal code to prosecute the criminals and protect the unveiled women, begs the question whether the adoption of this specific criminal offense in 1950 was really necessary. This issue becomes even more plausible if one takes into account a comparative perspective: the Soviet authorities declined the proposal of similar legislation as redundant for as much as those crimes could have been already sanctioned as duress under the general Soviet Penal Code in force at the time.<sup>40</sup> Secondly, and even more intriguing, is the question which penal code the Yugoslav courts were referring to when they stated their verdicts dated before 1950: after they had taken the full control over the state in 1945, the Yugoslav communists abolished the whole prewar legal system by voting the Law on Invalidity of Legal Acts Enacted Before 6 April 1941 and During the Enemy Occupation. According to that general abrogation law, every single piece of old regime's legislation had been declared invalid unless it complied with the new socialist order.<sup>41</sup> In other words, it was up to the new socialist courts to evaluate ideological compatibility and applicability of the old penal code in every single case. Consequently, in order to protect the unveiling and boost the women's emancipation, the socialist judges might have easily decided to proceed on the grounds of the old Yugoslav Penal Code of 1930, by implementing its provisions on duress (*i.e.*, Art. 242).<sup>42</sup>

---

formed by her inmates, a.k.a. her family members, was as envisaged as a moderately sanctioned infraction under Art. 3 of all four Yugoslav statutes.

39 For the court sentences made against the obstructions of unveiling, mostly the insults directed at the unveiled women, see: Kačar, S., 1999, p. 34.

40 Northrop, D., 2004, p. 267.

41 Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije [Law on Invalidity of Legal Acts Enacted Before 6 April 1941 and During the Enemy's Occupation], *Službeni list FNRJ* [Official Gazette of FPR Yugoslavia], No. 86/46, 105/46, 96/47, p. 1078, Arts. 1 and 4.

42 This hypothesis seems to be as much as probable, since the assumed way of Yugoslav socialist court reasoning obviously fitted with general tendencies of that time. According to Zdeněk Kühn, one of the main drivers of judicial activism in Stalinist

Far more interesting is the second criminal offense that sanctioned the promotion of full-face veil. The law stipulated that any act of veil-wearing promotion shall be considered as a criminal one, but it specifically emphasized the propaganda performed through the abuse of religious feelings, prejudice and backwardness. It is the ‘abuse of religious feelings’ that deserves more attention and gives opportunity for a more ambitious conclusion: despite the fact that this provision did not explicitly designate religious servants as the only possible perpetrators, it implicitly referred to them, making of this provision a socialist pulpit law or, at least, its very embryo.

By definition, a pulpit law is a legislation that made a crime for any cleric who makes a political statement while exercising its sacerdotal office. The first law of this kind was the so-called *Kanzelparagraph* of 1871 German Penal Code which stated that “Any cleric or other minister of religion shall be punished with imprisonment or incarceration of up to two years if he, while exercising his occupation or having his occupation exercised, makes state affairs the subject of announcements or discussion either in public before a crowd, in a church, or before any number of people in some other place designated for religious gathering for in such a way that it endangers the public peace.”<sup>43</sup> Consequently, the *actus reus* of this crime entailed 1) religious servants, 2) doing politics, 3) exercising their sacerdotal function, 4) in public, and 5) in a way that endangers the public peace. In a word, it denounced preaching politics from a pulpit. As an expression of Bismarck’s *Kulturkampf* targeting the church influence on the state politics, it was passed by Reichstag in late 1871, but remained practically inefficient<sup>44</sup> to be finally abrogated in 1953. However, the German law served as a model for many other criminal legislations,<sup>45</sup> including

---

judiciary (as it was the Yugoslav one up to the early 1950s) was the woman’s emancipation understood as woman’s inclusion in rows of proletariat as the agent of postwar reconstruction and building of socialism. Kühn, Z., *The Instrumental Use of Basic Rights by the Stalinist Judiciary*, in: Sajó, A., (ed.), 2006, *Abuse: The Dark Side of Fundamental Rights*, Utrecht, Eleven International Publishing, p. 99.

43 Section para. 130a of the *Strafgesetzbuch*.

44 As any other highly controversial legislation, the pulpit law easily risked to fall into spontaneous disuse. According to Ronald Ross, it was an excessively legalistic approach, with its scrupulous regard for evidence and proof, that obviously stood in the way of the successful implementation of the *Kanzelparagraph*: although the police monitored religious services for possible infractions of its provisions, the charges were difficult to verify, and convictions were rare. Simply, “the police and the courts never abandoned strict procedural considerations to lash out indiscriminately at all, or even most, of those clerics accused of abusing the power of the pulpit”. Ross, R. J., 1984, *Enforcing the Kulturkampf in the Bismarckian State and the Limits of Coercion in Imperial Germany*, *The Journal of Modern History*, Vol. 56, No. 3, p. 468.

45 Only a year after the German *Kanzelparagraph* was formally abolished, in 1954, Lyndon B. Johnson in capacity of the US Senator proposed a motion that would become the section 501(c) (3) of the federal Internal Revenue Code. This federal act prohibits

the Yugoslav one. As a general prohibition, it was incorporated in the very core of the first Yugoslav constitution of 1921 which stated that “Religious representatives must not use their spiritual authority for political purpose in places of worship or in texts of religious nature or by exercising their official duties.”<sup>46</sup> This constitutional declaration, however, had not been implemented before 1 January 1930 when the first Yugoslav Penal Code was enacted.<sup>47</sup> As its Art. 400,<sup>48</sup> this pulpit law was only conditionally abrogated in 1945. It means that, as it was explained above, it might have been implemented by the socialist courts in terms of its compliance with the new socialist order. Thus, even if there are no reports of such an implementation, the latter was theoretically probable: in its early phase of consolidation, the new Yugoslav regime had been striving, by all means, to take administrative control over religious denominations and repress their reactionary propaganda. Besides, the first socialist Constitution of 1946 gave a ground for such judicial politics by a general prohibition of political abuse of religion and, more explicitly, an interdiction of political organizations established on a religious basis.<sup>49</sup> In such a way, the 1946 Constitution

---

intervention in political campaigns by organizations that are exempt from the federal income tax such as schools, hospitals, social service agencies, universities, museums or charitable associations, including religious organizations. In other words, the political abstention is the condition of maintaining the tax-exempt status. Nevertheless, this prohibition does not imply any criminal sanction, and despite the fact that it prohibits only religious organizations from intervening in a political campaign for elective public offices, it still represents a legal means that effectively restrain political activities of the religious denominations in the USA. For more about this, see: Zelinsky, E. A., *The Internal Revenue Code and Religious Institutions*, in: Zelinsky, E. A., 2017, *Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution*, Oxford, Oxford University Press, pp. 43–63; Johnson, S. N., 2001, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, *Boston College Law Review*, Vol. 42, No. 4, pp. 875–901; O’Daniel, P. L., 2001, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, *Boston College Law Review*, Vol. 42, No. 4, pp. 733–769.

46 Art. 12, line 7 of The St. Vitus Day Constitution of Kingdom of Serbs, Croats and Slovenes. According to Marko Pavlović, the main cause for adoption of Yugoslav *Kanzelparagraph* was the fact that priests were public officials who might abuse their position by doing favor to their political party. Pavlović, M., 2017, *Kancel paragraf Vidovdanskog ustava*, *Anali Pravnog fakulteta u Beogradu*, Vol. 65, No. 3, p. 41.

47 The 1930 Yugoslav Penal Code restated almost word for word the above-mentioned constitutional stipulation, and provided an alternative sanction of up to two years of imprisonment or a fine. *Ibid.*, p. 45.

48 For more on Art. 400 (*i.e. Kanzelparagraph*) of 1930 Yugoslav Penal Code, see: Čubinski, M., 1930, *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije*, Beograd, Izdavačka knjižarnica Gece Kona, p. 577 or Dolenc, M., 1930, *Tumač Krivičnog zakonika Kraljevine Jugoslavije*, Zagreb, Tisak Tipografija D.D. Zagreb, p. 490.

49 *Ustav Federativne Narodne Republike Jugoslavije* [Federative People’s Republic of Yugoslavia Constitution], *Službeni list FNRJ* [Official Gazette of FPRY], No. 10/46,

announced a criminal legislation yet to come. The latter had complex genesis, though. Its starting point, seemingly, was the 1950 burka ban that went along with the constitutional semantics: as it was stated above, the law incriminated especially a veil-favorable propaganda performed through the *abuse of religious feelings*. Certainly, this piece of legislation was not a pulpit law strictly speaking – in a way it did not appoint religious servants as the only potential abusers, nor specifically limited acts of abuse on public performances such as mass religious gatherings and church services – but, it was surely its very inception.<sup>50</sup> Only six months later, these four state-level statutes would be complemented by the 1951 pulpit law *stricto sensu* within Art. 311 of the new Yugoslav federal Penal Code providing that: “Religious representative abusing the free exercise of religious affairs and freedom of worship to the purpose in opposition to the constitutional order shall be incarcerated up to two years.”<sup>51</sup> Furthermore,

Art. 25, pp. 77–78. The succeeding Yugoslav Constitutional acts of 1963 and of 1974, in their Arts. 46 and 176 respectively, retained the general prohibition of the political abuse of church and religion, but did not explicitly stipulate any interdiction of confessional political organizations.

- 50 It would be further fortified by a similar federal prohibition of political abuse of religion. For more on this federal legislation see: Božić, M., 2019, Neither Secular State nor Laical Republic? Legal Position of Religious Communities in Communist Yugoslavia – Legal Framework Analysis, *Pravni zapisi*, Vol. 10, No. 1, pp. 50–51.
- 51 Krivični zakonik [Penal Code], *Službeni list FNRJ* [Official Gazette of FPRY], No 13/51, pp. 185–224. At least a part of the Yugoslav socialist theory of criminal law was ready to qualify this Art. 311 as a pulpit law, or *Kanzelparagraph*, e.g., Tahović, J., 1961, *Krivično pravo posebni deo*, Beograd, Savremena administracija, p. 426. As a result of the late 1960s and the early 1970s the constitutional reforms, the penal legislation competencies had been changed so that the pulpit law provision had been eliminated from the federal Penal Code and incorporated into Penal Codes of the six Yugoslav federated states: Кривични законик СР Србије [Penal Code of SR Serbia], *Службени гласник СР Србије* [Official Gazette of SR Serbia], No. 26/77, Art. 238, p. 1367; Krivični zakonik SR Hrvatske [Penal Code of SR Croatia], *Narodne novine SR Hrvatske* [People’s Newspapers of SR Croatia], No. 25/77, Art. 217, p. 404; Kaznenski zakon SR Slovenije [Penal Code of SR Slovenia], *Uradni list SR Slovenije* [Official Gazette of SR Slovenia], No. 12/77, Art. 236, p. 664; Krivični zakon SR Bosne i Hercegovine [Penal Code of SR Bosnia and Herzegovina], *Službeni list Bosne i Hercegovine* [Official Gazette of SR Bosnia and Herzegovina], No. 16/77, Art. 222, p. 480; Кривичен закон на СР Македонија [Penal Code of SR Macedonia], *Службен весник на СР Македонија* [Official Gazette of SR Macedonia], No. 25/77, Art. 227, p. 516; Кривични закон СР Црне Горе [Penal Code of SR Montenegro], *Службени лист СР Црне Горе* [Official Gazette of SR Montenegro], No. 22/77, Art. 226, p. 311; (The Penal Code of Autonomous Province of Vojvodina and the Penal Code of Autonomous Province of Kosovo did not contain this provision. According to Art. 2 of the Serbian Penal Code, Art. 238 of the latter was in force in both Autonomous Provinces). This transfer of competencies from federal to state legislation did not affect the sense of the prohibition, though. The wording of the 1977 provisions remained identical to the old, the 1951 federal one.

the *Kanzelparagraph* was embedded in the *Protocol on the Negotiations Between Yugoslavia and the Holy See* signed in 1966.<sup>52</sup> According to the Protocol, catholic priests' duty was to remain within the limits of their religious service, so they could not abuse their religious functions for political purposes. The common thread in these series of regulations is the abuse of religion as a concept that the earlier prewar Yugoslav legal system was not familiar with.<sup>53</sup> The idiosyncrasy of the notion was not merely lexical, but a conceptual one: defined as a political use of religion, this abuse remains in close connection to the Marxist understanding of religion in general, and to the specific way of functioning of Yugoslav socialism in particular.

Commonly considered as a relic of the past, religion has not always been seen as a potential threat to the socialist state and order. An openly hostile attitude of postwar Marxist doctrine in Yugoslavia eventually evolved to acceptance of a relatively peaceful coexistence,<sup>54</sup> but had never abandoned

52 Protokol o razgovorima koji su vođeni između predstavnika vlade Socijalističke Federativne Republike Jugoslavije i predstavnika Svete Stolice [Protocol on Negotiations Between the Representatives of the Government of Socialist Federative Republic of Yugoslavia and the Representatives of the Holy See], *Službeni list SFRJ – Međunarodni ugovori i drugi sporazumi* [Official Gazette of the SFRY – International Treaties and Other Agreements], No. 11/66, pp. 984–986, the section II, point 2. Even if the 1966 *Protocol* was more a Memorandum of understanding than an international treaty and despite the fact that the extent of religious limits has never been clear and certain, this stipulation stays perfectly in line with the idea of *Kanzelparagraph*. For more on this see: Božić, M., 2020, *Tito's Concordat – The 1966 Protocol on the Negotiations Between Yugoslavia and the Holy See from a Legal Perspective*, *Pravni zapisi*, Vol. 11, No. 2, pp. 554–579.

53 Legal definition of 'political abuse of religion' had been constantly evolving: 1946 Yugoslav Constitution referred to abuse of both, the church – as an institutional – and religion – as a phenomenon. Burka ban from the late 1950s incriminated abuse of 'religious feelings', while 1951 federal Penal Code penalized the abuse of 'free exercise of religious affairs and freedom of worship'. On the other hand, 1953 federal act on legal status of religious communities prohibited any political abuse of "religious institutions, religious affairs, religious rituals, religious press, religious instruction and other forms of manifestation of religious feelings".

54 In the Marxist doctrinal writings on religion dated from the mid-1960s to the late 1980s prevail a common place that religion is expected to disappear progressively with the further development of the socialist society. Therefore, not only the administrative measures against religion were really necessary, but they could have turned out to be counterproductive in a way they might have risen social tension and provoked instability. Hence, if the clericalism – as the political interference of religion in state affairs remained an act of crime, the open anticlerical behavior of some party members – so called *sectarianism*, also became an inadmissible and harshly criticized stance up to the mid-1960s. E.g.: Frid, Z., 1971, *Religija u samoupravnom socijalizmu*, Zagreb, Centar za društvene djelatnosti omladine RK SOH, p. 40; Kurtović, T., 1978, *Crkva i religija u socijalističkom samoupravnom društvu*, Beograd, Rad, p. 376; Cvitanović, I., 1987, *Sloboda religije u socijalističkom samoupravnom društvu*, Novi Sad, Dnevnik, p. 19.

its basic premises: as a strictly private affair, religion was protected by the Constitution in terms of religious freedom, but without any licit role in political life of the socialist system.<sup>55</sup> For any church and clergymen, this did not mean their complete exclusion from the politics, but rather a strictly controlled inclusion into it. Although the Yugoslav communist party did not tolerate any political opposition, it did not deny the plurality of interests and established the so-called Socialist Union as a forum designed to debate, converge and harmonize distinctive regards on the given topic. Nobody, including religious servants,<sup>56</sup> was allowed to autonomously step forward and take a political stance beyond this state-controlled body. Preaching a politically inspired sermon in church or mosque was considered as an abuse of religious freedom aimed against the established order – an act of clericalism.

Once put it in perspective with this Marxist doctrine of clericalism, the wording of Art. 4 of the 1950 Yugoslav law becomes more worth telling: as a felony, the promotion of full-face veil by abusing religious feelings, *i.e.*, by using the same to a political purpose, targeted those who were, in the first place, in capacity to perform such (ab)use: the religious authority capable to incite these spiritual, but highly institutionalized emotions. More than at anyone else, the letter of 1950 law was directed at the disobedient Yugoslav imams.<sup>57</sup>

### 3. CONCLUSION

Enacted in the early 1950s, the Yugoslav burka ban is formally still binding. None of the four Yugoslav republics that voted the ban did abrogate or amended this legislation after the collapse of socialism and disintegration of the common state. Formally still in force, the ban is effectively obsolete because of its disuse, though. Fully applied after its enactment, it fulfilled its purpose soon and lost on significance: long before the end of the 1950s, veiled women on the Yugoslav streets became only an incident. The indubitable success of the law testifies its meaningfulness. It also highlights a sharp contrast with the contemporary burka bans in Europe: unlike some modern democracies who resort to the ban in order to

55 *E.g.*: Frid, Z., 1971, pp. 10–11, 36, 71–72; Kurtović, T., 1978, pp. 136–137, 146, 217, 344 and 173–174; Samardžić, R., 1985, *Religija i vjerske zajednice u Socijalističkoj Federativnoj Republici Jugoslaviji*, Beograd, Rad, pp. 42, 56 and 61; Cvitanović, I, 1987, pp. 39–40.

56 More precisely, religious servants were free to preach politics when it was favorable to socialist state order and were welcome to take part in work of the Socialist Union. *E.g.*: Frid, Z., 1971, p. 93; Kurtović, T., 1978, p. 348.

57 There are reports on high officials of the Yugoslav Muslim religious leadership that they were persuading and convincing imams who still hesitated or resisted to accept unveiling. See: Radić, R., 1995, p. 259 (fn. 396).

protect the gender equality allegedly threatened from a tiny minority of veiled women, the Yugoslav socialism was confronting a rooted and vivid tradition as a *de facto* setback for women's inclusion in the public life and working force. Hence, there is an asymmetry: enabled by the law, the gender equality seems to be a justified cause then, but only a low-rated excuse before the ECtHR now.

Yet, the both legislative politics share a common paternalistic aim: to free woman and make her a part of unique and indivisible political (either republican or proletarian) nation that does not admit communitarian deviations. In the most prominent western democracies that have introduced burka ban first, such as France or Belgium, this restriction is explicitly connected to their concept of religiously neutral *i.e.*, laical state highly intolerant to religious interference in politics. In the socialist Yugoslavia, the same logic was less obvious, but implicitly grounded in the Marxist doctrine: religion was understood as a reactionary institution that was tolerated but reduced to a strictly private affair, without any recognized role in public life of the new socialist state. The very same idea was embodied in the Yugoslav full-face veil ban which did not prohibit only veiling as such, but also its promotion on a religious basis. The abuse of religious feelings, forbidden by the law, was not a capricious gesture of the Yugoslav lawmaker but an emanation of systemic legal policy grounded on the socialist Constitution and elaborated through further criminal legislation. Keeping religion out of politics, the latter culminated in the 1951 socialist pulpit law that incriminated all religious servants preaching politics in public.

*A priori* excluding religion as such from open public space and free debate, this so-called militant secularism, has always been away from theory and practice of liberal democracy. Being open and inclusive, a democratic society of women and men equal in their rights and liberties does not favorize or discriminate anybody on religious basis. As religious neutrality of the state, secularism is a guarantee of equality in religious liberty. When it is invoked as an absolute value in order to justify oppression against all "those who are perceived as alien and therefore unworthy of inclusion in the body politic"<sup>58</sup> secularism loses its cogency and sense. As a distorted concept, this militant secularism is often wrongly misinterpreted as an expression of militant democracy restraining the liberties of those who use them in a way to destroy liberal order.<sup>59</sup> There should not be

---

58 Ginsburg, T., Huq, A., 2018, *How to Save a Constitutional Democracy*, Chicago-London, The University of Chicago Press, p. 171 (fn. 10).

59 For more about the ongoing debate on the concept and limits of militant democracy, see: Beširević, V., 2022, *Militant Democracy and Populism: A Response to Tom Ginsburg and Aziz Huq*, in: Gardašević, Đ., Gotovac, V., Zrinščak, S., (eds.), 2022, *Liber Amicorum Josip Kregar*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, forthcoming.

any ambiguity, though. Even if militant, democracy is necessarily secular. Militant secularism, however, can never be democratic.

## BIBLIOGRAPHY

1. Ballinger P., Ghodsee, K., 2011, Socialist Secularism. Religion, Modernity, and Muslim Women's Emancipation in Bulgaria and Yugoslavia, 1945–1991, *Aspasia*, Vol. 5, No. 1, pp. 6–27.
2. Barton, D., 2012, Is the French Burka Ban Compatible with International Human Rights Law Standards? *Essex Human Rights Review*, Vol. 9, No. 1, pp. 1–27.
3. Behiery, V., 2014, A Short History of the (Muslim) Veil, *Implicit Religion*, Vol. 16, No. 4, pp. 413–441.
4. Beširević, V., 2022, Militant Democracy and Populism: A Response to Tom Ginsburg and Aziz Huq, in: Gardašević, Đ., Gotovac, V., Zrinščak, S., (eds.), 2022, *Liber Amicorum Josip Kregar*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, forthcoming.
5. Bonfiglioli, C., 2012, *Revolutionary Networks: Women's Political and Social Activism in Cold War Italy and Yugoslavia (1945–1957)*, doctoral dissertation, Utrecht University.
6. Božić, M., 2019, Neither Secular State nor Laical Republic? Legal Position of Religious Communities in Communist Yugoslavia – Legal Framework Analysis, *Pravni zapisi*, Vol. 10, No. 1, pp. 40–64.
7. Božić, M., 2020, Tito's Concordat – The 1966 Protocol on the Negotiations Between Yugoslavia and the Holy See from a Legal Perspective, *Pravni zapisi*, Vol. 11, No. 2, pp. 554–579.
8. Clayer, N., Behind the veil: the reform of Islam in interwar Albania or the search for a “modern” and “European” Islam, in: Cronin, S., (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, Modernism and the Politics of Dress*, New York, Routledge, pp. 231–251.
9. Cronin, S., Introduction: coercion or empowerment?, Anti-veiling campaigns: a comparative perspective, in: Cronin, S. (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, Modernism and the Politics of Dress*, New York, Routledge, pp. 1–36.
10. Cvitanović, I., 1987, *Sloboda religije u socijalističkom samoupravnom društvu* [Freedom of Religion in Socialist Selfmanagement Society], Novi Sad, Dnevnik.
11. Čubinski, M., 1930, *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije*, [Scholar and Practical Commentary on Penal Code of the Kingdom of Yugoslavia] Beograd, Izdavačka knjižarnica Gece Kona.
12. Dolenc, M., 1930, *Tumač Krivičnog zakonika Kraljevine Jugoslavije* [Interpretation of Penal Code of Kingdom of Yugoslavia], Zagreb, Tisak „Tipografija” D.D. Zagreb.
13. Folić, Z., 1999, Skidanje zara i feredže u Crnoj Gori 1947–1953 [Unveiling in Montenegro between 1947 and 1953], *Istorijski zapisi*, Vol. 72, No. 3–4, pp. 73–90.

14. Frid, Z., 1971, *Religija u samoupravnom socijalizmu* [Religion in Selfmanagement Socialism], Zagreb, Centar za društvene djelatnosti omladine RK SOH.
15. Ginsburg, T., Huq, A., 2018, *How to Save a Constitutional Democracy*, Chicago-London, The University of Chicago Press.
16. Hadžiristić, T., 2017, Unveiling Muslim Women in Socialist Yugoslavia: The Body between Socialism, Secularism, and Colonialism, *Religion & Gender*, Vol. 7, No. 2, pp. 184–203.
17. Jahić, A., 2017, *Muslimansko žensko pitanje u Bosni i Hercegovini 1908–1950* [Muslim woman's cause in Bosnia and Herzegovina 1908–1950], Zagreb, Bošnjačko nacionalno vijeće za grad Zagreb.
18. Johnson, S. N., 2001, Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations, *Boston College Law Review*, Vol. 42, No. 4, pp. 875–901.
19. Kačar S., 1999, Sudari svjetova (o akciji skidanja zara i feredže u Sandžaku) [Clash of the Worlds (On the Campaign on Unveiling in Sadžak Region)], *Almanah*, Vol. 2, No. 7–8, pp. 31–44.
20. Kačar S., 2001, *Zarozavanje zara* [Lifting the Veil], Podgorica, Almanah.
21. Kamp, M., Women-initiated unveiling: state-led campaigns in Uzbekistan and Azerbaijan, in: Cronin, S. (ed.), 2014, *Anti-Veiling Campaigns in the Muslim World – Gender, modernism and the politics of dress*, New York, Routledge, pp. 205–228.
22. Karčić, F., 2013, Primjena zakona o zabrani nošenja zara i feredže u Bosni i Hercegovini [Enforcement of Law on Ban of the *Zar* and the *Feredža* in Bosnia and Herzegovina], *Novi Muallim*, Vol. 14, No. 56, pp. 50–55.
23. Karčić, F., 2013, Stavovi vodstva Islamske zajednice u Jugoslaviji povodom zabrane nošenja zara i feredže [Attitude of Yugoslavia Muslim Community Leadership on the Ban of the *Zar* and the *Feredža*], *Anali Guzi Husrev-begove biblioteke*, Vol. 42, No. 34, pp. 225–235.
24. Kladničanin, F., 2020, *Peča* [Petcha], Novi Pazar, Akademaska inicijativa Forum 10.
25. Klajn, I., Šipka, M., 2006, *Veliki rečnik stranih reči i izraza* [Great Dictionary of Foreign Words and Phrases], Novi Sad, Prometej.
26. Koprivica V., 2015, Muslimani Crne Gore u Socijalističkoj Federativnoj Republici Jugoslaviji (1946–1990) [Muslims of Montenegro in SFRY (1946–1990)], in: Folić, Z., Koprivica V., Kurpejović, A. (eds.), *Istorija Muslimana Crne Gore 1918–2007* [The History of Muslims of Montenegro 1918–2007], Podgorica, Matica Muslimanska Crne Gore.
27. Kühn, Z., The Instrumental Use of Basic Rights by the Stalinist Judiciary, in: Sajó, A. (ed.), 2006, *Abuse: The Dark Side of Fundamental Rights*, Utrecht, Eleven International Publishing, pp. 99–110.
28. Kurtović, T., 1978, *Crkva i religija u socijalističkom samoupravnom društvu* [Church and Religion in Socialist Selfmanagement Society] Beograd, Rad.
29. Mancini, S., European Law and the Veil: Muslim Women From Victims to Emblems of the Enemy, in: Melloni, A., Cadeddu, F. (eds.), 2019, *Religious Literacy, Law and History. Perspectives on European Pluralistic Societies*, New York, Routledge, pp. 127–136.

30. Massell, J. G., 1974, *The Surrogate Proletariat: Moslem Women and Revolutionary Strategies in Soviet Central Asia, 1919–1929*, Princeton, Princeton University Press.
31. Milinović, D., Petakov, Z., 2010, *Partizanke: žene u Narodnooslobodilačkoj borbi* [Partisan Women: Ladies in People's Liberation War], Novi Sad, Cenzura & Rosa Luxemburg Stiftung.
32. Möschel, M., Veiled Issues in European Courts, in: Calvi, G., Fadil, N., (eds.), 2011, *Politics of Diversity. Sexual and Religious Self-Fashioning in Contemporary and Historical Contexts*, Florence, European University Institute, Department for History and Civilization, pp. 5–18.
33. Northrop, D., 2004, *Veiled Empire, Gender & Power in Stalinist Central Asia*, Ithaca and London, Cornell University Press.
34. O'Daniel, P. L., 2001, More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches, *Boston College Law Review*, Vol. 42, No. 4, 733–769.
35. Pavlović, M., 2017, Kancel paragraph Vidovdanskog ustava [Kanzelparagraph of St. Vitus Constitution], *Anali Pravnog fakulteta u Beogradu*, Vol. 65, No. 3, pp. 28–49.
36. Perica, V., 2002, *Balkan Idols: Religion and Nationalism in Yugoslav States*, Oxford, Oxford University Press.
37. Radić, R., 1995, *Država i verske zajednice u Srbiji 1945–1953*, [State and religious communities in Serbia between 1945 and 1953], Beograd, Institut za noviju istoriju Srbije.
38. Ross, R. J., 1984, Enforcing the Kulturkampf in the Bismarckian State and the Limits of Coercion in Imperial Germany, *The Journal of Modern History*, Vol. 56, No. 3, pp. 456–482.
39. Samardžić, R., 1985, *Religija i vjerske zajednice u Socijalističkoj Federativnoj Republici Jugoslaviji* [Religion and Religious Communities in Socialist Federative Republic of Yugoslavia], Beograd, Rad.
40. Simić, I., 2018, *Soviet Influences on Postwar Yugoslav Gender Policies*, Palgrave Macmillan.
41. Škaljić, A., 1985, *Turcizmi u srpskohrvatskom-hrvatskosrpskom jeziku* [Terms of Turkish Origin in Serbo-Croatian Language], Sarajevo, Svjetlost.
42. Wallach Scott, J., 2007, *The Politics of The Veil*, Princeton and Oxford, Princeton University Press.
43. Zelinsky, E. A., The Internal Revenue Code and Religious Institutions, in: Zelinsky, E. A., 2017, *Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution*, Oxford, Oxford University Press, pp. 43–63.

## LEGAL ACTS

1. Krivični zakonik Kraljevine Jugoslavije [Penal Code of Kingdom of Yugoslavia], *Službene novine Kraljevine Srba, Hrvata i Slovenaca* [Official Gazette of the Kingdom of Serbs, Croats and Slovenes], No. 33/29, pp. 158–186.

2. Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije [Law on Invalidity of Legal Acts Enacted Before 6 April 1941 and During the Enemy's Occupation], *Službeni list FNRJ* [Official Gazette of FPR Yugoslavia], No. 86/46, 105/46, 96/47, p. 1078.
3. Zakon o zabrani nošenja zara i feredže [Statute on Ban of Wearing the *Zar* and the *Feredža*], *Službeni list NR Bosne i Hercegovine* [Official Gazette of PR Bosnia and Hercegovina], No. 32/50, p. 427.
4. Закон за забрана да се носи зар и фереџе [Statute on Ban of Wearing the *Zar* and the *Feredža*], *Службени весник на HP Македонија* [Official Gazette of PR Macedonia], No. 1/51, p. 1.
5. Закон о забрани ношења зара и фереџе [Statute on Ban of Wearing the *Zar* and the *Feredža*], *Службени тласник HP Србије* [Official Gazette of PR Serbia], No. 4/51, pp. 84 and 85.
6. Закон о забрани ношења зара и фереџе [Statute on Ban of Wearing the *Zar* and the *Feredža*], *Службени листи HP Црне Горе* [Official Gazette of PR Montenegro], No. 31/50, p. 229.
7. Ustav Kraljevine Srba, Hrvata i Slovenaca [Constitution of the Kingdom of Serbs, Croats and Slovenes], *Službene novine Kraljevine Srba, Hrvata i Slovenaca* [Official Gazette of the Kingdom of Serbs, Croats and Slovenes], No. Special 142a.
8. Ustav Federativne Narodne Republike Jugoslavije [Federative People's Republic of Yugoslavia (FPRY) Constitution], *Službeni list FNRJ* [Official Gazette of FPRY], No. 10/46, p. 73–94.
9. Krivični zakonik [Penal Code], *Službeni list FNRJ* [Official Gazette of FPRY], No. 13/51, pp. 185–224.
10. Krivični zakon SR Bosne i Hercegovine [Penal Code of SR Bosnia and Herzegovina], *Službeni list Bosne i Hercegovine* [Official Gazette of SR Bosnia and Herzegovina], No. 16/77, pp. 453–483.
11. Krivični zakonik SR Hrvatske [Penal Code of SR Croatia], *Narodne novine SR Hrvatske* [People's Newspapers of SR Croatia], No. 25/77, pp. 379–407.
12. Кривичен закон на CP Македонија [Penal code of SR Macedonia], *Службен весник на CP Македонија* [Official Gazette of SR Macedonia], No. 25/77, pp. 489–519.
13. Kaznenski zakon SR Slovenije [Penal Code of SR Slovenia], *Uradni list SR Slovenije* [Official Gazette of SR Slovenia], No. 12/77, pp. 634–667.
14. Кривични законик CP Србије [Penal Code of SR Serbia], *Службени тласник CP Србије* [Official Gazette of SR Serbia], No. 26/77, pp. 1341–1369.
15. Кривични закон CP Црне Горе [Penal code of SR Montenegro], *Службени листи CP Црне Горе* [Official Gazette of SR Montenegro], No. 22/77, pp. 282–314.
16. Protokol o razgovorima koji su vođeni između predstavnika vlade Socijalističke Federativne Republike Jugoslavije i predstavnika Svete Stolice [Protocol on negotiations between the representatives of the Government of the Socialist Federative Republic of Yugoslavia and the representatives of the Holy See], *Službeni list SFRJ – Međunarodni ugovori i drugi sporazumi* [Official Gazette of the SFRY – International treaties and other agreements], No. 11/66, pp. 984–986.

## CASE LAW

1. ECtHR, *S. A. S. v. France*, No. 43835/11, Judgement of 1. July 2014, [GC].
2. ECtHR, *Dakir v. Belgique*, No. 4619/12, Judgement of 11 July 2017.
3. ECtHR, *Belcacemi et Oussar v. Belgique*, No. 37798/13, Judgement of 11 July 2017.

### DEMISTIFIKOVANI ZAKON: O ZABRANI VELA, KANCELPARAGRAFU I MILITANTNOM SEKULARIZMU U SOCIJALISTIČKOJ JUGOSLAVIJI

Marko Božić

APSTRAKT

Detaljno proučena s aspekta svoje političke pozadine, jugoslovenska zabrana zara i feredže s početka pedesetih godina XX veka do danas ostaje izvan polja interesovanja istoričara prava. Izlažući ovo jugoslovensko zakonodavstvo normativnoj analizi i poređenju sa sličnim savremenim zabranama burke i nikaba, ovaj rad dolazi do zaključaka koji nadilaze dosadašnje historiografske studije. Mada kratka po formi, jugoslovenska zabrana zara i feredže predstavljala je složeno zakonodavstvo kojim je nesumnjivo zabranjeno pokrivanje ženskog lica, ali su uvedena i krivična dela protiv protivnika skidanja zara i feredže, kao i zametak budućeg socijalističkog kancelparagrafa, tzv. predikaoničkog zakona. Militantna orijentacija ovog zakonodavstva, koje se otvoreno suprotstavilo jednoj verski motivisanoj praksi, samo se naizgled razlikuje od umerenijeg izraza savremenih zakonskih zabrani burke i nikaba. Produbljena analiza ideološkog opravdanja jugoslovenskog zakonodavstva, međutim, ukazuje na bitnu sličnost sa zabranama savremenih laičkih država: u oba slučaja radi se o akciju paternalističke države koja za cilj ima isključivanje religije iz političke sfere društvenog života i javne rasprave. Kao takva, analiza jugoslovenske zabrane zara i feredže doprinosi boljem razumevanju militantnog sekularizma kao savremene, ali nikako i nove kontroverze.

**Ključne reči:** zabrana burki, kancelparagraf, socijalistička Jugoslavija, socijalistički sekularizam, militantni sekularizam.

Article History:

Received: 29 September 2021

Accepted: 6 December 2021

Tamara Mladenović\*

## PRAVO NA ANONIMNI POROĐAJ NASPRAM PRAVA DETETA NA IDENTITET

**Apstrakt:** *Pravo deteta na identitet, međunarodno priznato Konvencijom UN o pravima deteta, jedno je od najvažnijih iz korpusa prava koja su priznata deci. Osim toga, njegova struktura je složena budući da obuhvata više užihih prava. Pa ipak, situacije u kojima dolazi do ograničenja prava na identitet nisu zanemarljive. Jedna od njih je i pravo na anonimni porođaj, kao mogućnost priznata od strane zakonodavca u izvesnom broju evropskih država. Suprotstavljeni interesi majke i deteta su neminovna posledica anonimnog porođaja. Cilj rada je poređenje prava deteta na identitet i prava majke na anonimni porođaj kao nepremostive prepreke utvrđivanju biološkog porekla. Posebna pažnja se posvećuje mogućnosti uspostavljanja adekvatne ravnoteže između njihovih interesa poređenjem značaja koji nacionalni pravni sistemi pružaju svakom od njih, uz odgovarajuće argumente. Prikazano je nekoliko različitih modela regulisanja zasnivanja materinstva koji se mogu pronaći u evropskim zakonodavstvima. Analiza, takođe, obuhvata i stavove međunarodnih organa, a naročito Evropskog suda za ljudska prava.*

**Ključne reči:** pravo na anonimni porođaj, prava deteta, pravo na identitet, Evropski sud za ljudska prava.

### 1. UVOD

Od samog trenutka rođenja deteta uloga majke postaje najznačajnija. Veza između majke i novorođenčeta je sveobuhvatna i iskonska. U momentu rođenja, zavisnost deteta od majke je gotovo potpuna, a njen uticaj na detetov život, opstanak i razvoj nemeerljiv. U tom smislu, imperator Napoleon Bonaparta (*Napoléon Bonaparte*) opisuje značaj uloge majke: „Buduća sudbina deteta, uvek je majčino delo”.<sup>1</sup> Pored toga, često se ukazuje i na značaj koji čin rađanja ima na život žene. Tako je indijski govornik

\* Asistentkinja, Pravni fakultet Univerziteta u Kragujevcu; e-mail: tmladenovic@jura.kg.ac.rs

1 Godechot, J., 2021, *Napoleon I: Biography, Achievements & Facts*, (<https://www.brittannica.com/biography/Napoleon-I>, 12. 9. 2021).

Radžniš Ošo (*Rajneesh Osho*) smatrao da se majka rađa u istom momentu kada i dete, budući da ona pre toga nije postojala. Žena jeste postojala, ali majka nikada.<sup>2</sup>

Moglo bi se reći da materinstvo više ne predstavlja precizan koncept. Razlog leži u različitom odgovoru nacionalnih zakonodavaca širom Evrope na pitanje da li je ono puka biološka činjenica ili obuhvata i voljnu komponentu. Drugim rečima, da li materinstvo može i u kojoj meri počivati na volji potencijalne majke. Za nju, mogućnost da postane majka ponekad bi mogla izgledati kao ogroman korak, potpuna promena stila života, nemogući trošak ili zastrašujuća odgovornost i emocionalna posvećenost.<sup>3</sup> Slučajevi napuštanja tek rođene dece od strane majki su oduvek postojali.<sup>4</sup> I upravo je to bio jedan od uzroka da pravni sistemi pojedinih zemalja Evrope predvide posebne pravne mehanizme čiji je cilj da za napuštanje tek rođene dece, koje se svakako ne može sprečiti, barem obezbede adekvatne uslove. Čuveni primer takvog instituta predstavlja ustanova „anonimnog porođaja” (*„accouchement sous X”*)<sup>5</sup>, koja ima dugu tradiciju u francuskom zakonodavstvu. Pravom na anonimni porođaj se ženi koja je dete rodila nudi zakonska mogućnost da zahteva da se njen identitet sačuva u tajnosti, neunošenjem podataka o njoj u registar

2 *Rajneesh Osho on motherhood*, (<https://www.wisesayings.com/authors/rajneesh-quotes/>, 12. 9. 2021).

3 Dally, A., 1982, *Inventing Motherhood: The consequences of and Ideal*, London, Burnett Books, p. 19.

4 Jedan od interesantnih podataka koji govore u prilog tome ogleda se u činjenici da je još 1198. godine Papa Inoćentije III (Pope Innocent III) proglasio neobičan dekret za crkve u Italiji: svaka je imala obavezu da postavi male, drvene točkice kako bi se sprečilo ubijanje i ostavljanje beba u reci Tibar. Ovi „točkovi za pronalaženje” (*„founding wheels”*) od tada su spasili stotine hiljada života. Bili su visoki otprilike dva metra i nalazili su se na crkvenom zidu okrenutom prema ulici. Spolja su delovali kao pravougaoni prozori, a zapravo su bili rotirajući cilindri, dovoljno veliki da u njih stane novorođenče. Njihova svrha je bila da zaštite život beba koje su izložene riziku, istovremeno garantujući anonimnost majke. Majke bi, najčešće pod velom noći, spuštale svoju decu u drveni pravougaonik i povlačile uzicu, oglašavajući zvono sa druge strane zida. Zvono bi upozorilo medicinsku sestru na suprotnoj strani. Kada bi čula zvonce, okrenula bi točak, rotirajući bebu prema sebi i uzimala „pronalezak” (*„founding”*). Nesumnjivo je da su ovi „točkovi za bebe” u stvari preteča pravnih mehanizama koji su se tek prošlog veka uveliko proširili u zemljama Evrope. Vid.: Simmonds, C., 2013, *An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights*, *The Cambridge Law Journal*, Vol. 72, No. 2, p. 263; Overmyer, M., 2019, *The Bell That Saved Abandoned Babies in the Middle Ages*, (<https://religionunplugged.com/>, 12. 9. 2021).

5 Koristeći francusku terminologiju označava se kao *„accouchement sous X”* što bi u doslovnom prevodu značilo *„porođaj pod X”*.

građanskog stanja.<sup>6</sup> Na taj način se, takođe, predupređuje prekid trudnoće i, u najekstremnijim slučajevima, infanticid.

Međutim, pravila koja uređuju zasnivanje materinstva kao pravne veze predstavljaju tipičan pokazatelj koliko delikatno može biti bilo kakvo mešanje države u porodične odnose. Sugerisano je da se nijedna zakonodavna intervencija u tom pravcu ne može smatrati neutralnom, pa čak ni odluka da se uopšte ne interveniše.<sup>7</sup> Režim za koji se opredelio francuski, kao i italijanski zakonodavac je više orijentisan na voljnu komponentu, predviđajući mogućnost potpuno diskretnog, anonimnog porođaja. Žena koja je dete rodila upisuje se u registar građanskog stanja na osnovu njene volje, a ne same činjenice rođenja deteta.<sup>8</sup> S druge strane, većina nacionalnih prava, uključujući i pravo Republike Srbije, činjenicu rođenja deteta i upisa imena majke u registar građanskog stanja identifikuje kao isključivu odrednicu za uspostavljanje roditeljskopravnog odnosa između majke i novorođenčeta.<sup>9</sup> Pritom, volji majke ne pridaje se nikakav značaj. U domaćem zakonodavstvu postoji zakonska obaveza prijavljivanja rođenja deteta i upisa imena majke u matičnu knjigu rođenih.<sup>10</sup> Pa ipak, ni ovakva odluka zakonodavca nije neprikosnoven. Nisu retki slučajevi ostavljanja tek rođene dece na različitim, neprikladnim mestima.<sup>11</sup> Najčešće u situacijama u kojima žena nosi neželjeno dete pa se, radi izigravanja zakonskog imperativnog rešenja, porodi izvan zdravstvene ustanove. U takvim okolnostima uočava se prednost predviđanja instituta poput anonimnog porođaja, budući da pravo ne može ignorisati činjenice. Ako postoji realna mogućnost da se izbegne primena norme koja predviđa obavezan upis imena majke u matičnu knjigu rođenih, onda se javlja potreba da se i takvi slučajevi pravno regulišu. U suprotnom, dobijamo situaciju identičnu onoj koja pretpostavlja mogućnost korišćenja prava na anonimni porođaj, ali sa znatno lošijim rezultatom.

6 Margaria, A., 2014, Anonymous Birth: Expanding the Terms of Debate, *Journal of Children's Rights*, Vol. 22, No. 3, p. 553.

7 Troiano, S., 2013, Understanding and Redefining the Rationale of State Policies Allowing Anonymous Birth: A Difficult Balance between Conflicting Interests, *International Journal of the Jurisprudence of the Family*, Vol. 4, p. 177.

8 Vlašković, V., 2014, *Načelo najboljeg interesa deteta u porodičnom pravu*, doktorska disertacija, Pravni fakultet Univerziteta u Kragujevcu, str. 210.

9 Ovakav sistem je zasnovan na maksimi koja potiče još iz rimskog prava: „*Mater semper certa est*”. Drevno pravilo ističe kako je majka uvek poznata, s obzirom na to da su nošenje i rođenje deteta najčešće vidljive, nesumnjive činjenice.

10 Čl. 42. Porodičnog zakona Srbije, *Sl. glasnik RS*, br. 18/05, 72/11 i 6/15, čl. 47. st. 1–2. Zakona o matičnim knjigama, *Sl. glasnik RS*, br. 20/09, 145/14 i 47/18; Ponjavić, Z., Vlašković, V., 2019, *Porodično pravo*, Beograd, Službeni glasnik, str. 200.

11 Ponjavić, Z., Palačković, D., 2017, Pravo na anonimni porođaj, *Stanovništvo*, Vol. 55, No. 1, str. 22.

Ovakva rasprava je aktualna zbog poteškoća oko uravnoteženja suprotstavljenih interesa: s jedne strane, prava majke na anonimnost i privatni život i, s druge, prava deteta na identitet. Priznavanje apsolutnog prava žene na anonimni porođaj je u očiglednoj suprotnosti sa obavezom države da obezbedi zakonodavne mere kojima bi se štitilo pravo deteta da zna svoje poreklo, kao deo šireg prava na identitet, koje je predviđeno Konvencijom UN o pravima deteta (dalje: KPD)<sup>12</sup> i Evropskom Konvencijom o ljudskim pravima<sup>13</sup>. Rezultat osnaživanja prava deteta na identitet je pretpostavka kako je u najboljem interesu deteta da zna svoje biološko poreklo, čime se favorizuje transparentnost. Anonimno odricanje od novorođenčeta se u tom kontekstu smatra „neprirodnim” i dostojnim moralnog prekora.<sup>14</sup> Postavlja se pitanje da li autonomija majke u slučaju anonimnog porođaja, ma koliko ona efikasno štitila život deteta, može biti dovoljno opravdanje za žrtvovanje njegovog prava na identitet. Međutim, kakav god odgovor bio, alternativa nije tako jednostavna: dopuštanje ili apsolutna zabrana anonimnog porođaja ne rešava sve probleme. Koji god pravni režim prevagnuo, izazov se sastoji u iznalaženju rešenja koje je u toj meri razrađeno da uzima u obzir sve relevantne interese, bez isključivog davanja prednosti samo jednom od njih.

## 2. „ACCOUCHEMENT SOUS X”: STVARNO ILI PRIVIDNO SREDSTVO ZAŠTITE DECE?

Model koji i dalje prevladava u pravnim sistemima Evrope, zasnovan na automatskom utvrđivanju materinstva bez pridavanja ikakvog značaja volji majke, svoje uporište ima u poštovanju osnovnih principa roditeljske odgovornosti. Uvažavanje takve odgovornosti uspeva da spreči mogućnost roditelja da tu mogućnost izbegne. Osim toga, navedeni model smanjuje troškove socijalnog davanja na ime pomoći napuštenoj deci, koje inače padaju na teret sredstava države.<sup>15</sup> Pa ipak, strogost i obave-

12 Konvencija je usvojena na 44. zasedanju Generalne skupštine Ujedinjenih nacija, na sednici održanoj 20. novembra 1989. godine. Republika Srbija je ratifikovala navedenu konvenciju (*Službeni list SFRJ – Međunarodni ugovori*, br. 15/90).

13 Konvencija za zaštitu ljudskih prava i osnovnih sloboda je usvojena 4. novembra 1950. godine u Rimu, od strane Saveta Evrope. Navedeni međunarodni ugovor se skraćeno označava kao Evropska konvencija o ljudskim pravima. Ovu konvenciju je ratifikovala i Republika Srbija (*Sl. list SCG – Međunarodni ugovori*, br. 9/03, 5/05 i 7/05 – ispr. i *Sl. glasnik RS – Međunarodni ugovori*, br. 12/10 i 10/15).

14 Marshall, J., 2018, Secrecy in births, identity rights, care and belonging, *Child and Family Law Quarterly*, Vol. 30, No. 2, p. 167.

15 Troiano, S., 2013, p. 187.

znost koji ovakav sistem podrazumeva ima i svojih nedostataka. Osnovna zamerka ovakvom sistemu se odnosi na slučajeve u kojima bi se majka, kako bi izbegla roditeljsku odgovornost, osetila prisiljenom preduzeti ekstremne mere, budući da joj pravni poredak ne ostavlja drugu mogućnost. Navedene situacije su zapravo primeri neželjene trudnoće koja nije okončana abortusom. Stoga, žena pribegava rađanju deteta van zdravstvene ustanove, u medicinski neprihvatljivim uslovima, a zatim napuštanju novorođenčeta, sa svim opasnostima koje ove odluke mogu predstavljati po život i zdravlje deteta, ali i žene. Pored toga, najekstremniji način koji žena može odabrati kako bi pronašla izlaz iz takve situacije jesu slučajevi ubistva deteta ubrzo nakon porođaja, odnosno slučajevi infanticida<sup>16</sup>. Zaista, žena se nakon porođaja može naći u dramatičnoj situaciji.<sup>17</sup> Moguće je da je doživela traumatična iskustva poput silovanja i/ili incesta, negativnih reakcija porodice, finansijskih problema ili odsustva partnera.<sup>18</sup>

Upravo u takvim primerima, ustanova anonimnog i poverljivog porođaja se pokazuje kao najadekvatnije rešenje za zaštitu života i zdravlja majke i deteta. Dakle, da bi autonomija majke preovladala, mora postojati dodatni interes koji opravdava takvo rešenje. Prema dominantnom stavu, on je pronađen u potrebi zaštite zdravlja i života majke i deteta. Pravilo kojim se majci omogućava da nakon porođaja zahteva da ostane anonimna pozitivno utiče na njeno zdravlje, s obzirom na to da otklanja psihološki pritisak kojem je ona izložena u delikatnom trenutku. Istovremeno, odvraća je od potrebe da dete ubije ili ga napusti u neodgovarajućim uslovima, čime se pruža zaštita njegovom pravu na život.<sup>19</sup> Štaviše, zaštita se tiče i opšteg, odnosno javnog interesa za očuvanje zdravlja ljudi i promovisanje životnih izbora, a ne samo individualnog interesa ili subjektivnog

16 Postoje shvatanja prema kojima je dan rođenja zapravo dan u kojem je pojedinac izložen najvećem riziku od ubistva. Izraz „*infanticid*” je zamenio raniji termin „čedomorstvo” i označava ubistvo bebe u roku od 24 časa od njenog rođenja. Infanticid se može relativno lako sakriti, usled čega većina počiniteljki nikada ne bude pronađena. Može se pretpostaviti da zabeleženi slučajevi predstavljaju samo vrh ledenog brega. Vid.: Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C. M., 2015, Anonymous birth law saves babies – optimization, sustainability and public awareness, *Archives of Women’s Mental Health*, Vol. 19, No. 2, p. 2.

17 Ponjavić, Z., Palačković, D., 2017, str. 23.

18 Hadžimanović, N., 2018, Confidential and Anonymous Birth in National Laws – Useful and Compatible with the UN Convention on the Rights of the Child?, *Comparazione e Diritto Civile*, p. 2.

19 Katarin Bone (*Catherine Bonnet*), dečiji psiholog, objavila je knjigu *Gest ljubavi, anonimni porođaj* (*Geste d’amour, l’accouchement sous X*) u kojoj opisuje traženje anonimnosti i napuštanje novorođenčeta kao pokušaj majke da ga zaštiti od sopstvenih čedomorskih želja. Vid.: Lafacheur, N., 2004, The French ‘Tradition’ of Anonymous Birth: The Lines of Argument, *International Journal of Law, Policy and the Family*, Vol. 18, No. 3, p. 323.

prava majke.<sup>20</sup> Čini se opravdanim priznati da svrha pravila koja regulišu anonimni porođaj leži direktno u očuvanju zdravlja i života deteta i majke, te da je takva zaštita omogućena garancijom prava ženi da ostane anonimna i dete preda na staranje državi.<sup>21</sup> Smatra se da bi u suprotnom, psihološki stres naveo majku da prouzrokuje štetu sebi ili novorođenčetu.

Očuvanje zdravlja deteta je i predušlov za zaštitu njegovog ličnog identiteta. Kada bi žena bila primorana da otkrije svoj identitet pri porođaju, u barem određenom broju slučajeva dete ne bi preživelo, te se ne bi ni postavljalo pitanje zaštite njegovog identiteta.<sup>22</sup> Dakle, kao primarni interes deteta prepoznaje se njegovo pravo na život i potreba da se rodi u bezbednim uslovima i prihvatljivom okruženju. Ali, ovakvo rezonovanje stvara nepotrebnu dihotomiju, imajući u vidu da ignoriše suštinska pitanja kao što su socijalne, ekonomske ili kulturne okolnosti koje kod žene stvaraju osećaj da nema drugog izbora osim da ostane anonimna.<sup>23</sup> Ustanova anonimnog porođaja stoga treba da „spasi decu”, omogućavanjem adekvatnog medicinskog nadzora tokom trudnoće i otklanjanjem rizika tajnog porođaja, napuštanja ili infanticida.

Poslednja decenija je vreme u kojem se ideja o anonimnom porođaju proširila iz nekoliko izolovanih zemalja na više od trećine evropskih jurisdikcija.<sup>24</sup> Francuska i Italija predviđaju najčistiji model anonimnog porođaja u Evropi.<sup>25</sup> Austrijsko zakonodavstvo je usvojilo posredni model prema kome je anonimni porođaj dozvoljen, ali u ograničenom broju

20 U tom smislu, tokom debate koja se vodila u Narodnoj skupštini Republike Francuske mogli su se čuti argumenti poput: „Imamo dužnost da obezbedimo nerođenim bebama da se rode.” Vid.: Troiano, S., 2013, p. 191; Lafaucheur, N., 2004, p. 329.

21 Mada pojedini autori dovode u pitanje opravdanost zaštite zdravlja majke i deteta navodeći da nema dovoljno statističkih, ni empirijskih dokaza o većem broju prekida trudnoće, čedomorstva ili napuštanja tek rođene dece u državama u kojima majka nema mogućnost da koristi pravo na anonimni porođaj. Ne može se tvrditi da su ove sumnje nerazumne. Jer korisnost i efikasnost pravila se ne mogu uzeti „zdravo za gotovo”, već je potrebno da ona budu potvrđena i u praksi. Vid.: Simmonds, C., 2013, p. 192.

22 U istom kontekstu, interesantno je mišljenje dvojice sudija Evropskog suda za ljudska prava u slučaju Odièvre protiv Francuske (*Odièvre v. France*) iz 2003. godine: „Pojedinac koji se po svaku cenu zalaže protiv anonimnosti, čak i uprkos izričite volje biološke majke, treba da se zapita da li bi uopšte bio rođen da ne postoji sistem anonimnog porođaja. Zato je ovakvo pitanje legitimna osnova za uvođenje i promovisanje navedenog sistema.” EctHR, *Odièvre v. France*, no. 42326/98, Judgement of 13 February 2003 [GC], Concurring opinion of judge Rees joined by judge Kūris, par. 4. Videti: Blauwhoff, R., 2008, Tracing down the historical development of the legal concept of the right to know one's origins: Has 'to know or not to know' ever been the legal question?, *Utrecht Law Review*, Igitur, Vol. 4, No. 2, p. 109; Lafaucheur, N., 2004, p. 337.

23 Simmonds, C., 2013, p. 264.

24 *Ibid.*

25 Troiano, S., 2013, p. 179.

slučajeva.<sup>26</sup> Još jednu vrstu ublaženog sistema poznaje zakonodavstvo Nemačke, čiji je Parlament nakon duge rasprave usvojio zakon koji uvodi model pod nazivom „diskretni porođaj” („*Vertrauliche Geburt*”)<sup>27</sup>. Sličan njemu je i belgijski model. Belgijsko zakonodavstvo niti dopušta anonimni porođaj, niti ga potpuno odbacuje, već takođe priznaje pravo na „diskretno” rađanje. Zanimljivo je da je priznavanju navedenog prava doprinela činjenica da su trudnice iz Belgije jednostavno prelazile granicu i porađale se u Francuskoj, koristeći prednosti koje pruža „*accouchement sous X*”.<sup>28</sup>

Opravljanje primene mehanizma anonimnog porođaja u pojedinim državama može se pronaći i u sudskoj praksi. Ustavni sud Italije koristi upravo pravo deteta na život kao osnovu zakonske norme o anonimnom porođaju, s krajnjim ciljem da se obeshrabre žene koje bi posezale za prekidom trudnoće ili već pomenutim nepoželjnim odlukama. Isti sud je kvalifikovao pravo na život kao pravo na fizički zdravo postojanje, te da je psihičko zdravlje pojedinca vrednost koja može biti od sekundarnog značaja u slučaju kada je ugrožen njegov telesni integritet.<sup>29</sup> Međutim, pravo na život koje predviđa Konvencija UN o pravima deteta ne podrazumeva samo njegovo puko rađanje. Ono ne štiti život kao takav, već onaj koji uvažava dostojanstvo ličnosti, odnosno kako fizički, tako i psihički, moralni i duhovni integritet. Pored toga, istovremeno predstavlja izvesnu pravnu zajednicu sa pravima deteta na opstanak i razvoj.<sup>30</sup> Posmatrano sa ovog aspekta, pravo na anonimni porođaj čini majku apsolutnim arbitrom detetovog statusa. U tom pravcu se kreće i izdvojeno mišljenje

26 Prema tom modelu pravo na anonimni porođaj može koristiti isključivo trudnica koja se nalazi u teškoj situaciji u smislu stanja nužde koje predstavlja ozbiljnu i inače neizbežnu opasnost na psihičko ili fizičko zdravlje, njen ili život bebe. Ovakvo uslovljavanje korišćenja prava na diskretni porođaj predstavlja njegovo značajno ograničenje i čini ga izuzetkom, a ne pravilom. Vid.: *Ibid.*, p. 188.

27 Iako je ovaj zakon usvojen tek 2013. godine, pre toga su u mnogim nemačkim gradovima uvedene „zaštićene kolevke” ili „šalteri za bebe” („*Babyklappen*”), uglavnom skriveni od očiju javnosti iza bolnica ili drugih ustanova u kojima majke mogu napustiti svoje dete (po uzoru na drevni model „točkova za pronalaženje”). Videti: Bartsch, M., Schröder, C., Windmann, A., 2012, *Abandoning Newborns: Do Baby Hatches Really Save Lives?* (<https://www.spiegel.de/international/germany/controversy-over-baby-hatches-in-germany-a-844134.html>, 13. 9. 2021).

28 Na taj način su „prekogranični porođaji” podstakli belgijski Konsultativni komitet za bioetiku da podrži institucionalizaciju „diskretnog porođaja”. Vid.: Freeman, M., Margaria, A., 2012, *Who and What Is a Mother? Maternity, Responsibility and Liberty*, *Theoretical Inquiries in Law*, Vol. 13, No. 153, p. 157.

29 Dok pravo majke da ostane anonimna nakon porođaja posmatra kao instrument u službi ostvarivanja javnih interesa, koji su garancija opstanka deteta. Vid.: Colcelli, V., 2012, *Anonymous Birth, Birth Registration and the Child’s Right to Know Their Origins in the Italian Legal System: A Short Comment*, *Civil & Legal Sciences*, Vol. 1, No. 2, p. 5.

30 Vlašković, V., 2014, str. 208.

sudija Evropskog suda za ljudska prava u slučaju *Odievr protiv Francuske* (*Odièvre v. France*) koji su oštro kritikovali ovakav pristup. Smatrali su da je pravom na anonimni porođaj majci dato „diskreciono pravo da na svet donese dete koje pati, osudivši ga na doživotno ignorisanje”.<sup>31</sup> Na taj način se ozbiljno krši jedno od najznačajnijih prava pojedinca, pre svega deteta – pravo na identitet.

### 3. PRAVO DETETA NA IDENTITET KAO 'ŽRTVA' POSTUPKA ANONIMNOG POROĐAJA

#### 3.1. PRAVO DETETA NA IDENTITET I NJEGOVA OGRANIČENJA SA ASPEKTA TUMAČENJA KONVENCIJE UN O PRAVIMA DETETA

Konvencija UN o pravima deteta predviđa čitav spektar prava kojima je konačno stavila tačku na dugotrajne napore za postizanje formalnog međunarodnog priznanja ljudskih prava detetu. Među njima svoje mesto je pronašla i pravo deteta na identitet. Međutim, KPD ne pruža sveobuhvatno objašnjenje pojma identiteta, budući da se njegov sadržaj pojma ne iscrpljuje samo članom 8, koji ga izričito propisuje<sup>32</sup>, već se pojedini aspekti mogu pronaći i u nekoliko ostalih članova<sup>33</sup>. To je neminovna posledica činjenice da je pravo na identitet veoma složeno, te u sebi objedinjuje određeni broj užih prava. Tumačenjem KPD-a može se izvesti zaključak da pravo deteta da zna svoje poreklo, predviđeno članom 7, predstavlja jedno od najvažnijih segmenata unutar šireg prava deteta na identitet. Pravo na saznanje porekla predstavlja *condicio sine qua non* za formiranje ličnog identiteta.<sup>34</sup> Spoljni činioci, potpuno nezavisni od samog deteta, ne samo da mogu ugroziti, dovesti u pitanje ostvarivanje njegovog prava na identitet, već ga mogu u potpunosti negirati. Među njima je svakako i mogućnost anonimnog porođaja koje pojedine države potpisnice svojim zakonodavstvom predviđaju. Usled toga neminovno se nameće pitanje kakav je stav KPD-a o opravdanosti anonimnog porođaja.

Prilikom uobličavanja člana 7. KPD-a vodila se debata u cilju pronalazjenja adekvatne formulacije kojom bi se priznalo pravo, ali istovremeno

31 EctHR, *Odièvre v. France*, no. 42326/98, Judgement of 13 February 2003 [GC], Joint dissenting opinion of judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Baretto, Tulkens and Pellonpää, para. 7; Simmonds, C., 2013, p. 264.

32 Čl. 8. Konvencije UN o pravima deteta.

33 Jumakova, A., 2020, Content of the child's right to identity within the scope of the Convention on the rights of the child and the Latvian national framework, *Miscellanea Historico-Iuridica*, Vol. 19, No. 1, p. 231.

34 Margaria, A., 2014, p. 558.

omogućili eventualni izuzeci. Konačna verzija predviđa pravo deteta da zna ko su mu roditelji „ako je to moguće”<sup>35</sup>, premda su pojedine delegacije smatrale da bi ovakvo formulisanje dovelo do proizvoljnog tumačenja odredbe.<sup>36</sup> Smisao ove fraze je da ukaže na životne situacije u kojima je praktično nemoguće utvrditi istinu o poreklu, ali i na okolnosti u kojima je ipak moguće saznati identitet bioloških ili gestacionih roditelja koji je usled različitih pravnih prepreka ostao skriven.

KPD pokazuje minimum tolerancije prema anonimnosti roditelja. Ona uspostavlja pretpostavku da tamo gde je moguće saznati njihov identitet dete ima pravo da dobije takve informacije, te državama potpisnicama nameće obavezu da obezbede sistem evidencije podataka o poreklu koji će detetu biti na raspolaganju kada to bude u njegovom interesu.<sup>37</sup> Nemogućnost ostvarivanja ovog prava izaziva veliku patnju kod deteta, sprečava pravilno oblikovanje identiteta, pa čak može izazvati i psihološke probleme. Ne znati ništa o svom poreklu je još gore i nepodnošljivije kada država, kao zvanični „čuvar” dece, raspolaže ovim podacima i odbija da ih otkrije.<sup>38</sup>

Ni Komitet za prava deteta nije tolerantan prema anonimnom porođaju. U Zaključnim zapažanjima povodom inicijalnog izveštaja Francuske on iskazuje zabrinutost u pogledu ostvarivanja prava deteta da zna svoje poreklo u slučajevima kada majka zahteva da ostane anonimna nakon porođaja, budući da možda ne odražava u potpunosti opšte principe KPD-a.<sup>39</sup> Komitet UN preporučuje državama potpisnicama da razmotre uklanjanje

35 Čl. 7. st. 1. Zakona o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Sl. list SFRJ – Međunarodni ugovori*, br. 15/90 i *Sl. list SRJ – Međunarodni ugovori*, br. 4/96 i 2/97.

36 Što i nije daleko od istine. Tipičan primer je upravo pomenuti prevod na srpski jezik, koji nije adekvatan, s obzirom na to da dodatno sužava već ograničeno polje primene prava deteta. Engleski izraz „*as far as possible*” bi po mišljenju domaće literature trebalo prevesti sintagmom „kad god je to moguće” ili „uvek kada je to moguće”. Vid.: Vlašković, V., 2014, str. 203; Draškić, M., 2007, *Porodično pravo i prava deteta*, Beograd, Pravni fakultet Univerziteta u Beogradu, str. 260, fn. 744. Pored toga, zbog nedovoljne određenosti izraza nekoliko zemalja potpisnica je stavilo izričite rezerve na član 7. Konvencije. Luksemburg je, primera radi, u svojoj rezervi naveo da, prema njihovom uverenju, član 7. ne predstavlja prepreku zakonu koji dozvoljava anonimni porođaj, za koji se smatra da je u interesu deteta u skladu sa članom 3. Konvencije. Interesantno je da Francuska nije stavila takvu rezervu, što može ukazati na njenu uverenost da su interesi države dovoljno zaštićeni ovakvim ograničenjem („*as far as possible*”). Videti: Hadžimanović, N., 2018, p. 11.

37 Pritom, izraz „koliko god je to moguće” ni najmanje nije prilagođen pravima roditelja jer postavlja široke granice u kojima postoji mogućnost otkrivanja njihovog identiteta. Tobin, J., 2019, *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, pp. 262–263.

38 Lafacheur, N., 2004, p. 327.

39 Committee on the rights of the child, *Consideration of reports submitted by states parties under article 44 of the convention*, France, Un doc. CRC/C/15/Add. 20, para. 14. (25 April 1994).

zahteva za pristanak biološke majke da otkrije svoj identitet tamo gde takav zahtev postoji (na primer u Francuskoj i Luksemburgu) i da svoje napore usmere na rešavanje osnovnih razloga koji žene uopšte navode da se porađaju anonimno.<sup>40</sup> Na ovaj način, Komitet ne dozvoljava da ograničavajuća formulacija iz člana 7. KPD-a ostvari nameravane efekte. Čini se da on ne deli mišljenje Luksemburga izraženo u rezervi da navedeni član ne predstavlja nikakvu prepreku zakonskom predviđanju prava na anonimni porođaj. Sličnu zabrinutost Komitet zadržava i prilikom ocene prakse anonimnog ostavljanja dece u tzv. „bebi kutijama” u brojnim državama, te je označava kao kršenje nekoliko članova KPD-a (čl. 7, 8, 9. i 19). Međutim, u pojedinim slučajevima afirmiše „mogućnost poverljivih porođaja u bolnicama kao krajnju meru sprečavanja napuštanja i/ili ubijanja deteta”, jer bi i u takvim slučajevima bilo moguće i zaista prikladno da se detetu omoguću pristup informacijama kao što su one vezane za njegovu nacionalnost ili medicinskih podataka o biološkim roditeljima.<sup>41</sup> Komitet UN za prava deteta bi trebalo da razmotri celokupnu situaciju u kojoj se nalaze majka i dete, kako bi se njegove preporuke mogle sprovesti posrednim merama. Imajući u vidu da je u dosadašnjim zapažanjima pravo na anonimni porođaj posmatrao isključivo sa aspekta prava deteta, ne bi se moglo reći da je ostvario značajan uspeh u državama koje nisu izmenile svoja zakonodavstva.

### 3.2. POTREBA USPOSTAVLJANJA HIJERARHIJE IZMEĐU SUPROTSTAVLJENIH PRAVA

Sa osnovnim ciljem da se francusko zakonodavstvo usaglasi sa Konvencijom o pravima deteta i pravom na saznanje porekla, 2002. godine dolazi do usvajanja Zakona o utvrđivanju porekla usvojene dece i šticienika države (poznat i pod nazivom *Royal*). Iako je zadržao nadmoć majke u postupku anonimnog porođaja, ovaj zakon je uveo niz mehanizama koji su značajno povećali izgleda za otkrivanje identiteta bioloških roditelja. Francuska je pokušala da uravnoteži pravo majke na poštovanje privatnosti i pravo deteta da zna svoje poreklo, zadržavajući mogućnost anonimnog porođaja uz favorizovanje pristupa detetu podacima o svom poreklu.<sup>42</sup> Ključnu inovaciju u tom smislu predstavlja uvođenje Nacionalnog saveta za pristup informacijama o poreklu (CNOAP). Pored prikupljanja i čuvanja podataka o ličnom poreklu, institucija deluje i kao posrednik između onih koji žele da ostvare takav pristup i njihovih bioloških

40 Hadžimanović, N., 2018, p. 14.

41 *Ibid.*

42 Kovaček-Stanić, G., 2011, Autonomija versus materijalna istina u komparativnom pravu o porodičnom statusu deteta, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3, str. 197.

roditelja.<sup>43</sup> Dakle, interesi deteta se štite i pre nego što se kod njega javi potreba da sazna navedene podatke. Naime, kada žena izrazi želju da se porodi anonimno, biće obavještena o pravnim posledicama takvog postupka, kao i o pravu svakog pojedinca da zna svoje poreklo. Nadalje, ona se poziva da u zapečaćenoj kovrti, zajedno sa podacima o identitetu dostavi podatke o svom i zdravlju oca deteta, poreklu deteta i okolnostima začeća. Takođe, obavezno se informiše da u svakom trenutku može dopuniti podatke o sopstvenom identitetu i time se odreći anonimnosti.<sup>44</sup> Međutim, kada Nacionalni savet primi zahtev lica koje želi da sazna podatke o poreklu, uspostavlja kontakt sa biološkom majkom i od nje zahteva izjašnjenje da li želi da otkrije identitet ili ne. Pa ipak, pravo majke na privatnost i dalje odnosi prevagu, jer se pristup podacima o poreklu ne može shvatati kao pravo deteta, već isključivo kao jedna mogućnost.<sup>45</sup>

Razlog leži u potrebi da se omogući autonomija i sloboda izbora žene koja nosi i rađa dete. U pitanju je zaštita njenog prava na samoodređenje. Na prvi pogled, moglo bi se reći da lično opredeljenje majke ne može predstavljati dovoljno opravdanje za takvo značajno negiranje interesa deteta da zna istinu o svom poreklu, odnosno žrtvovanje prava deteta na identitet. Međutim, identitet se može shvatiti takođe kao pitanje opredeljenja, budući da njegova izgradnja uvek zavisi od nečijeg izbora. To što je i identitet majke, jednako kao i identitet deteta u rukama žene koja dete rađa tipična je posledica prirodne prednosti koja joj je data. U tom smislu, odluke da zatrudni, postane majka po rođenju ili da se te odgovornosti odrekne predstavljaju niz konkretnih izbora koji čine identitet jedne žene. Mišljenje prema kome svaku od ovih odluka treba shvatiti kao situacije koje ženu jednostavno zadese, bez ikakve mogućnosti njenog izbora, može se kritikovati kao ometanje sposobnosti žene da život oblikuje po svom izboru – da gradi sopstveni identitet.<sup>46</sup> U takvom kontekstu

43 Margaria, A., 2014, p. 563.

44 Ponjavić, Z., Palačković D., 2017, str. 27; Margaria, A., 2014, str. 564; Hlača, N., 2007, Pravo majke na anonimnost poroda – „L'accouchement sous X – porod pod X”, *Gynaecol Perinatol*, Vol. 16, No. 3, str. 159.

45 Ponjavić, Z., Palačković D., 2017, str. 27. Dok se prema nemačkom sistemu „diskretnog porođaja” pruža bolja zaštita pravima deteta. Žena koja želi da sačuva svoj identitet pri porođaju može upotrebiti pseudonim, dok se svi njeni lični podaci, kao i podaci o rođenju čuvaju zapečaćeni u kovrti koja će služiti ostvarivanju prava deteta u budućnosti. Pristup navedenim podacima dete može ostvariti kada navrší 16 godina života, uz neke izuzetke. Naime, majka se može usprotiviti otkrivanju svog identiteta, te ako to i učini, a dete ne odustaje od namere da sazna svoje poreklo, na sudu je da donese odluku o tome da li se njeno protivljenje može smatrati opravdanim. Vid.: Tobin, J., 2019, p. 188.

46 Termin „majka” se smatra važnim segmentom identiteta žene. Videti: D'alton-Harrison, R., 2014, Mater semper incertus est: Who's Your Mummy?, *Medical Law Review*, Vol. 22, No. 3, p. 2; Marshall, J., 2018, p. 182.

celokupna situacija deluje kao sukob dva ekvivalentna prava – prava deteta na identitet i identičnog prava majke. Prema tome, ne može se dati bezuslovna prednost interesu deteta.

Pravo na anonimni porođaj može se posmatrati i kao izraz prava na slobodno roditeljstvo, koje upravo predstavlja uslov za realizaciju autonomnog izbora žene. Ono joj omogućuje da slobodno raspolaže svojim materinstvom, te na taj način odluči da li će biti roditelj ili ne.<sup>47</sup> Činjenica da iz prava na slobodno roditeljstvo, kao apsolutnog i neotuđivog ličnog prava, proizlazi pravo na abortus podstakla je predstavnike feminističkog pokreta da anonimni porođaj predstave kao „produžetak” prava na prekid trudnoće. Drugim rečima, okarakterisali su ga kao sredstvo kojim se nastoji da se isprave nedostaci zakonskih rešenja o ograničenju prekida trudnoće.<sup>48</sup> Međutim, ukoliko bi žena koristila pravo na prekid trudnoće, dete se ne bi ni rodilo. U slučaju anonimnog porođaja postoji živo rođeno dete, kao individua sa sopstvenim pravima.

Centralno je pitanje da li rođenjem deteta prestaje pravo žene na slobodu izbora i kontrolu nad sopstvenim telesnim integritetom. Samim činom rađanja ona stvara autonomno ljudsko biće čije postojanje više ne zavisi isključivo od nje.<sup>49</sup> Takva situacija ima implikacije i na pitanje ličnog identiteta. Pa ipak, debata o potrebi za izgradnjom identiteta deteta u potpunosti se koncentriše na neophodnost saznanja o biološkoj majci, zanemarujući značaj otkrivanja identiteta oca.<sup>50</sup> Razlog za ovaj propust treba tražiti u nemogućnosti identifikacije oca deteta, budući da zavisi od postojanja uzročne veze između odnosa majke i deteta, sa jedne, i oca i deteta, sa druge strane, prema kojoj je uspostavljanje prvog neophodan uslov za nastanak drugog odnosa. U slučaju kada majka zahteva tajnost svojih podataka nakon porođaja, i otac i dete se moraju suočiti sa pravnom i faktičkom nemogućnošću otkrivanja međusobnog identiteta.<sup>51</sup> Navedeno rezonovanje nas može dovesti do zaključka da su prava i interesi majke nadmoćniji od prava kako samog deteta, tako i biološkog oca. Odnosno, pravo majke na privatnost i samoodređenje uživa zaštitu naspram prava deteta na identitet i interesa biološkog oca koji neminovno iščezavaju majčinom odlukom da ostane anonimna. Bezuslovnim prihvatanjem reproduktivnog izbora žene budućnost identiteta deteta je isključivo u rukama majke.

47 Ponjavić, Z., Palačković D., 2017, str. 24.

48 Lafaucheur, N., 2004, p. 331.

49 Freeman, M., Margaria, A., 2012, p. 165.

50 Marshall, J., 2018, p. 179.

51 Margaria, A., 2014, p. 571.

Zaista, može se zanemariti interes oca kada je u pitanju prekid trudnoće, budući da je fetus deo telesnog integriteta žene, ali je znatno teže negirati interese koje on ima kada se dete rodi.<sup>52</sup> Takva zakonska regulativa šalje nedvosmislenu poruku kako očevi nisu voljni i/ili sposobni da ispunjavaju roditeljske dužnosti u odsustvu majke, što značajno umanjuje društvenu vrednost očinstva i isključuje realnu mogućnost da dete odgaja njegov biološki otac.<sup>53</sup> U delu feminističke pravne teorije, odbacuje se legitimnost očevog interesa. Predviđanje prava na anonimni porođaj ocenjuje se kao neophodno sredstvo očuvanja ravnoteže između roditeljskih obaveza muškarca i žene, navodeći kako je muškarcima lako da ostanu anonimni.<sup>54</sup> U tom smislu, interes biološkog oca za razvoj porodičnih i emocionalnih veza sa detetom ne treba da nadjača pravo majke na očuvanje anonimnosti.

Značajan stav u tom pravcu je istakao francuski profesor i nekadašnji ministar Žan-Fransoa Matej (*Jean-François Mattéi*) ističući kako bi žene koje su se opredelile za anonimni porođaj radije koristile pravo na prekid trudnoće nego rodile dete pod svojim imenom. On navodi da su pravo majke na privatnost i pravo deteta na identitet zapravo jednaka te se moraju posmatrati hronološki. U tom slučaju, ako pravo deteta prevlada nad majčinim pravom, onda dete nikad neće nastati. Otuda, pravo majke mora odneti prevagu.<sup>55</sup> Iz tog razloga je, uprkos dobrodošloj reformi francuskog zakonodavstva „hijerarhija” između prava majke i prava deteta zadržana. Blandin Male-Briku (*Blandine Mallet-Bricout*) to slikovito iskazuje rečima: „Lopta ostaje na njenoj strani terena”.<sup>56</sup>

52 Freeman, M., Margaria, A., 2012, p. 165.

53 Margaria, A., 2014, p. 575.

54 Iako postoje stavovi koji ističu da su porodični odnosi, jednako kao i bračni status pojedinca pitanja od javnog interesa koja ne mogu biti prepuštena isključivo privatnoj volji, što ujedno opravdava njihovu javnu registraciju. Ako je pravo na anonimnost omogućeno majci, onda bi svaki tuženi muškarac u postupku utvrđivanja očinstva mogao istaći prigovor pozivajući se na jednako pravo, bez ikakvih razlika. Pravo na utvrđivanje biološkog očinstva u sudskom postupku, protivno volji muškarca, jasan je dokaz da je u ovakvom sukobu pravo na anonimnost roditelja podređeno pravu deteta na saznanje porekla. Dok bi u slučaju sumnje, princip najboljeg interesa deteta pojačao značaj prava deteta na identitet. Vid.: Pastore, A., 2019, El parto anonimo o secreto y el parto confidencial o discreto como sistemas legales estrategicos alternativas al aborto, *Academia Nacional de Ciencias Morales y Politicas*, p. 96.

55 Lafaucheur, N., 2004, p. 330.

56 Mallet-Bricout, B., 2002, Reforme de l'accouchement sous X: quel equilibre entre les droits de l'enfant et les droits de la mere biologique?, *La Semaine Juridique Edition Generale*, Vol. 11, No. 9, p. 485.

#### 4. SUKOB INTERESA MAJKE I DETETA U SVETLU PRAKSE EVROPSKOG SUDA ZA LJUDSKA PRAVA

Zakonska pravila koja uređuju pravo na anonimni porođaj su bila predmet ispitivanja i Evropskog suda za ljudska prava (dalje: ESLJP). Centralno pitanje postavljeno je povodom ocene usaglašenosti navedenog prava sa članom 8. Evropske konvencije o ljudskim pravima, kojim se pruža zaštita pravu na privatni i porodični život pojedinca.<sup>57</sup> On, naravno, ne predviđa izričito pravo na saznanje svog porekla, ali je praksa ESLJP-a u nekolicini slučajeva svojim tumačenjem pomenutog člana, naročito prava na zaštitu privatnog života, pridala veliki značaj posrednoj zaštiti prava na identitet.<sup>58</sup>

Gljučni i suprotstavljeni argumenti su izneti u slučaju *Odièvr protiv Francuske (Odièvre v. France)*<sup>59</sup> iz 2003. godine. Podnositeljka predstavke je francuska državljanka rođena 1965. godine u Parizu, čija je majka koristila pravo na anonimni porođaj. Kako je od nadležnih institucija zahtevala informacije o svome biološkom poreklu, takav zahtev je odbijen u skladu sa rešenjem nacionalnog zakonodavstva. Mogla je ostvariti pristup isključivo podacima koji ne identifikuju njenu majku. Usled toga, obraća se ESLJP-u 1998. godine sa predstavkom u kojoj navodi da je Francuska povredila član 8. i njeno pravo na poštovanje privatnog i porodičnog života. Naime, istakla je da je potraga za ličnim identitetom sastavni deo njenog „privatnog”, ali i „porodičnog života”, budući da je francusko zakonodavstvo sprečava da uspostavi emocionalne veze sa biološkom porodicom. Međutim, ESLJP je smatrao nepotrebnim ispitivati slučaj iz perspektive porodičnog života, s obzirom na to da se isti ne može svesti na puko postojanje biološke veze. Prema tome, čitava rasprava se svela na posmatranje povrede člana 8. isključivo sa aspekta prava na privatni život deteta, ali i majke.<sup>60</sup> Podnositeljka predstavke je svoje argumente zasnivala na potrebi zaštite prava deteta, kao i poteškoća skopčanih sa vođenjem

57 Čl. 8. st. 1. Evropske konvencije o ljudskim pravima.

58 Pa tako, u slučaju *Gaskin v. United Kingdom* presudom utvrđeno pravo pojedinca da ne bude lišen sopstvene istorije, što doprinosi razvoju prava na identitet. Vid.: EctHR, *Gaskin v. U.K.*, no. 10454/83, Judgement of 7 July 1989. U presudi *Bensaid v. United Kingdom* se navodi da je pravo na identitet i lični razvoj zaštićeno članom 8. Evropske konvencije. Vid.: EctHR, *Bensaid v. U.K.*, no. 44599/98, Judgement of 6 February 2001, para. 47. ESLJP ističe da „pravo na identitet koje u sebi obuhvata i pravo na saznanje porekla jeste sastavni deo pojma privatnog života” presudom u slučaju *Jaggi v. Switzerland*. Videti: EctHR, *Jaggi v. Switzerland*, no. 58757/00, Judgement of 13 July 2006.

59 EctHR, *Odièvre v. France*, no. 42326/98, Judgement of 13 February 2003.

60 Ponjavić, Z., Palačković D., 2017, str. 30.

života u nepoznavanju sopstvenog identiteta. Negirala je anonimni porođaj kao pravo žene, smatrala je da je on rezultat klasičnog neuspeha i da predstavlja nepotrebno nasilje. Odbacila je i njegovu povezanost sa olakšanom mogućnošću usvojenja, navodeći da se deca mogu u potpunosti zbrinuti i usvojiti bez obzira na to da li je njihova majka koristila pravo na anonimni porođaj ili ne.<sup>61</sup> Protivljenje pojedinih usvojitelja ukidanju ovakvog instituta je, prema njenom mišljenju, samo posledica iracionalnog straha i želje da usvoje dete „bez prošlosti”<sup>62</sup>.

Konačno, glavni argument ticao se francuskog „slepog” davanja prednosti „navodnim interesima majke”, čime je zanemaren princip proporcionalnosti. Čak ni zakon iz 2002. godine nije ostavio prostora da nezavisni organ proceni okolnosti slučaja i donese konačnu odluku ukoliko majka ipak odbije otkrivanje svog identiteta.<sup>63</sup> S druge strane, Vlada Republike Francuske se branila stavom da je povreda prava na privatni život u ovom slučaju bila posledica legitimnog cilja zaštite javnog zdravlja. Zakonodavac je pokušao da održi ravnotežu između prava žene da izbegne materinstvo, s obzirom na to da ga zajedno sa trudnoćom posmatra kao aspekte njenog privatnog života i prava deteta na identitet. Takav pokušaj je rezultirao predviđanjem psihološke i socijalne pomoći budućim majkama, pružanjem mogućnosti detetu da pristupi izvesnim podacima, koji se ne odnose na identitet roditelja, kao i mogućnošću naknadnog otklanjanja anonimnosti uz pristanak majke.<sup>64</sup>

Sud je, najpre, primetio da u navedenom slučaju postoje dva suprotstavljena interesa: pravo deteta da zna svoje bološko poreklo, s jedne strane, i pravo žene da ostane anonimna, s druge. Oni nisu lako pomirljivi, jer se ne tiču odrasle osobe i deteta, već dveju odraslih osoba koje imaju sopstvenu slobodnu volju.<sup>65</sup> Prema stavu suda, pravu na poštovanje života se

---

61 Primer takve mogućnosti može se, između ostalog, pronaći i u domaćem zakonodavstvu. Ukoliko majka napusti dete i ne želi da se brine o njemu, biće u potpunosti lišena roditeljskog prava. U takvim slučajevima za davanje deteta na usvojenje ne zahteva se njena saglasnost. Dakle, za razliku od francuskog rešenja, prema Porodičnom zakonu RS majka se pravno može odreći svog deteta tek posrednim putem – nakon upisa u matičnu knjigu rođenih, kroz lišenje roditeljskog prava ili putem davanja saglasnosti za usvojenje. U tom smislu: Hlača, N., 2007, str. 159.

62 Što u ovom slučaju nije bilo tako. Njeni usvojitelji su je podržali u odluci da traži podatke o svojoj biološkoj porodici kao i da podnese predstavku ESLJP-u. Vid.: Lafau-  
cheur, N., 2004, p. 341.

63 Lafaucheur, N., 2004, p. 335.

64 *Ibid.*, p. 336.

65 U tom smislu, sudija iz Norveške je tokom debate istakao da su pre rođenja interesi trudnice i deteta jednaki, s obzirom na to da je u najboljem interesu deteta da bude rođeno u odgovarajućim medicinskim uslovima, te da ovakvo pravo ne može biti dovedeno u pitanje potrebom da se ostvari neki drugi društveni cilj. Videti: EctHR,

daje veća vrednost u Evropskoj konvenciji o ljudskim pravima nego pravu na saznanje porekla, pa isto to čini i francusko zakonodavstvo.<sup>66</sup> Kako se pored dva pomenuta interesa istovremeno moraju uzeti u obzir i interesi trećih lica, poput usvojitelja, biološkog oca i drugih srodnika, ESLJP je glasovima većine sudija (10 od 17) doneo odluku da francuski zakonodavac nije prekršio pravo na poštovanje privatnog života. Ovo naročito nakon usvajanja zakona iz 2002. godine, kojim je osigurana uravnoteženost i proporcionalnost u okviru ostavljenog diskrecionog prostora državama članicama. Njima se mora garantovati polje slobodne procene prilikom odabira mera kojima se teži usklađivanju dva različita interesa.<sup>67</sup>

Međutim, Sud je devet godina kasnije u slučaju *Godeli protiv Italije (Godelli v. Italy)*<sup>68</sup> zauzeo nešto drugačiji stav. Ovoga puta u fokusu je bilo italijansko zakonodavstvo o pravu na anonimni porođaj u kontekstu prava na poštovanje privatnog i porodičnog života. Podnositeljka predstavke je italijanska državljanka, anonimno rođena 1943. godine. Nakon što je bezuspešno pokušala da dobije podatke o svom poreklu od nadležnih državnih institucija, podnela je predstavku ESLJP-u zbog povrede člana 8. Evropske konvencije. Odluka suda u navedenom slučaju je opravdavana razlikom između francuskog i italijanskog sistema. Sud je zauzeo stav da italijanskim zakonodavnim rešenjem nije postignuta pravična ravnoteža između prava majke na anonimni porođaj i prava deteta da zahteva makar neidentifikujuće podatke o poreklu ili mogućnost kasnijeg otkrivanja identiteta majke uz njenu saglasnost. Drugim rečima, ovakvo rešenje, za razliku od francuskog, ne predviđa čak ni puku mogućnost za dete da jednog dana otkrije identitet biološke majke makar isključivo u situaciji kada ona na to pristane.<sup>69</sup> Italija je dala apsolutnu prednost zaštiti majčinih interesa, umesto uspostavljanju mehanizma koji bi uskladio prava u sukobu. Prema tome, u presudi je izraženo jasno protivljenje ESLJP-a apsolutnoj zabrani pristupa informacijama o poreklu, čime se ne pruža zaštita jednom od konkurentnih prava.<sup>70</sup> I pored toga što je osudio Italiju za

---

*Odièvre v. France*, no. 42326/98, Judgement of 13 February 2003, para. 44; Lafau-  
cheur, N., 2004, p. 337.

66 Draškić, M., 2016, *Komentar Porodičnog zakona, Praksa Evropskog suda za ljudska prava, praksa Ustavnog suda, praksa redovnih sudova prema stanju zakonodavstva od 1. decembra 2015. godine*, Beograd, Službeni glasnik, str. 124.

67 Milovanović, S., 2019, *Nemogućnost utvrđivanja porekla deteta kod anonimnog porođaja*, master rad, Pravni fakultet Univerziteta u Beogradu, str. 25.

68 EctHR, *Godelli v. Italy*, no. 33783/09, Judgement of 25 September 2012.

69 Pri čemu bi predviđanje takvih mogućnosti po stavu ESLJP-a bilo sasvim dovoljno da dokaže uspostavljanje neophodne ravnoteže dva suprotstavljena interesa i opšteg, javnog interesa. Vid.: Ponjavić, Z., Palačković D., 2017, str. 33.

70 *Ibid.*

povredu prava na privatan život, ESLJP nije doveo u pitanje opravdanost regulisanja prava na anonimni porođaj, već je ukazao na potrebu korekcije takvog rešenja odgovarajućim merama.<sup>71</sup> Problem ne predstavlja pravo žene na anonimni porođaj, već njegova apsolutnost. Vodeći računa o tome da pravo na saznanje porekla predstavlja samo jedan segment prava na privatan život, sud ponovo dolazi do zaključka da ono mora biti usklađeno sa ostalim elementima koji čine navedeno pravo.<sup>72</sup>

Može se dovesti u pitanje logika ovakvog pristupa ESLJP-a prilikom odlučivanja povodom navedenih predstavi, prema kome zakonska pravila o anonimnom porođaju zavise isključivo od uravnoteženosti interesa različitih strana. Da li je uopšte moguće uspostaviti balans između zaštite zdravlja majke i tek rođenog deteta, te njegovog prava na život naspram prava deteta na identitet? Prva dva potpadaju pod zaštitu javnog ili opšteg interesa, koji u svakom slučaju nadjačava pravo pojedinca. Stoga se i ne čini mogućim uravnoteženje interesa čiji je osnov zaštite ne samo različit već i neuporediv.

## 5. ZAKLJUČAK

Pravo deteta na identitet konkuriše drugim privatnim, ali i javnim interesima. Sukobi ljudskih prava posledica su mnoštva vrednosti koje se istovremeno štite odredbama međunarodnih dokumenata. Tipičan primer možemo pronaći u članu 8. Evropske konvencije o ljudskim pravima koji garantuje zaštitu privatnog i porodičnog života pojedincima. Kao što je istaknuto u slučaju *Odijev* protiv Francuske, institut anonimnog porođaja je upečatljiv slučaj koji stvara tenziju između prava različitih subjekata, s obzirom na to da svaki od njih uživa jednaku zaštitu prava na privatni život. Međutim, i rešenja nacionalnih zakonodavstava koja predviđaju mogućnost anonimnog porođaja i regulativa onih koji postavljaju imperativna pravila u pogledu utvrđivanja materinstva mogu se smatrati neprikladnim, jer implicitno pretpostavljaju hijerarhiju prava. Zakonodavac ne treba da zauzme isključivo jednu stranu, bilo da je to garancija anonimnosti koja predstavlja nepremostivu prepreku ostvarivanju prava deteta na identitet, bilo da je priznavanje apsolutnog prava deteta na saznanje porekla. Ovakvi kategorički stavovi ne nude rešenje, već produbljuju konflikt između konkurentnih prava koja ipak imaju jednaku težinu.

Francuska reforma zakonodavstva iz 2002. godine pokazuje svest o tome. Različit stav ESLJP-a povodom instituta anonimnog porođaja u

---

71 Troiano, S., 2013, p. 195.

72 Ponjavić, Z., Palačković D., 2017, str. 34.

dvema državama, Francuskoj i Italiji, takođe pokazuje mogućnost uravnoteženja interesa bez potpunog negiranja jednog od sukobljenih prava. Čak i Komitet za prava deteta predviđa mogućnost poverljivih porođaja, doduše, kao krajnju meru. Ipak, to je bilo dovoljno da se uvidi značaj potrebe zaštite interesa svih učesnika kojih se navedeni postupak tiče. Moglo bi se zaključiti da je i sam Komitet podlegao legitimnom i tradicionalnom cilju anonimnog porođaja, odnosno zaštiti života i zdravlja novorođenčeta. Iz takvog ugla posmatranja, zapravo je reč o sukobu dva prava deteta – prava na život i prava na identitet. Dolazi do prinudne razmene identiteta za život. Logički se daje primat najvrednijem ljudskom pravu koje je osnov ostvarivanja svih ostalih. Jer mogućnost pristupa podacima o sopstvenom poreklu imaju samo oni koji su već rođeni.

## LITERATURA

1. Blauwhoff, R., 2008, Tracing down the historical development of the legal concept of the right to know one's origins: Has 'to know or not to know' ever been the legal question?, *Utrecht Law Review*, Igitur, Vol. 4, No. 2.
2. Colcelli, V., 2012, Anonymous Birth, Birth Registration and the Child's Right to Know Their Origins in the Italian Legal System: A Short Comment, *Civil & Legal Sciences*, Vol. 1, No. 2.
3. Dally, A., 1982, *Inventing Motherhood: The Consequences of and Ideal*, London, Burnett Books.
4. Dalton-Harrison, R., 2014, Mater semper incertus est: Who's Your Mummy?, *Medical Law Review*, Vol. 22, No. 3.
5. Draškić, M., 2007, *Porodično pravo i prava deteta*, Beograd, Pravni fakultet Univerziteta u Beogradu.
6. Draškić, M., 2016, *Komentar Porodičnog zakona, Praksa Evropskog suda za ljudska prava, praksa Ustavnog suda, praksa redovnih sudova prema stanju zakonodavstva od 1. decembra 2015. godine*, Beograd, Službeni glasnik.
7. Freeman, M., Margaria, A., 2012, Who and What Is a Mother? Maternity, Responsibility and Liberty, *Theoretical Inquiries in Law*, Vol. 13, No. 153.
8. Grylli, C., Brockington, I., Fiala, C., Huscsava, M., Waldhoer, T., Klier, C. M., 2015, Anonymous birth law saves babies – optimization, sustainability and public awareness, *Archives of Women's Mental Health*, Vol. 19, No. 2.
9. Hadžimanović, N., 2018, Confidential and Anonymous Birth in National Laws – Useful and Compatible with the UN Convention on the Rights of the Child?, *Comparazione e Diritto Civile*.
10. Hlača, N., 2007, Pravo majke na anonimnost poroda – „L'accouchement sous X – porod pod X”, *Gynaecol Perinatol*, Vol. 16, No. 3.
11. Jumakova, A., 2020, Content of the child's right to identity within the scope of the Convention on the rights of the child and the Latvian national framework, *Miscellanea Historico-Iuridica*, Vol. 19, No. 1.

12. Kovaček-Stanić, G., 2011, Autonomija versus materijalna istina u komparativnom pravu o porodičnom statusu deteta, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3.
13. Lafaucheur, N., 2004, The French 'Tradition' of Anonymous Birth: The Lines of Argument, *International Journal of Law, Policy and the Family*, Oxford University Press, Vol. 18, No. 3.
14. Mallet-Bricout, B., 2002, Reforme de l'accouchement sous X: quel equilibre entre les droits de l'enfant et les droits de la mere biologique?, *La Semaine Juridique Edition Generale*, Vol. 11, No. 9.
15. Margaria, A., 2014, Anonymous Birth: Expanding the Terms of Debate, *Journal of Children's Rights*, Vol. 22, No. 3.
16. Marshall, J., 2018, Secrecy in births, identity rights, care and belonging, *Child and Family Law Quarterly*, Vol. 30, No. 2.
17. Milovanović, S., 2019, *Nemogućnost utvrđivanja porekla deteta kod anonimnog porođaja*, master rad, Pravni fakultet Univerziteta u Beogradu.
18. Pastore, A., 2019, El parto anonimo o secreto y el parto confidencial o discreto como sistemas legales estrategicos alternativas al aborto, *Academia Nacional de Ciencias Morales y Politicas*.
19. Ponjavić, Z., Palačković, D., 2017, Pravo na anonimni porođaj, *Stanovništvo*, Vol. 55, No. 1.
20. Ponjavić, Z., Vlašković, V., 2019, *Porodično pravo*, Beograd, Službeni glasnik.
21. Simmonds, C., 2013, An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights, *The Cambridge Law Journal*, Vol. 72, No. 2.
22. Tobin, J., 2019, *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press.
23. Troiano, S., 2013, Understanding and Redefining the Rationale of State Policies Allowing Anonymous Birth: A Difficult Balance between Conflicting Interests, *International Journal of the Jurisprudence of the Family*, Vol. 4.
24. Vlašković, V., 2014, *Načelo najboljeg interesa deteta u porodičnom pravu*, doktorska disertacija, Pravni fakultet Univerziteta u Kragujevcu.

## PROPISI

1. Evropska konvencija o ljudskim pravima – European Convention on Human Rights of 04 November 1950.
2. Konvencije UN o pravima deteta – Convention on the Rights of the Child 44/25 of 20 November 1989.
3. Committee on the rights of the child, *Consideration of reports submitted by states parties under article 44 of the convention*, France, UN doc. CRC/C/15/Add. 20, (25 April 1994).
4. Porodični zakon Srbije, *Sl. glasnik RS*, br. 18/05, 72/11 i 6/15.

5. Zakona o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Sl. list SFRJ – Međunarodni ugovori*, br. 15/90 i *Sl. list SRJ – Međunarodni ugovori*, br. 4/96 i 2/97.
6. Zakon o matičnim knjigama, *Sl. glasnik RS*, br. 20/09, 145/14 i 47/18.

## SUDSKA PRAKSA

1. EctHR, *Gaskin v. U.K.*, no. 10454/83, Judgement of 7 July 1989.
2. EctHR, *Bensaid v. U.K.*, no. 44599/98, Judgement of 6 February 2001.
3. EctHR, *Odièvre v. France*, no. 42326/98, Judgement of 13 February 2003 [GC].
4. EctHR, *Jaggi v. Switzerland*, no. 58757/00, Judgement of 13 July 2006.
5. EctHR, *Godelli v. Italy*, no. 33783/09, Judgement of 25 September 2012.

## IZVORI SA INTERNETA

1. Bartsch, M., Schröder, C., Windmann, A., 2012, *Abandoning Newborns: Do Baby Hatches Really Save Lives?* (<https://www.spiegel.de/international/germany/control-over-baby-hatches-in-germany-a-844134.html>, 13. 9. 2021).
2. Godechot, J., 2021, *Napoleon I: Biography, Achievements & Facts*, (<https://www.britannica.com/biography/Napoleon-I>, 12. 9. 2021).
3. Overmyer, M., 2019, *The Bell That Saved Abandoned Babies in the Middle Ages*, (<https://religionunplugged.com/>, 12. 9. 2021).
4. *Rajneesh Osho on motherhood*, (<https://www.wisesayings.com/authors/rajneesh-quotes/>, 12. 9. 2021).

## ANONYMOUS BIRTH VERSUS CHILD'S RIGHT TO IDENTITY

Tamara Mladenović

### ABSTRACT

The right to identity of the child, internationally recognized by the UN Convention on the Rights of the Child, is one of the most important in the corpus of child rights. Its structure is complex since it includes several narrower rights. Nevertheless, the situations where it comes to restriction of the right to identity are not negligible. One of them is the right to anonymous birth, the possibility acknowledged by legislators in a certain number of European countries. Conflicting interests between a mother and a child are inevitable consequence of the anonymous birth. The aim of this article is to compare the right to identity of a child and the mother's right to anonymous birth as insurmountable barrier in

determining biological origin. Special attention is paid to the possibility of establishing an adequate balance between their interests, by comparing the importance that national legal system offers to each of them, with appropriate arguments, several different models of motherhood regulations are presented and can be found in European legislations. The analysis also includes the stances of international bodies, especially the European Court of Human Rights.

**Key words:** anonymous birth, child rights, right to identity, European Court of Human Rights.

Dostavljeno Uredništvu: 30. septembra 2021. godine

Pihvaćeno za objavljivanje: 6. decembra 2021. godine

PREGLEDNI NAUČNI ČLANAK

Jelena Danilović\*

## ETIČKI KODEKSI FARMACEUTSKIH KOMPANIJA KAO AKTI AUTONOMNOG PRAVA I NJIHOVO MESTO NA FULEROVOJ MORALNOJ LESTVICI

***Apstrakt:** U članku su analizirani etički kodeksi farmaceutskih kompanija kao specifični akti autonomne regulative koji propisuju moralne principe fer i poštenog poslovanja, ali i konkretne pravne dužnosti, sa ciljem da se postave pravnoteorijski osnovi za bolje razumevanje ovog koncepta. Prvi deo članka posvećen je razvoju i osobenostima etičkih kodeksa kao hibridnih pravno-moralnih instituta. U drugom delu autorka analizira pravnu prirodu kodeksa sa stanovišta teorija pravnog pluralizma, identifikujući ih kao institute autonomnog prava. U trećem delu se analizira moralni sadržaj kodeksa, dok se u poslednjem delu ovi specifični pravno-moralni instituti analiziraju u kontekstu Fulerove moralne lestvice. Primenjene su metode konceptualne analize pojma etičkih kodeksa i deskriptivne analize poslovne prakse i dostupne relevantne autonomne regulative. Izlaganje je dopunjeno i komparativnim metodom prikaza uporednopravne empirijske prakse. U zaključku se razmatra mesto etičkih kodeksa, kao specifičnih autonomnih akata, u okvirima Fulerove moralne skale i percipiranog antagonizma morala dužnosti i morala težnje.*

**Ključne reči:** etički kodeks, autonomno pravo, usklađenost poslovanja, moral težnje/aspiracije, moral dužnosti.

### 1. ETIČKI KODEKSI

#### 1.1. METODOLOŠKI UVOD

Cilj analize etičkih kodeksa farmaceutskih kompanija koja se izlaže u ovom članku je bolje teorijsko razumevanje pravnog i moralnog aspekta ovog novog, hibridnog, praktičnog pravnog koncepta, te njegovo prepoznavanje i smeštanje u okvire teorije prava.

U konceptualnoj analizi pravnog aspekta ovih kodeksa, polazi se od pluralističkih pravnih teorija koje podvlače savremeno shvatanje da kreatori

\* Doktorantkinja, Pravni fakultet Univerziteta u Beogradu; e-mail: jelena53c@gmail.com

prava više nisu samo države već i nedržavni akteri koji stvaranjem samo-obavezujućih normi teže zadovoljenju svojih interesa i vrednosti. Prema modifikovanom, etatiističkom konceptu pluralizma, koji se iznosi u članku, uloga države ipak nije potpuno potisnuta jer država i dalje postavlja granice autonomne regulative, ali se podvlači značaj sfere slobodnog i samostalnog normiranja svakodnevnog poslovanja u okviru državnih regula. Takvo autonomno pravo po svojoj prirodi nije nužno oslonjeno na državne sankcije i fizičku prinudu kao obeležje pravnosti, te prinuda kojom se osigurava poštovanje normi autonomnog prava ima često i oblike različitih društvenih sankcija. Deskriptivnim i komparativnim metodom izlaže se i relevantna praksa uporednog prava koja potvrđuje pravnost autonomnih normi etičkih kodeksa. U daljoj analizi, prelazi se na razmatranje drugog naznačenog, moralnog aspekta ovih akata. S obzirom na izražen moralni sadržaj, promovisane etičke vrednosti i cilj ovih kodeksa, nužno je osvetliti ne samo pravni već i moralni aspekt radi sveobuhvatnog razumevanja koncepta. U ovom delu analize koristi se kao osnovno eksplanatorno oruđe Fulerovo razlikovanje moralnosti težnje i moralnosti dužnosti. Razmatra se da li se i na koji način ovi suprotstavljeni aspekti moralnosti mogu razaznati u etičkim kodeksima i kom delu Fullerove skale moralnosti kodeksi sa takvim elementima moralnosti pripadaju.

Očekivani doprinos ove analize je unapređeno razumevanje prirode i suštine ovog instituta pozitivnog prava, koji je u teorijskom smislu još uvek nedovoljno obrađen.

## 1.2. RAZVOJ IDEJE

Kompanije su dužne da u svom poslovanju nedvosmisleno poštuju zakone. Dugo se smatralo da je dovoljno ispuniti ovaj minimum, uz određenu profitabilnost, da bi kompanija bila prihvaćena kao adekvatan učesnik na tržištu i poželjan poslovni partner. Međutim, velike međunarodne kompanije su u XX veku uvidele manu takvog nominalno-legalnog pristupa koji zanemaruje etiku poslovanja zarad profita. Ovo je rezultiralo ranjivošću korporativnih sistema na krivična dela međunarodne korupcije, zloupotrebe položaja, kršenja pravila slobodne konkurencije ili podataka o ličnosti.<sup>1</sup> Naročito ranjivima pokazale su se međunarodne farmaceutske kompanije s obzirom na to da one posluju u senzitivnim sferama javnog zdravlja, odnosa sa zdravstvenim profesionalcima, državnim organima i

---

1 Npr. skandali Enron-a 1999. godine, Siemens-a iz 2008. godine, Fejsbuk-Kembridž analitika 2015. itd.

pacijentima, a sve to u okvirima raznorodnih kulturnih, moralnih i pravnih poredaka širom sveta. Slučajevi neetičkog<sup>2</sup> su poljuljali reputaciju farmaceutske industrije i pretili da naruše poverenje društva u celini u zakonitost poslovanja ovih kompanija kao i u zdravstveni sistem, te da dovedu u pitanje objektivnost odluka državnih institucija ili zdravstvenih profesionalaca koje mogu biti pod uticajem farmaceutske industrije. Iz navedenih razloga došlo je do ubrzanog razvoja, standardizovanja i usavršavanja sistema internih pravila i kontrola i promovisanja integriteta u poslovanju, sve u cilju osiguranja zakonitog poslovanja i zaštite reputacije kompanija.

Na međunarodnom nivou, kao deo ovog procesa u širem smislu, Organizacija za ekonomsku saradnju i razvoj – OECD je razvila Principe korporativnog upravljanja.<sup>3</sup> Principi promovišu korporativno upravljanje kao „skup odnosa između kompanijskog menadžmenta, odbora kompanije, vlasnika i drugih učesnika u poslovanju”,<sup>4</sup> te podržavaju postavljanje transparentnih pravila u kompanijama radi promocije fer poslovanja, sprečavanja sukoba interesa u odlučivanju, sprečavanja manipulacije tržištem itd.

Kompanijama bi, ukratko, za transparentnost, garanciju zakonitog i ispravnog poslovanja, bilo korisno da usvoje pomenute principe korporativnog upravljanja, uz obavezu da izveštavaju da li se pridržavaju postavljenih pravila ili da pruže objašnjenje za odstupanje od njih. Dakle, u pitanju je pristup „saobrazi se pravilu ili objasni (zašto nisi)” („*comply or explain*”) koji postavlja minimalne standarde dobrog poslovanja. Ovi standardi OECD-a nisu obavezni, već svaka kompanija može da ih prihvati u meri koja odgovara njenom poslovanju i ciljevima.

U okviru Principa pominje se i etički kodeks kao interni kompanijski akt samouređenja etičkih principa poslovanja, ali svega u par rečenica – kao korisni alat koji može da služi dugoročnom interesu kompanija, koji je baziran na profesionalnim standardima i koji bi trebalo da barem postavi pravila sprečavanja sukoba interesa.<sup>5</sup> Međutim, značaj ovog akta nije prepoznat ni razvijen u okviru OECD regulative,<sup>6</sup> iako se u najširem smislu reči može uklopiti u principe dobrog korporativnog upravljanja.

2 Glaxo Smith Kline (GSK) (2012, podmićivanje zdravstvenih profesionalaca, nedozvoljena promocija itd.), Pfizer (2009, nedozvoljena promocija, podmićivanje), Merck (2008, prevare, podmićivanja), Astra Zeneca (2010, nedozvoljene promocije, podmićivanja), Novartis (2010, nedozvoljene promocije, podmićivanja) i dr.

3 OECD, *G20/OECD Principles of Corporate Governance* (30 November 2015), (<https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1617139126&id=id&accname=guest&checksum=38013B6144C42210721AEE6ADD2F775B>, 17. 10. 2021).

4 *Ibid.*, str. 9.

5 OECD, 2015, str. 47.

6 OECD je razvila i posebnu konvenciju za sprečavanje korupcije (OECD, *Convention on combating bribery of foreign public officials in international business transactions and*

U nedostatku adekvatne međunarodne regulative, a pritisnuti potrebom da se adekvatno obrate javnosti, potrošačima i regulatorima i potvrde zakonitost rada i društveno odgovorno poslovanje, multinacionalne farmaceutske kompanije razvijaju interne akte pod imenom etički kodeksi. Ovi akti su bazirani na principima savesnosti i poštenja i adekvatnog korporativnog upravljanja. Često se za te akte koriste i nazivi kodeks ponašanja (*Code of Conduct*), principi ponašanja ili pravila poslovne etike, što su sve sinonimi za istovrsni interni dokument pa ćemo ih u ovom članku sve nazivati etičkim kodeksom.

Pomenute akte, po pravilu, razvija, primenjuje i kontroliše nova poslovna funkcija usklađenosti poslovanja (*compliance*) koja postavlja principe i konkretna pravila moralno ispravnog poslovanja, identifikuje, sprečava i sankcionise nedozvoljene poslovne prakse, štiti i održava reputaciju društva. Navedena regulativa preuzima principe kodeksa lekara i farmaceuta (npr. zabrana neprimerenog uticaja na terapijsku odluku), koje dopunjuje pravilima fer tržišne utakmice (npr. zaštita slobodne konkurencije, sprečavanje pranja novca, provera pouzdanosti poslovnih partnera), transparentnih odnosa prema zaposlenima, pacijentima, državnim organima i zdravstvenim profesionalcima (npr. zabrana korupcije, sprečavanje sukoba interesa, istinito promovisanje proizvoda), te načelno promovise fer i pošteno poslovanje. Na današnjem stepenu razvoja farmaceutske industrije, ne postoji iole veća farmaceutska kompanija koja nema javno dostupan etički kodeks sa sličnim osnovnim sadržajem.<sup>7</sup>

### 1.3. OSOBENOSTI

Etički kodeksi su, s obzirom na svoj sadržaj, formu i značaj, specifični jer ne postoji državna regulativa koja obavezuje farmaceutske kompanije na donošenje ovih akata. Štaviše, državni propisi ih u najvećem broju

---

*related documents* (21 November 1997, 25 May 2009, 26 November 2009, 16 November 2016, 13 March 2019) ([http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf), 17. 10. 2021), koja se bavi pitanjem korupcije državnih zvaničnika, što jeste i jedna od ključnih tema svih etičkih kodeksa u praksi. Međutim, ni ova konvencija se ne dotiče regulative etičkih kodeksa, čak ni u smislu preporuka ili dobre prakse.

- 7 Primera radi, javno dostupni etički kodeksi farmaceutskih kompanija uključuju: Blue Book: Pfizer's Code of Conduct ([https://cdn.pfizer.com/pfizercom/investors/corporate/Pfizer\\_2020BlueBook\\_English.pdf](https://cdn.pfizer.com/pfizercom/investors/corporate/Pfizer_2020BlueBook_English.pdf), 17. 10. 2021), Sanofi Code of Ethics (<http://www.codeofethics.sanofi/assets/media/pdf/EN-Code-Of-Ethics.pdf>, 17. 10. 2021), STADA Code of Conduct (<https://www.stada.com/about-stada/compliance>, 17. 10. 2021), Takeda Code of Conduct ([https://www.takeda.com/4ab3f9/siteassets/en-us/home/corporate-responsibility/global\\_compliance\\_external\\_brochure.pdf](https://www.takeda.com/4ab3f9/siteassets/en-us/home/corporate-responsibility/global_compliance_external_brochure.pdf), 17. 10. 2021), Merck Code of Conduct ([https://www.merckgroup.com/id/compliance/English\\_Merck\\_CoC\\_new.pdf](https://www.merckgroup.com/id/compliance/English_Merck_CoC_new.pdf), 17. 10. 2021), Johnson & Johnson Code of Business Conduct (<https://www.jnj.com/sites/default/files/pdf/code-of-business-conduct-english-us.pdf>, 17. 10. 2021) itd.

zemalja ne prepoznaju kao bitne aspekte interne regulative, za razliku od nekih drugih akata kao što su statuti, osnivački akti, kolektivni ugovori, sistematizacije radnih mesta itd. Čak i u retkim situacijama gde zakon prepoznaje potrebu razvoja funkcije usklađenosti poslovanja radi očuvanja zakonitosti rada i integriteta<sup>8</sup> takav zakon redovno ne reguliše pojam, sadržinu ni domašaj etičkih kodeksa.

Dalje, za razliku od pravila internog upravljanja koja su pretežno okrenuta „ka unutra” (u prvom redu ka vlasnicima i menadžerima), etički kodeksi postavljaju pravila adekvatnog poslovanja svih zaposlenih (ne samo menadžmenta) i okrenuti su pretežno „ka spolja” – prema konkurentima, potrošačima, zdravstvenim profesionalcima i državnim funkcionerima. Štaviše, postavljena etička pravila mogu biti nekad i suprotna poslovnim interesima (pojedinih) menadžera ili vlasnika, ali je opšti standard usklađenosti poslovanja da u slučaju ozbiljnog i nerazrešivog sukoba pravila usklađenosti i potrebe ostvarenja trenutnog profita, prednost mora biti na strani pravila koja štite dugoročno poslovanje i vrednost kompanije na tržištu u celini.

Konačno, za etičke kodekse principijelno ne važi pristup „*comply or explain*”. Kompanije nisu dužne da donose ove kodekse – ti akti su u potpunosti dobrovoljni – pa samim tim ni da objašnjavaju bilo kom telu da li su ili nisu prekršile odredbe ovih kodeksa niti zašto neki aspekti usklađenosti nisu deo tih akata. Međutim, u praksi je očigledno da im kompanije pridaju veliki značaj iako nisu dužne da bilo kome podnose izveštaje o tome, te da kodekse poštuju kao ključne kompanijske smernice, osnov za razvoj svih drugih internih pravila i da se opredeljuju da ih tretiraju kao interno obavezne. To može, s obzirom na to da se u praksi pokazalo da kršenje etičkih standarda (čak i u slučaju kad je formalno-pravno moguće odbraniti akte kompanije pred nadležnim organima), u krajnjoj liniji dovesti do ugrožavanja kompanijske reputacije, narušavanja odnosa s klijentima, pacijentima ili poslovnim partnerima, što se odražava i na prilode kompanije.

## 2. O PRAVNOJ PRIRODI ETIČKIH KODEKSA

Iz razvoja koncepta i samog naziva etičkih kodeksa moglo bi se zaključiti da ti akti pre sadrže moralne nego pravne norme. Ipak, oni poseduju i nedvosmislena obeležja pravnosti, stoga postoje ozbiljni argumenti

8 Zakon o bankama, *Sl. glasnik RS*, br. 107/05, 91/10, 14/15, čl. 83, nameće obavezu razvoja funkcije usklađenosti poslovanja, odgovorne za identifikaciju i praćenje rizika usklađenosti poslovanja banke i za upravljanje tim rizikom. Međutim, odredbe se tiču samo ustanovljenja funkcije i ne regulišu etičke kodekse, njihovu obaveznost sadržinu, domet ili obaveznost. Drugi propisi Republike Srbije, trenutno, ne prepoznaju ni funkciju usklađenosti poslovanja, ni etičke kodekse kao pojam.

da ih kao pravne akte prihvate i sudski i izvršni organi. Prihvatanje etičkih kodeksa kao pravnih akata je u određenoj meri već prisutno u uporedno-pravnoj praksi koja je izložena u nastavku.

## 2.1. ETIČKI KODEKSI KAO AKTI AUTONOMNOG PRAVA

Etički kodeksi kao samoregulatorna kompanija se mogu najpre shvatiti kao deo opšteg sistema autonomnog prava. Pojam autonomnog prava je generalno nedorečen i otvoren za različita tumačenja, ali u teoriji se po pravilu vezuje za pluralističku pravnu koncepciju. Kako primećuje Mitrović<sup>9</sup>, individualizam i racionalizam XX veka su uticali na oživljavanje ideja pravnog pluralizma (prisutnih od srednjeg veka). Dolazi do racionalizacije u kojoj stvaranje prava nije više „sveto” pravo države koja jedina ima mogućnost promulgacije pravnih normi (tzv. monistički pristup), već se ovo pravo priznaje različitim titularima, zahvaljujući čemu samo pravo može lakše da se stvara i menja. Premda i danas postoji izvesno „idolopoklonstvo zakona”, odnosno nepoverenje prema drugim oblicima regulisanja društvenih odnosa, pre svega iz bojazni da jedino zakonska regulatorna obezbeđuje maksimalnu pravnu sigurnost,<sup>10</sup> kruti monistički pristup više ne odgovara poslovnoj praksi, niti reflektuje modernu ulogu države.

Kao odgovor na ovaj pristup razvija se pravni pluralizam, koji polazi od ideje da u društvu postoji mnoštvo društvenih organizacija koje imaju potrebu i mogućnost samoregulacije svojih aktivnosti. Iz toga se razvija koncept da pravo ne čine samo zakonske norme podržane državnom prisudom, kako to tvrde monističke teorije, već da svaka društvena grupa i zajednica (uključujući korporacije) stvara autonomno svoje pravo.<sup>11</sup> Autonomija tako počiva na ideji da „država ne mora neposredno da uređuje sve pravno važne odnose da bi ispunila svoje isto tako važne društvene zadatke”.<sup>12</sup> Pravo se tako više ne posmatra samo kao formalni sistem normi već se razvija i postoji u stvarnosti u okviru složenog života društvenih grupa, zajednica i organizacija, te se stvara i spontano, voljom pojedinaca, relativno nezavisno od države.<sup>13</sup> U ideji autonomije sadržana je ideja o

9 Mitrović, D., 2003, Autonomija kao pojam i oblik, O smislu, vrstama i domašajima autonomije, *Anali Pravnog fakulteta*, 3–4, str. 420.

10 Blagojević, B., 1971, Aktuelni problemi u vezi sa nacrtom amandmana i regulisanje odnosa iz ugovora o osiguranju, *Osiguranje i privreda*, 6–7; prema: Šulejić, P., 1985, O sistemu i metodi zakonskog regulisanja odnosa iz ugovora o osiguranju, *Anali Pravnog fakulteta*, 3–4, str. 487.

11 Vukadinović, G., 2011, O pojmu autonomnog prava, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3, str. 164–165.

12 Mitrović, D., 2003, str. 418.

13 Vukadinović, G., 2012, Vrste autonomnog prava i shvatanja pravnog pluralizma, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 4, str. 47–48.

pravu na samoorganizaciju, koja obuhvata i pravo na relativno samostalnu, autonomnu normativnu delatnost.<sup>14</sup>

Na pola puta između monističkih i pluralističkih teorija su etatičke teorije pluralizma, u kojima se priznaje postojanje entiteta koji u okviru države stvaraju svoje pravo, ali se takođe naglašava da su takve norme pravne samo zato jer je država izričito ili prećutno saglasna s njihovim postojanjem.<sup>15</sup> Tako Mitrović ističe da „je upravo država sa svojim državnim pravom ta koja određuje i 'dozira' autonomno pravo”.<sup>16</sup> U suprotnom, „kada bi autonomija bila nezavisna, tj. samostalna od državne vlasti, tada to i ne bi bila autonomna, već nova državna vlast. To znači da je, uprkos svom poreklu, autonomija moguća samo kao korelat i dopuna državnoj vlasti, koja je dozvoljava i određuje, kao i da je zbog toga uvek relativna i srazmerna.”<sup>17</sup> Autonomija tako nije samo pitanje volje ili odluke već rezultat razvoja državnih zajednica u kojima se dešava decentralizacija, dekoncentracija moći i deetatizacija,<sup>18</sup> zbog čega autonomno pravo posredno zavisi od državne volje. Ovo je naročito vidljivo u okvirima preplitanja autonomnog i privrednog prava, u delu koji im je zajednički, a odnosi se na autonomiju volje poslovnih subjekata, između ostalog, i u poslovima prometa, organizovanja i položaja subjekata, gde se autonomni akti prepliću sa državnim regulativom privrednih subjekata.<sup>19</sup>

Etički kodeksi se u ovom teorijskom okviru etatičkih pluralističkih teorija mogu adekvatno identifikovati kao deo autonomne regulative kompanija kojima je, kao pravno priznatim subjektima, važećim državnim propisima dozvoljeno da samostalno uređuju poslovanje sledeći svoje ciljeve i vrednosti, u meri u kojoj to nije u suprotnosti sa zakonima. Takvo pravo na samoregulativu proizilazi iz postojećeg sistema državnih propisa i to konkretno iz ustavnih prava na samostalnost privrednih subjekata, slobodu preduzetništva, otvoreno i slobodno tržište,<sup>20</sup> ali i iz opšteg pravnog načela da je dozvoljeno sve što zakonom nije izričito zabranjeno.

Dodatno, varijanta iznetog pluralističkog shvatanja je i ideja da su norme pravne u meri u kojoj su garantovane nekakvom prinudom – ne nužno fizičkom prinudom, već i ekonomskom, psihičkom ili nekom drugom. Uostalom, kako navodi Maks Veber, „i konzulska kazna i 'bratska

14 Mitrović, D., 2003, str. 417.

15 Vukadinović, G., 2011, str. 165.

16 Mitrović, D., 2018, *Autonomno pravo*, Beograd, Pravni fakultet Univerziteta u Beogradu, str. 16.

17 Mitrović, D., 2003, str. 418.

18 *Ibid.*, str. 419.

19 Mitrović, D., 2018, str. 18.

20 Ustav Republike Srbije, *Sl. glasnik RS*, br. 98/06, čl. 82– 84.

opomena' spadaju u prinudu ukoliko su bile regulisane pravilom i ako ih je sprovodio aparat ljudi".<sup>21</sup> Ovakvo shvatanje autonomnog prava bi odgovalo ideji autonomnih normi koje država ne sankcioniše, ali koje su prepoznate kao pravne norme jer sadrže druga svojstva prava (spoljašnjost, društvenost, merljivost itd.).<sup>22</sup> Takvo razumevanje podržava i Hartova teorija, po kojoj pravila nameću obaveze onda kada „pritisak društva na one koji odstupaju ili prete da će odstupiti od pravila postaje veliki”.<sup>23</sup> U ovakvom pogledu norme autonomnog prava mogu, ali ne moraju biti zaštićene državnom prinudom. Smatramo da su u takvoj postavci upravo forme nedržavnog pritiska i reakcije značajne kada pravnost ne garantuje državna prinuda već „[...] autoritet odlučujućih članova podržan mehanizmom sankcionisanja (isključenje iz članstva, oduzimanje privilegija i beneficija, pretnja...)”.<sup>24</sup>

Primenu etičkih kodeksa u skladu sa ovim teorijskim stavom prati više mogućih oblika prinude, razumevši prinudu u širem smislu, tako da uključuje: (i) zakonsku prinudu, u slučaju kad je kršenje kodeksa istovremeno i kršenje zakonskih normi (npr. akt korupcije ili pranja novca); (ii) disciplinske sankcije prema zaposlenima koji krše interna pravila kompanije, uključujući i pravila etičkih kodeksa, u skladu sa radnopravnim zakonodavstvom; (iii) disciplinske sankcije za samu kompaniju koja je članica nekog udruženja, ako je kršenje etičkog kodeksa istovremeno i kršenje pravila udruženja, što može dovesti do isključenja kompanije iz udruženja i gubljenja određenih privilegija<sup>25</sup> i (iv) ugrožavanje reputacije i poslovnih odnosa sa trećim licima, što može dovesti do pada profita, ekonomskog pritiska, nemogućnosti zaključenja poslova i slično. Jedino poslednje navedeno ne uključuje pravilo koje sprovodi Veberov „aparat ljudi”, ali je za svrhu članka navedeno kao aspekt „bratske opomene” koji se ispoljava kroz neformalni pritisak, očekivanja okoline ili „peer pressure”. Ovaj pritisak može da poprimi i „formu opšte difuzne negativne reakcije”, pri čemu je u takvoj reakciji, prema Hartu, važno samo da insistiranje na značaju ili ozbiljnosti društvenog pritiska stoji iza toga, a da

---

21 Veber, M., 1976, *Privreda i društvo I*, Beograd, Prosveta, str. 256.

22 Mitrović, D., 2018, str. 20.

23 Herbert, H., 2013, *Pojam prava*, Beograd, Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik, str. 146.

24 Mitrović, D., 2018, str. 32.

25 Primera radi, etički kodeks međunarodnog udruženja generičkih farmaceutskih kompanija Medicines for Europe obavezuje sve članice na poštovanje postavljenih etičkih pravila pod pretnjom disciplinskih sankcija. Članice često razvijaju svoje interne kodekse s pozivom na ovaj kodeks udruženja ili direktno referiraju na isti, tako da kršenje internih akata predstavlja i kršenje pravila udruženja (code-of-conduct-final-COLORS.cdr) (medicinesforeurope.com).

se pravila podržana na ovaj način smatraju nužnim za održanje nekog aspekta društvenog života.<sup>26</sup>

## 2.2. SUDSKA VERIFIKACIJA PRAVNOSTI ETIČKIH KODEKSA

Pravnost etičkih kodeksa se može razmatrati i kroz pitanje verifikacije ovih akata u okviru sudskog postupka u meri u kojoj bi sudovi u praksi uzeli u obzir postojanje i sadržaj ovih akata, razmatrali ih kao izvor prava za konkretan slučaj i doneli svoju odluku pod uticajem ovih dokumenata. U nedostatku sudskih odluka koje se tiču etičkih kodeksa farmaceutskih kompanija, za ovu analizu je indikativna međunarodna sudska praksa u slučaju kodeksa etike lekarskih udruženja ili zdravstvenih ustanova, koji su preteča i idejna osnova kompanijskih kodeksa farmaceutskih kompanija.

Analiza koju su sprovele Kembel i Kranli Glas<sup>27</sup> na primeru sudske prakse po pitanju adekvatnih standarda pružene medicinske nege i dužne pažnje pokazuje da sudovi u Sjedinjenim Američkim Državama i Kanadi ozbiljno uzimaju u obzir interne kodekse lekarske prakse pri donošenju odluka. Posmatrani sudovi ove akte tumače i prihvataju kao definisane i važeće standarde profesionalne lekarske nege. Po pravilu nije dovoljno samo postojanje ovih kodeksa već sudovi dodatno utvrđuju i da su ti standardi zaista u praksi prihvaćeni od strane eminentnih zdravstvenih profesionalaca, na osnovu njihovih ekspertskih svedočenja.

Shvatanje da se kodeksi mogu prihvatiti kao važeći pravni standardi podržano je i teorijskom hipotezom Kembel i Kranli Glas<sup>28</sup> da kodeksi lekarske prakse postaju obavezni za profesionalce samo ukoliko potvrđuju široko prihvaćenu profesionalnu praksu najvećeg broja zdravstvenih stručnjaka. Ovako shvaćeni kodeksi bivaju priznati od strane suda kao relevantni pravni akti koji sumiraju ključne standarde i koji kao takvi daju konkretan sadržaj opštim pravnim standardima – poput dužne pažnje, dobre prakse, etičkog postupanja itd. Na taj način oni olakšavaju presuđivanje u situaciji kada nema adekvatne zakonske odredbe za rešavanje konkretnog slučaja ili kada je odredba nejasna ili nepotpuna.

Naravno, sudovi nisu vezani internim aktima na način na koji su vezani zakonskim normama i formalno nisu obavezni da takve standarde prihvate, te mogu da ih odbace ili da ustanove drugačije standarde kao relevantne. U realnosti ipak, prema Kembel i Kranli Glas, u najvećem broju slučajeva sudovi ih po pravilu prihvataju kao merilo za interpretaciju

26 Herbert, H., 2013, str. 146.

27 Campbell, A., Cranley Glass, K., 2001, The Legal Status of Clinical and Ethics Policies, Codes and Guidelines in Medical Practice and Research. *McGill Law Journal*, 46, p. 477.

28 *Ibid.*, pp. 478–480.

zakonskih normi u konkretnom slučaju, što rezultira priznanjem kodeksa kao relevantnog pravnog akta.

Do sličnih zaključaka dolaze i italijanski stručnjaci<sup>29</sup>, koji u analizi italijanskog Kodeksa medicinske deontologije nacionalnog udruženja lekara nalaze da sudovi u poslednjim decenijama odbacuju tradicionalni pristup internim kodeksima udruženja kao vanpravnoj kategoriji i uzimaju ih u obzir kao pravno relevantne akte za odlučivanje. Njihovo istraživanje pokazuje da sudovi izričito prihvataju određena interna etička pravila (poput forenzičkih) kao „prava pravna pravila” koja su obavezujuća u okviru odnosne regulative, utemeljena u principima profesionalne prakse i dodatno sankcionisana disciplinskim sankcijama u skladu sa zakonom u slučaju kršenja. Italijanski sudovi verifikuju pravnost deontoloških normi ne samo kroz isticanje široko prihvaćenih profesionalnih standarda (poput američkih kolega) već i kroz dodatno naglašavanje činjenice da su ove norme proizvod profesionalnog udruženja koje je priznato od strane države (što je odjek etatističkih pluralističkih teorija), ima svojstvo pravnog lica i ima disciplinska ovlašćenja, tj. Veberove mehanizme prinude u širem smislu. Iz ovoga se izvlači i „eksterna” važnost deontoloških pravila koja predviđaju standarde ponašanja u odnosu prema trećim licima i obavezuju lekare pod pretnjom sankcija.

Smatramo da bi domaći sudovi sličnu argumentaciju mogli da koriste i pri oceni pravnosti i značaja internih etičkih kodeksa farmaceutske kompanija u slučaju sporova koji bi uključivali ove akte. Nema prepreke da se ovi interni akti posmatraju kao poslovni standardi postupanja koje je sama kompanija predstavila i prihvatila pred trećim licima kao samoobavezujuće,<sup>30</sup> poput standarda lekarskih udruženja ili zdravstvenih institucija, a koji tako postaju očekivani način poslovanja u koji se treća lica mogu pouzdati. U slučaju kad su takvi akti usklađeni sa važećim propisima, oni mogu biti i sudski prepoznati kao autonomni pravni akti koji formulišu važeće i očekivane standarde postupanja kompanija u odnosu na koje se može ceniti i konkretan slučaj.

### 2.3. VERIFIKACIJA PRAVNOSTI ETIČKIH KODEKSA OD STRANE DRUGIH DRŽAVNIH ORGANA

Veliki značaj u međunarodnom priznanju pravnosti i značaja internih etičkih kodeksa ima američki Zakon o praksama korupcije u inostranstvu

---

29 Patuzzo, S., Stefano, F. de, Ciliberti, R., 2018, The Italian Code of Medical Deontology. Historical, ethical and legal issues, *Acta Biomed*, 89, (2) pp. 157–164.

30 Po pravilu se etički kodeksi javno objavljuju na internet stranici kompanije i kontinuirano su dostupni trećim licima.

(The Foreign Corrupt Practices Act, of 1977 – dalje: FCPA)<sup>31</sup> čiju primenu nadziru dva američka federalna državna organa – Ministarstvo pravde (Krivično odeljenje) i Komisija za hartije od vrednosti (Odeljenje za izvršenja). Ova dva državna organa su razvila i zvanične smernice za odlučivanje u slučajevima kršenja FCPA u kojima izričito ističu veliki značaj etičkih kodeksa kompanija prilikom donošenja odluka o postupku i sankcijama iz svoje nadležnosti. Ovo je naročito bitno za farmaceutsku industriju, čije su kompanije često bile predmet istraga zbog kršenja odredaba FCPA u pogledu zabrane korupcije na međunarodnom nivou.

Tako Ministarstvo pravde i Komisija za hartije od vrednosti u svojim smernicama<sup>32</sup> naglašavaju da se pri donošenju odluka rukovode, između ostalog, i postojanjem i efektivnošću kompanijskog programa usklađenosti poslovanja u trenutku prekršaja FCPA. Etički kodeks, kao osnovni deo svakog kompanijskog programa usklađenosti, njegov sadržaj i praktična primena, tako postaje zvanično priznat od strane najviših državnih organa Sjedinjenih Američkih Država kao ključan pravni dokument za odluke nadležnih organa koje se tiču: (i) odgovarajuće procesne forme (mogućnost poravnanja sa nadležnim organima, sporazum o krivici itd.); (ii) iznosa novčane kazne, ako se kompanija novčano kažnjava; i (iii) pitanja obaveza koje se dodatno nameću kompaniji radi sprečavanja daljeg kršenja FCPA i obezbeđivanja zakonitog poslovanja kompanije (npr. da li se postavlja državni „nadzornik za usklađenost” koji nadzire etičko postupanje kompanije).<sup>33</sup>

### 3. MORALNI SADRŽAJ ETIČKIH KODEKSA

Prilikom analize nikako ne treba izostaviti činjenicu da je suština etičkih kodeksa farmaceutskih kompanija – njihov moralni sadržaj – sadržana već u njihovim nazivima. Etički kodeksi ustanovljavaju bazu univerzalnih moralnih vrednosti koje kompanija promovise i čije ostvarenje očekuje od svojih zaposlenih. Te moralne vrednosti su osnov za razvoj svih internih pravila u kompaniji i merilo ispravnog postupanja. Identifikacija ključnih etičkih vrednosti je relativno laka za manje lokalne ili regionalne kompanije, ali se problem usložnjava u slučaju velikih multinacionalnih

31 Department of Justice USA, The Foreign Corrupt Practices Act of 1977 (19 December 1977, 23 August 1988, 31 July 1998, 10 November 1998), Pub. L. 95–213, 91 Stat. 1494 (1977), 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78f.

32 The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 2020, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, (<https://www.justice.gov/criminal-fraud/file/1306671/download>, 17.10.2021), p. 57.

33 *Ibid.*

kompanija koje funkcionišu na kulturno, istorijsko i religijski raznorodnim tržištima kada je teško odrediti bazu vrednosti koja je podjednako prihvatljiva za sve.

S obzirom na navedeno, jasno je da skup univerzalnih vrednosti etičkih kodeksa farmaceutskih kompanija mora biti relativno mali da bi bio široko prihvatljiv. U tom kontekstu, pogled na javno dostupne kodekse ukazuje da svi oni počivaju na opštim vrednostima etičkog dobra – fer i poštenog poslovanja, poštovanja prava i dostojanstva drugih i posvećenosti dobrobiti zajednice. Iz tih osnovnih ideja se dalje razvijaju pojedinačna pravila o zabrani korupcije, sprečavanju sukoba interesa, zaštiti životne sredine itd.

Moralni sadržaj etičkih kodeksa prepoznaje na međunarodnom nivou i OECD kad u Principima korporativnog upravljanja navodi da etički kodeksi „kao opšti okvir za etičko ponašanje *prevazilaze poštovanje zakona*“.<sup>34</sup> Ovo je potvrđeno i smernicama za primenu FCPA, gde se naglašava da dobre interne kontrole mogu sprečiti ne samo kršenje FCPA već i druge nezakonite ili nemoralne prakse kompanije, njenih zavisnih društava ili zaposlenih.<sup>35</sup> Slične formulacije mogu se naći praktično u svakom javno dostupnom etičkom kodeksu gde se takođe naglašava integritet i vrednosti koje prevazilaze prosto poštovanje važećih propisa i zahtevaju ispravno postupanje u etičkom smislu te reči.

Stoga etičke kodekse farmaceutskih kompanija prema njihovom sadržaju i ciljevima možemo relativno lako identifikovati i kao dokumenta sa moralnom sadržinom, koji ne samo da potvrđuju i promovišu već i izričito zahtevaju poštovanje postavljenih moralnih vrednosti. Nije, dakle, reč samo o nominalnoj promulgaciji etičkih kodeksa već je u pitanju njihov praktični značaj, jer temeljne vrednosti kao bitne aspekte poslovanja prepoznaju i zaposleni, potrošači i konkurenti, te kompanije nedvosmisleno uspostavljaju i moralne, a ne samo formalno-poslovne odnose sa zajednicom u kojoj posluju. Kao posledica ovakvog pristupa, kompanije koje poštuju promovisane etičke standarde u praksi stiču lojalne kupce ili partnere i ojačavaju svoju reputaciju, što u konačnom doprinosi stabilnosti njihovog poslovanja i profitabilnosti kao komparativnoj dodatnoj vrednosti u odnosu na konkurente koji nemaju sličan pristup.

Napred izneta analiza etičkih kodeksa s jedne strane kao pravnih, a s druge kao moralnih akata, dovodi nas do zanimljivog pitanja kako bi ovi akti mogli biti posmatrani u teoriji Lona Fulera u kojoj se pravni i moralni

---

34 OECD, 2015, 47.

35 The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 2020, A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 41.

akti razmatraju u okviru spektra zamišljene moralne lestvice. Iako je Fuller u svojim razmatranjima moralnosti prava imao u vidu pre svega čoveka pojedinca i njegov odnos prema pravu i moralu, osnovne ideje njegove teorije moralnosti i moralnosti prava možemo bez poteškoća proširiti i na pitanje interne etičke regulative kompanija. S obzirom na navedeno, razvijamo dalju analizu polazeći od shvatanja da etički kodeksi farmaceutskih kompanija mogu da adekvatno funkcionišu i da se analiziraju u okvirima Fullerove teorije moralnosti prava.

#### 4. FULLEROVA LESTVICA MORALNOSTI

Lon Fuller definiše pravo kao svrsishodni poduhvat koji ima za cilj „podređivanje ljudskog ponašanja vladavini pravila”.<sup>36</sup> U svom razmatranju prava Fuller posebnu pažnju pridaje odnosu prava i morala, čiju osnovu predstavlja razlikovanje dva vida moralnosti – moralnosti dužnosti i moralnosti težnje (aspiracije).

U Fullerovoj teoriji, moralnost dužnosti govori jezikom zabrana i naredbi. To je moralnost nužna za postojanje bilo kakvog suživota i leži na dualizmu dobro/loše. Pravila koja je regulišu su neelastična, imperativna i predstavljaju ono što je neophodno poštovati da bi život u zajednici sa drugima uopšte bio moguć. Moral dužnosti je početna tačka ljudskih dostignuća, ono što bi svako mogao i morao da pruži u interakciji sa drugima i što ne zahteva veliki napor u poštovanju – norme poput: ne kradi, ne ubij. Stoga kršenje takvih pravila predstavlja kršenje osnovnih dužnosti koje okolina osuđuje i koje povlači kaznu. Kazne imaju prednost nad podsticajima jer nema svrhe nagrađivati čoveka za ono što je minimum zahteva za zajednički život. Relativno je lako odrediti da li je propisana dužnost prekršena ili ne, a kažnjavanje prekršilaca u skladu sa propisanim pravilima se smatra opravdanim i neophodnim za funkcionisanje društva. S obzirom na sve navedeno, pravne norme pripadaju domenu moralnosti dužnosti.

Moralnost težnje s druge strane ovog sistema ima svrhu da omogući ljudima da dosegnu svoj maksimalni potencijal. To je „moralnost dobrog života, izvrsnosti, najpotpunijeg ostvarivanja ljudskih moći”.<sup>37</sup> Ovaj moral polazi sa drugog kraja zamišljene moralne lestvice – od ideala kome se teži, a ne od minimuma koji je nužan, od dobrog i ispunjenog života, a ne bazičnih zahteva suživota. Počiva na ideji ispunjenosti ljudske svrhe, konceptu neke više vrednosti, a ne na dualizmu dobro/loše. Pravila su elastična, promenjiva i izražena u vidu afirmativnih zahteva – norme poput:

36 Fuller, L., 2011, *Moralnost prava*, Beograd, Pravni fakultet Univerziteta u Beogradu, str. 114.

37 *Ibid.*, str. 21.

poštuj bližnjeg svog, pomozni nemoćnima. Stoga neispunjavanje zahteva moralnosti težnje ne povlači kaznu, već prezrenje za promašeni cilj, za ponašanje koje ne odgovara misaonom ljudskom biću. U okviru moralnosti težnje, nagrade, pohvale i podsticaji imaju veći značaj nego kazne. Međutim, pravila koja predviđaju uslove za dobijanje pohvala ili podsticaja su manje jasna nego pravila koja propisuju kazne za kršenje dužnosti, s obzirom na to da je pitanje da li je neko ostvario ideal kome se teži ili nije podložno subjektivnoj oceni samog ideala, stepena dostignuća i uspešnosti, a ta ocena je kompleksnija i spornija što se više krećemo ka postavljenom idealu. S obzirom na te elemente, moralne norme koje promovišu etičke vrednosti dobrog i poštenog se nalaze u domenu moralnosti težnje.

Po Fuleru, sva pravila možemo da posmatramo u okvirima zamišljene moralne lestvice koja na jednom kraju ima moral dužnosti, a na suprotnom moral težnje. Većito pitanje za pravnike jeste gde se nalazi pokazatelj koji označava liniju razgraničenja, prelazak moralnosti dužnosti u moralnost težnje i obratno. S jedne strane, ukoliko je linija razgraničenja suviše u okvirima morala težnje, posledica je postojanje premalo jasnih pravila, što može dovesti do proizvoljnog tumačenja ideala ili vrednosti neke profesije ili industrije i u konačnom ugrožavanja prava drugih lica. S druge strane, ukoliko je linija razgraničenja postavljena suviše u okvirima morala dužnosti, to u praksi može da veže ruke onima koji primenjuju norme previše striktnim regulativama, da onemogući najbolji mogući pristup, adekvatnu analizu i tumačenje, prilagodljivost konkretnoj situaciji, te da uguši bilo kakav razvoj kreativnosti i ideja.

Kako ističe Burg<sup>38</sup>, u pravnoj teoriji sfera morala aspiracije je uvek bila marginalna i većina teoretičara se fokusirala na moralnost dužnosti koja govori o pravnim pravilima i obavezama. Međutim, moralnost težnje je u novim pravnim konstruktima u kojima se prepliću pravni i moralni aspekti, kakav je koncept etičkih kodeksa, od velikog značaja za razumevanje tih novih koncepata, ali i same Fulerove teorije.

## 5. ETIČKI KODEKSI NA FULEROVOJ LESTVICI

### 5.1. ASPEKT MORALNOSTI DUŽNOSTI

Analiza sadržaja etičkih kodeksa pokazuje da oni imaju dualnu prirodu – kao pravni i moralni akti. U pogledu njihovog pravnog aspekta, oni

---

38 Burg, W. van der, 2009, *The Morality of Aspiration: A Neglected Dimension of Law and Morality*. Amsterdam University Press, *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies*, No. 09–03, pp. 169–192 (<https://ssrn.com/abstract=1462655>, 17. 10. 2021), p. 169.

sadrže znatan broj konkretnih pravnih pravila i uputstava za svakodnevno postupanje. Ova pravila su bazična, predstavljaju osnov prihvatljivog poslovnog postupanja, iskazana su u vidu jasnih i konkretnih zabrana i instrukcija. Primera radi: „zaposlenima je zabranjeno davanje, obećavanje ili nuđenje bilo kakve vrednosti, u cilju uticaja na bilo kakav akt ili odluku, naročito u odnosu sa zdravstvenim profesionalcima i državnim zvaničnicima”,<sup>39</sup> „zabranjena je bilo kakva forma mita ili korupcije”,<sup>40</sup> „zabranjena je trgovina akcijama kompanije [...] ili povezanih društava u slučaju posedovanja internih informacija koje će verovatno značajno uticati na cenu akcija”,<sup>41</sup> „nikad ne promoviramo proizvode za indikacije koje nisu predviđene uputstvom za lek”<sup>42</sup>.

Kršenje ovih pravila je lako određivo i dodatno redovno i zakonski kažnjivo u svim jurisdikcijama. Stoga se etički kodeks u farmaceutskoj industriji ne smatra samo za pamflet vrednosti već mnogo više za skup minimalnih dužnosti zaposlenih i minimalnih očekivanja od trećih lica. Ovo tim pre što etički kodeksi predstavljaju bazu za razvoj svih drugih internih pravila, ugovora i smernica za svakodnevni rad, te se obavezna snaga etičkih kodeksa širi kapilarno i na posredni način.

Takođe, zanimljivo je posmatrati etički kodeks sa stanovišta jednog od bitnih aspekata morala dužnosti – kroz reciprocitet koji se zasniva na razmeni obećanja i očekivanje uzajamnosti u ponašanju. Ovo je izraženo kroz zlatno pravilo: ponašaj se prema drugima onako kako želiš da se drugi ponašaju prema tebi, odnosno u Fulerovoj interpretaciji: „Čim od vas dobijem uveravanja da ćete prema meni da se ophodite onako kako biste vi sami želeli da se ophode prema vama, tad ću da budem spreman da sa svoje strane uzvratim istim načinom ophođenja prema vama”<sup>43</sup>. Dobrovoljno samoobavezivanje normama etičkih kodeksa u odnosima prema zaposlenima, ali i prema trećim licima (poslovnim partnerima, konkurentima), naglašava ovaj princip, jer gradi očekivanja unutar kompanije, ali i na širem tržištu da će se kompanija ponašati na određeni etički način, te da po pravilu očekuje isto takvo ponašanje i od svojih zaposlenih, poslovnih partnera ili konkurenata.

39 Sanofi, *Code of Ethics*, (<http://www.codeofethics.sanofi/assets/media/pdf/EN-Code-Of-Ethics.pdf>, 17. 10. 2021), p. 39.

40 Pfizer, 2020, *Blue Book: Pfizer's Code of Conduct*, ([https://cdn.pfizer.com/pfizercom/investors/corporate/Pfizer\\_2020BlueBook\\_English.pdf](https://cdn.pfizer.com/pfizercom/investors/corporate/Pfizer_2020BlueBook_English.pdf), 17. 10. 2021), p. 23.

41 Sanofi, *Code of Ethics*, (<http://www.codeofethics.sanofi/assets/media/pdf/EN-Code-Of-Ethics.pdf>, 17. 10. 2021), p. 26.

42 Takeda, *Global Code of Conduct*, ([https://www.takeda.com/4ab59d/siteassets/system/who-we-are/corporate-governance/compliance/global-code-of-conduct\\_en.pdf](https://www.takeda.com/4ab59d/siteassets/system/who-we-are/corporate-governance/compliance/global-code-of-conduct_en.pdf), 17. 10. 2021), p. 2.

43 Fuller, L., 2011, str. 35.

S druge strane, još jedan argument za identifikaciju etičkih kodeksa u okvirima moralnosti dužnosti jeste i nemogućnost primene principa marginalne korisnosti koji je karakterističan za moralnost težnje. Naime, moralnost težnje, po Fuleru, počiva na principu marginalne koristi i napora da na najbolji način iskoristimo postojeće resurse.<sup>44</sup> To bi značilo da u slučaju vrednosti i ideala treba da težimo ravnoteži i srednjem putu, što podrazumeva balansiranje, povlačenje ili čak i odustajanje od nekih vrednosti zarad postizanja oportuniteta i ravnoteže ciljeva i realnih mogućnosti u celini. Etički kodeksi međutim nikako ne podržavaju princip marginalne korisnosti. Sva načela kodeksa se postavljaju u istu ravan (poštovanje zabrane zloupotrebe položaja je podjednako bitno kao i sprečavanje neloyalne konkurencije ili zabrana odavanja poverljivih informacija). Ne promovise se „srednji put” i ne podržava balansiranje načela, već su sva načela postavljena beskompromisno, nehijerarhično i posmatraju se kao dovoljno bazična tako da se zastupa ideja da ona praktično i ne mogu doći u sukob jer sva imaju istu usmerenost ka poštenju, moralu i integritetu.

S obzirom na sve navedeno, etički kodeksi se nameću kao obavezni pravni akti i kao takvi se mogu prepoznati u okvirima Fulerove moralnosti dužnosti.

## 5.2. ASPEKT MORALNOSTI TEŽNJE

Etički kodeksi farmaceutske kompanije su očigledno i odraz morala težnje po terminima, ciljevima i vrednostima integriteta koje razvijaju. Jezik etičkih kodeksa ovih kompanija se u velikom delu bazira na formulacijama poput: „posvećeni smo poštovanju prava”, „promovišemo vrednosti”, „podržavamo ravnopravnost”, „poštujemo privatnost” i slično. Dakle, sama postavka etičkih kodeksa otelotvoruje višu ideju dobra i morala kome se teži u svakodnevnom poslovanju. Ovaj aspekt je najprimetniji u uvodnim odredbama kodeksa, kao što su odredbe kodeksa Takede: „[...] mi donosimo odluke i preduzimamo aktivnosti koje utiču na ljudske živote. Ovo je plemenita svrha, koja zahteva najviše standarde etičkog ponašanja. Takeda Globalni etički kodeks nam daje okvir za postizanje ovih standarda. On postavlja principe koje moramo poštovati svaki dan. Takođe nam omogućava da očuvamo integritet koji je utkan u naše nasleđe[...]”<sup>45</sup> Slično tome, etički kodeks Sanofi navodi „U cilju izgradnje uspešnog poslovanja, kontinuirano težimo postupanju sa integritetom. Za svaku odluku koju donosimo u potpunosti integrišemo etičke principe.

---

44 *Ibid.*, str. 34.

45 Takeda, *Global Code of Conduct*, p. 1.

Integritet je posvećenost koja mora da vodi naša ponašanja i preko osnovne usklađenosti poslovanja sa zakonima i propisima, te da nas vodi da donosimo prave izbore u susretu sa bilo kojom situacijom.”<sup>46</sup>

To dodatno objašnjava način funkcionisanja i vrednosti farmaceutske industrije i u skladu je sa pravno-teorijskim stavom da ne možemo potpuno razumeti određenu profesiju (a mi bismo dodali i industriju kao što je farmaceutska) ukoliko ne priznamo i ne prepoznamo da funkcionisanje te profesije nije samo okarakterisano minimalnim dužnostima već i idealima i aspiracijama.<sup>47</sup> Takav kompanijski pristup je podržan i polifoničnom idejom poslovanja Kevina Džeksona po kome maksimiziranje profita nije jedina svrha biznisa, već se poslovanje vidi kao ispunjavanje različitih funkcija kompanije u okviru društva, te se kompanija takođe „fokusira na etiku i odgovornost prema licima van firme”.<sup>48</sup> Upravo je reputacioni kapital ona karika koja nedostaje u globalnom upravljanju kompanijama,<sup>49</sup> a koja se razvija iz moralnosti težnje i ideala socijalno prihvatljivog, dobrog i poštenog poslovanja koje ide u korist društva u celini. Etički kodeksi jasno ukazuju na to da su aspekti vrednosti kojima farmaceutske kompanije teže kompleksni, naročito u sferama kao što je briga o zdravlju i fer i poštenom poslovanju. Kroz samoregulativu kompanija se razrađuju ideali i postavljaju principi iz sfere morala aspiracije.

Fuler podvlači da, kad je u pitanju moralnost težnje, „ne postoji način na koji bi pravo moglo da prinudi čoveka da živi u skladu sa vrlinama za koje je sposoban”.<sup>50</sup> Principi iz etičkih kodeksa stoga pre svega i apeluju na svest, odgovornost, etičko postupanje i poštovanje drugih, dok je pretnja disciplinskim sankcijama zaposlenih za kršenje kodeksa manjeg značaja u konceptu kodeksa, a posledice kršenja kodeksa od strane trećih lica se obično i ne pominju.<sup>51</sup>

Dodatno, ono što je karakteristično za moralnost aspiracije jeste to da se postavljeni ideali nikada ne mogu u potpunosti dostići. Možemo biti manje ili više uspešni u pokušajima da ispunimo svaki aspekt vrednosti fer i poštenog poslovanja, ali uvek postoji prostor da se razvijemo

46 Sanofi, *Code of Ethics*, p. 7.

47 Burg, W. van der, 2009, p. 171.

48 Jackson, K., 2010, Global corporate governance: Soft Law and Reputational Accountability, *Brooklyn Journal of International Law*, Vol. 35, Issue 1, pp. 43–105 (<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1165&context=bjil>, 17. 10. 2021), p. 62.

49 *Ibid.*, p. 67.

50 Fuller, L., 2011, str. 24.

51 Od partnera se redovno samo „očekuje” ili se „ohrabruju” da poštuju iste principe zarad uspešne saradnje, ali se ne navodi šta se dešava u slučaju potencijalnog kršenja ovih akata od strane poslovnog partnera.

više i bolje. Etički kodeksi prepoznaju tu osobenost, te svoje ciljeve i svrhu upravo i formulišu kroz pojmove „očekivanja” i „ohrabrenja” u ostvarenju postavljenih vrednosti, a kršenje kodeksa je u prvom redu nemoralno i neprihvatljivo ponašanje i propust u ostvarenju vrednosti koje kompanija zastupa, a tek u drugom redu potencijalni predmet za disciplinsko sankcionisanje.

## 6. ZAKLJUČAK: KODEKSI U SIVOJ ZONI MORALNE SKALE

Isprepletanost elemenata morala dužnosti i morala težnje u etičkim kodeksima farmaceutskih kompanija ukazuje na njihovu hibridnu, mešovitu prirodu u kojoj su principi istovremeno i pravila, dužnosti istovremeno i ideali, a sve to zajedno u praksi dobro funkcioniše kroz ovaj novi obavezujući koncept. To nam ukazuje da, iako postoji jasna razlika u krajnjim dometima morala aspiracije i morala dužnosti, oni ipak čine jedan kontinuum.<sup>52</sup> Posmatrajući Fulerovu skalu morala dužnosti i aspiracije, takvi dualni akti bi bili upravo u delu zamišljene i nedokučive granice koja razdvaja obavezu i ideal. Ova „ničija zemlja” nije samo jedna tačka već pre predstavlja polje u kome se prelivaju dužnosti u vrednosti i obratno. Takođe, to nije nužno zona arbitrarnosti i možemo bolje razumeti odnos dve moralnosti ukoliko mapiramo aspekte jedne i druge moralnosti prema karakterističnim elementima i analiziramo njihove uzajamne veze.

Analiza etičkih kodeksa koja je ovde izneta ukazala je da njihovi karakteristični elementi i odnosi uključuju podjednako pravila iz sfere morala dužnosti (ne daj mito, ne sklapaj nezakonite dogovore) ali i principe iz sfere morala težnje (težimo fer i poštenom poslovanju, poštujemo svoje klijente). S obzirom na takav sadržaj, specifične alate obaveznosti koji proističu iz njihove identifikacije kao akata autonomnog prava, te jasne aspekte morala dužnosti i morala aspiracije koji se ovde javljaju, etički kodeksi konceptualno leže u graničnom polju između moralnosti dužnosti i moralnosti težnje. Ovo potvrđuje i model reflektivnog ekvilibrijuma u kome elementi oba kraja etičke lestvice uzajamno deluju, obogaćuju i korriguju jedni druge i pokazuju na najbolji način kako ljudi u praksi razmišljaju kad donose moralne ili pravne odluke.<sup>53</sup> U pitanju su norme koje predviđaju i ono što bi trebalo, ali i ono što jeste dobro poslovanje, koji se u povratnoj sprezi izvode iz toga što je postavljeno kao „treba”. Tako etički kodeksi predstavljaju jednu zaokruženu celinu težnji i obaveza, vrednosti i praktičnosti u okvirima autonomnog prava.

---

52 Burg, W. van der, 2009, p. 175.

53 *Ibid.*, p. 179.

Pri tome, osim ove statičke dimenzije da su kodeksi u „sivoj zoni” skale morala, treba naglasiti i njihovu dinamičku dimenziju koja se ogleda u napredovanju kodeksa od nominalno deklarativnih moralnih akata ka pravnim aktima. Ovo je evidentno u praksi kroz povećanje svesti o njihovom značaju u poslednjim decenijama, njihov intenzivni razvoj i produbljivanje tema kojima se bave. Fuller govori o približavanju dve moralnosti kada kaže: „Da bi došlo do upotrebljivih standarda odlučivanja, pravo mora da se okrene ka svom krvnom srodniku – moralnosti dužnosti”.<sup>54</sup> Mi smo upravo svedoci pomeranja ideje integriteta u poslovanju kao apstraktne vrednosti ka praktičnoj dužnosti zaposlenih, kompanije i trećih lica u okviru ove moralne skale.

Razvoj etičkih kodeksa ukazuje da je profitno poslovanje u skladu sa moralnim načelima ne samo nešto što je „lepo imati” i nominalno promovisati, već da prelazi u ono što „moramo znati” ako želimo da budemo uspešni u poslu. Ovi se akti tako sa svojom specifičnom sadržinom razvijaju u nove profesionalne standarde za poslovanje u farmaceutskoj industriji. Na ovaj način se staro pravilo *bona fides* ponovo vraća u fokus poslovanja u svojoj modernoj formi.

## LITERATURA

1. Blagojević, B., 1971, Aktuelni problemi u vezi sa nacrtom amandmana i regulisanje odnosa iz ugovora o osiguranju, *Osiguranje i privreda*, 6–7, prema: Šulejić, P., 1985, O sistemu i metodu zakonskog regulisanja odnosa iz ugovora o osiguranju, *Anali Pravnog fakulteta*, 3–4, str. 485–491.
2. Burg, W. van der, 2009, The Morality of Aspiration: A Neglected Dimension of Law and Morality. Amsterdam University Press, *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies*, No. 09–03, pp. 169–192 (<https://ssrn.com/abstract=1462655>, 17. 10. 2021).
3. Campbell, A., Cranley Glass K., 2001, The Legal Status of Clinical and Ethics Policies, Codes and Guidelines in Medical Practice and Research. *McGill Law Journal*, 46, pp. 473–489.
4. Fuller, L., 2011, *Moralnost prava*, Beograd, Pravni fakultet Univerziteta u Beogradu.
5. Herbert, H., 2013, *Pojam prava*, Beograd, Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.
6. Jackson, K., 2010, Global corporate governance: Soft Law and Reputational Accountability, *Brooklyn Journal of International Law*, Vol. 35, Issue 1, pp. 43–105 (<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1165&context=bjil>, 17. 10. 2021).
7. Mitrović, D., 2003, Autonomija kao pojam i oblik, O smislu, vrstama i domašaji-ma autonomije, *Anali Pravnog fakulteta*, 3–4, str. 417–440.

<sup>54</sup> Fuller, L., 2011, str. 26.

8. Mitrović, D., 2018, *Autonomno pravo*, Beograd, Pravni fakultet Univerziteta u Beogradu.
9. Patuzzo, S., Stefano, F. de, Ciliberti, R., 2018, The Italian Code of Medical Deontology. Historical, ethical and legal issues, *Acta Biomed*, 189(2), pp. 157–164. (<https://pubmed.ncbi.nlm.nih.gov/29957745/> 17. 10. 2021).
10. Veber, M., 1976, *Privreda i društvo I*, Beograd, Prosveta.
11. Vukadinović, G., 2011, O pojmu autonomnog prava, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3, str. 163–172.
12. Vukadinović, G., 2012, Vrste autonomnog prava i shvatanja pravnog pluralizma, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 4, str. 45–54.

## PROPISI

1. Department of Justice USA, *The Foreign Corrupt Practices Act of 1977* (19 December 1977, 23 August 1988, 31 July 1998, 10 November 1998), Pub. L. 95–213, 91 Stat. 1494 (1977), 15 U.S.C. §§78dd-1, et seq.
2. OECD, *G20/OECD Principles of Corporate Governance* (30 November 2015), (<https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1617139126&id=id&accname=guest&checksum=38013B6144C42210721AEE6ADD2F775B>, 17. 10. 2021).
3. OECD, *Convention on combating bribery of foreign public officials in international business transactions and related documents* (21 November 1997, 25 May 2009, 26 November 2009, 16 November 2016, 13 March 2019). ([http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf), 17. 10. 2021).
4. Ustav Republike Srbije, *Sl. glasnik RS*, br. 98/06.
5. Zakon o bankama, *Sl. glasnik RS*, br. 107/05, 91/10, 14/15.

## IZVORI SA INTERNETA

1. Johnson & Johnson, *Johnson & Johnson Code of Business Conduct* (<https://www.jnj.com/sites/default/files/pdf/code-of-business-conduct-english-us.pdf>, 17. 10. 2021).
2. Medicines for Europe, *Code of Conduct 2020* (code-of-conduct-final-COLORS.cdr (medicinesforeurope.com), 17. 10. 2021).
3. Merck, *The Merck Code of Conduct*, ([https://www.merckgroup.com/id/compliance/English\\_Merck\\_CoC\\_new.pdf](https://www.merckgroup.com/id/compliance/English_Merck_CoC_new.pdf), 17. 10. 2021).
4. Pfizer, 2020, *Blue Book: Pfizer's Code of Conduct*, ([https://cdn.pfizer.com/pfizer-com/investors/corporate/Pfizer\\_2020BlueBook\\_English.pdf](https://cdn.pfizer.com/pfizer-com/investors/corporate/Pfizer_2020BlueBook_English.pdf), 17. 10. 2021).
5. Sanofi, *Code of Ethics*, (<http://www.codeofethics.sanofi/assets/media/pdf/EN-Code-Of-Ethics.pdf>, 17. 10. 2021).
6. STADA, *Code of Conduct for Employees of STADA Group*, ([https://www.stada.com/media/1921/001\\_stada\\_code\\_of\\_conduct.pdf](https://www.stada.com/media/1921/001_stada_code_of_conduct.pdf), 17. 10. 2021).

7. Takeda, *Global Code of Conduct*, ([https://www.takeda.com/4ab59d/siteassets/system/who-we-are/corporate-governance/compliance/global-code-of-conduct\\_en.pdf](https://www.takeda.com/4ab59d/siteassets/system/who-we-are/corporate-governance/compliance/global-code-of-conduct_en.pdf), 17. 10. 2021).
8. The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 2020, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, (<https://www.justice.gov/criminal-fraud/file/1306671/download>, 17. 10. 2021).

## CODES OF CONDUCT OF PHARMACEUTICAL COMPANIES AS ACTS OF AUTONOMOUS LAW AND THEIR PLACE WITHIN FULLER'S MORAL SCALE

Jelena Danilović

### ABSTRACT

The article analyses codes of conduct of pharmaceutical companies, as specific autonomous acts which prescribe both moral principles of fair and honest business and particular legal duties. Article aims to set jurisprudential base for better understanding of this concept. The first part of the article deals with development and specifics of ethical codes as hybrid, legal and moral instruments. The second part analyses legal nature of the codes reviewed from pluralistic jurisprudence stance, identifying them as institutes of autonomous law. The third part analyzes moral content of codes, while in the final part the article analyzes these specific legal and moral institutes, within the context of Fuller's moral scale. Applied methods are conceptual analysis of the code of conduct concept as well as descriptive analysis of the business practice and available, relevant autonomous rules. Overview includes also comparative method of presentation of empirical practice. Conclusion analyses position of ethical codes, as specific autonomous acts, within the frame of Fuller's moral scale and perceived antagonism of morality of aspiration and morality of duty.

**Key words:** Code of Conduct, autonomous law, compliance, morality of aspiration, morality of duty.

Dostavljeno Uredništvu: 10. aprila 2021. godine

Prihvaćeno za objavljivanje: 6. decembra 2021. godine

SIMPOZIJUM O KNJIZI / BOOK SYMPOSIUM

PREDGOVOR / PREFACE

*Bojan Spaić\**

PREFACE TO BOOK SYMPOSIUM:  
MIODRAG JOVANOVIĆ,  
*THE NATURE OF INTERNATIONAL LAW*  
(Cambridge University Press, 2019)

*The Nature of International Law* (hereinafter: *NoIL*) by Miodrag Jovanović, published by Cambridge University Press, comes at a time marked by a sharp increase of philosophical interest in questions of international law. Even within this line of recent, at times substantial contributions to the literature, Jovanović's book is in many ways an outlier. Firstly, while legal philosophers have overwhelmingly focused on narrow topics of international criminal law, humanitarian intervention, migrations, human rights law,<sup>1</sup> *NoIL* tackles the persisting issue of legality of international law heads on. Secondly, and in sharp contrast with some more recent books on the topic,<sup>2</sup> *NoIL* engages in a discussion about the nature of international law with contemporary and past legal philosophy, without confining itself to one (by and large Anglo-American) tradition of legal thinking.

Even though it garnered significant attention after its publication, unfortunate and alarming events, starting in late 2019 and lasting until now, have significantly hindered organised attempts to discuss both the arguments and the ideas of the book. From a philosophical perspective, Jovanović approaches the subject-matter by tackling the perennial problem of conceptualising law, and he does so in a very specific way. His challenge to the methodological orthodoxy, convincingly based on both elaborate philosophical argument and on theoretical authorities in the

---

\* Associate Professor, Faculty of Law University of Belgrade; e-mail: bojan.spaic@ius.bg.ac.rs

1 See, for example, Tasioulas, J., Besson, S. (eds.), 2010, *The Philosophy of International Law*, Oxford University Press.

2 See, Lefkowitz, D., 2020, *Philosophy and International Law*, Cambridge University Press; Haque, A. A., 2021, International Law: System or Set?, *EJIL:Talk!*, (<https://www.ejiltalk.org/international-law-system-or-set/>).

field, leads him to abandon conceptual essentialism in favour of the prototype theory of concepts, allowing for an insightful analysis of typical features of law, namely — normativity, institutionality, coerciveness and justice-aptness. This is the angle from which Jovanović casts the question about the nature of international law, and it is from this perspective that he argues for the conclusion that international law shares all the features typical of national law.

Philosophical arguments of the book have been subject to philosophical scrutiny in previous book forums.<sup>3</sup> Backed by *Union University Law School Review (Pravni zapisi)*, *Serbian Association for Legal and Social Philosophy (IVR Serbia)* and *Belgrade Legal Theory Group (BLTG)*, this symposium, organised on 18th of June 2021 at the Faculty of Law University of Belgrade, took a deferent route. Its purpose, on the one hand, was to stress-test the common belief that scholars writing in the field of international law, being inclined to legal argument based on sources, institutions, and practices, are reluctant to tackle more abstract philosophical issues. On the other hand, the aim of the symposium was to try to challenge the stubborn notion that philosophy of law is extraneous to the quotidian concerns of legal practice, interpretative concerns of legal dogmatics, and descriptive concerns of legal science. With this in mind, the invitations to participate were extended to established and rising international law scholars from the region and (just) one philosopher of law.

I am proud to present the result of their engagement with *NoIL* in this volume of *Pravni zapisi*. Jernej Letnar Čer nič and Ana Zdravković tackled the arguments of the book by scrutinising Jovanović's analysis of the law-making nature of activities of non-state bodies in international law (Čer nič) and by elaborating on *erga omnes* obligations in international law as precursors to *jus cogens* norms (Zdravković). Tatjana Papić and Miloš Hrnjaz took note of the substantive philosophical concepts and methodological tools developed in *NoIL*. Building on from there, their contributions inquire into the relation between indeterminacy and uncertainty in international law (Papić) and even develop a novel theory of the formation of international customary law as an alternative to the dominant additive theory (Hrnjaz). Goran Dajović, being the only philosopher of law discussing the book, addresses *NoIL* on its philosophical merits, by challenging Jovanović's exposition of normativity – one the most contested issues in contemporary philosophical debates about international law. Aimed at bringing the philosophical debate closer to the domestic public, it is also the only contribution published in Serbian.

3 See *Revus, Journal for Constitutional Theory and Philosophy of Law*, 2021, Vol. 43, (<https://journals.openedition.org/revus/5741>).

As a whole, the papers resulting from the symposium expose the aforementioned commonly held beliefs regarding international law scholarship and philosophy of law as simplistic prejudices. At their best, efforts in the domain of philosophy of law infuse the landscape of a legal discipline with novel approaches and novel ideas, change the focus of debate, provide legal science with refined tools for approaching its subject. The reply written by Jovanović shows that this is not a one-way street and that the input of legal science, in this case of international law scholarship, is invaluable to philosophy of law both as a testing ground for those novel approaches and ideas and as a source of factual knowledge about law.

I owe immense gratitude to Ana Zdravković and Violeta Beširević. Without their exceptional organisational and editorial skills, the symposium and this published collection of papers would have never come to be.

Received: 28 November 2021

Accepted: 6 December 2021

Goran Dajović\*

## NORMATIVNOST MEĐUNARODNOG PRAVA

**Apstrakt:** U knjizi „*The Nature of International Law*”, Miodrag Jovanović nastoji da objasni prirodu međunarodnog prava tako što analizira tipične karakteristike prototipskog pojma prava (institucionalnost, normativnost, prinudnost i podobnost za pravednost), a zatim sagledava savremeno međunarodno pravo kroz prizmu tih karakteristika. U članku se posebna pažnja posvećuje njegovoj analizi normativnosti (međunarodnog) prava. Osnovna intencija ovog članka nije da kritikuje Jovanovićeve teze o normativnosti prava kao takvog, već da ukaže da one nisu najbolji mogući okvir za objašnjenje normativnosti međunarodnog prava. Stoga se izlaže drugačiji konceptualni okvir od onog koji je on ponudio u ključu Razove ideje pravnih normi kao isključujućih razloga za delanje i praktičke racionalnosti. Taj okvir čini dobro poznata Hartova ideja internog stajališta ili interne tačke gledišta. Izložena argumentacija pokazuje da bi, unutar takvog okvira, normativnost međunarodnog prava mogla bolje da se objasni i razume, a u njega se, čini se, dobro uklapaju i pojedine uvrežene intuicije o međunarodnom pravu.

**Ključne reči:** međunarodno pravo, normativnost, autoritet, isključujući razlozi, interna tačka gledišta.

### 1. UVOD

Već naslov knjige *The Nature of International Law*, Miodraga Jovanovića,<sup>1</sup> informiše potencijalnog čitaoca da autor njome želi da odgovori na fundamentalna pitanja (o pojmu) međunarodnog prava. Te odgovore Jovanović traži služeći se pojmovima koje je izgradila opšta pravna teorija, definišući pravo kao takvo. Njegova ideja je da kroz prizmu

\* Vanredni profesor, Pravni fakultet Univerziteta u Beogradu; e-mail: gorand@ius.bg.ac.rs

O osnovnim idejama iz ovog članka izlagao sam na simpozijumu pod nazivom *Filozofija međunarodnog prava*, u organizaciji Belgrade Legal Theory Group, na Pravnom fakultetu Univerziteta u Beogradu, 18. juna 2021. Zahvaljujem učesnicima konferencije na zanimljivoj debati i podsticajnim idejama koje su tokom nje iznosili.

1 Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press.

elemenata pojma prava „propusti” fenomen(e) međunarodnog prava. Rečju, opšta teorija prava se bavila i bavi se pojmom prava, a ne pojmom međunarodnog prava. I ona se bavila i bavi tim pojmom, pre svega, proučavajući nacionalni pravni sistem kao takav. Ili, kako konstatuje Twajning (*Twining*), barem u njenoj mejnstrim orijentaciji zapadne provenijencije, pravna teorija se „koncentriše[...] na nacionalno pravo suverenih država i to poglavito onih u razvijenim industrijskim društvima”.<sup>2</sup> Kao dodatni argument za ovakav postupak analize međunarodnog prava navodi se i da „ako se međunarodno pravo ne uklapa u kriterijume koncepta prava koji se koristi na nivou nacionalnog prava, to nije (samo) problem za pravnost (*legality*) međunarodnog prava, već (takode) i za same te kriterijume, pa otuda i za datu pravnu teoriju”.<sup>3</sup>

Međutim, problem s kojim se već na startu susreće takav poduhvat je sledeći: postoji li uopšte pojam (nacionalnog) prava koji je rezultat klasične konceptualne analize („metafizički vođene”, kako kaže Jovanović), a u čije bi se „kriterijume” moglo uklopiti međunarodno pravo, koje je fenomenološki upadljivo drugačije od nacionalnog pravnog sistema? Beskrajne debate o tome da li je međunarodno pravo uopšte pravo pokazuju, čini se na prvi pogled, da oko odgovora na ovo pitanje ne postoji ni minimalna saglasnost. I upravo je to debata u koju se, sasvim originalno, uključuje i Jovanović, svojom knjigom. Kažem „originalno” jer naš autor osnovni problem u ovoj debati sagledava na drugačiji način.

Naime, problem u debati oko pojma međunarodnog prava je u sledećem. „Metafizički vođena” konceptualna analiza traga za onim što se u klasičnom shvatanju pojma uopšte naziva nužnim i dovoljnim karakteristikama fenomena koji pojam nastoji da obuhvati. Takvo, klasično shvatanje pojma ima dve neizbežne posledice: (1) pojmovi jasno i oštro razdvajaju pojavu koju pojam označava od drugih pojava i (2) sve pojave koje jedan pojam definiše „istog” su ranga, na neki način su jednake. Rečju, prema klasičnom shvatanju pojma, ne postoje ni granični ni tipični slučajevi pojave koju pojam obuhvata.<sup>4</sup> I upravo te dve posledice su „problematične” prilikom primene bilo kojeg pokušaja klasične definicije prava<sup>5</sup> na međunarodno pravo, jer je međunarodno pravo moguće pojmiti

2 Otuda, nastavlja Twajning, pravno teoretisanje je „podložno optužbama za parohijalizam i etnocentrizam”. Vid.: Twining, W., 2009, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, p. 10. Nav. prema Jovanović, M. A., 2019, p. 63.

3 Besson, S., Tasioulas, J., Introduction, u: Besson S., Tasioulas J. (eds.), 2010, *The Philosophy of International Law*, p. 8. Nav. prema Jovanović, M. A., 2019, p. 66.

4 Dajović, G., 2015, *Ogled o metajurisprudenciji*, Beograd, Pravni fakultet Univerziteta u Beogradu, str. 46.

5 Na stranu ću ostaviti problem da je svaka takva „esencijalistička” definicija prava, sama po sebi, epistemološki dubiozna.

kao pravo samo u smislu graničnog, netipičnog slučaja prava. A bilo koja klasična definicija (prava), baš kao i svaka druga (1) nivelirše sve pojave koje denotira, (2) posmatrajući ih kao podjednako „dobre” instantijacije pojma prava.<sup>6</sup>

Ipak, takav zaključak Jovanovića ne obeshrabruje, naprotiv. Odričući se „metafizički vođene” konceptualne analize, on problemu prirode međunarodnog prava prilazi na inovativan način, analizirajući koncept (međunarodnog) prava kao prototipski koncept.<sup>7</sup> U skladu s tim, naš autor stipulira četiri tipične karakteristike prava ili četiri karakteristike nacionalnog pravnog sistema, kao tipičnog primerka prava. Jovanovićeva stipulacija tih karakteristika nije proizvoljna. Ona je teorijski plodotvorna i široko zastupljena u preovlađujućim uvidima savremenih pravnih teoretičara a, čini se, i empirijski zasnovana. Koje su to karakteristike?

Pošto je sveprisutna funkcija prava da koordinira i usmerava ljudska ponašanja u društvu i da rešava međusobne sporove njegovih članova, prva od tih karakteristika jeste da je pravo normativno, to jest da svoje adresate u tim situacijama snabdeva razlozima za delanje (normativnost). Nadalje, pravo sadrži institucije koje su ovlašćene da sprovede te norme i presuđuju sporove povodom njihovog kršenja (institucionalnost). Zatim, ono u sebe uključuje mehanizme prinude koji služe kao garancija da prekršioc i normi neće umaći sankciji za njihovo kršenje (prinudnost). Najzad, pravne norme su podobne da budu procenjivane kao pravedne ili nepravedne (/podobnost za/ pravednost).<sup>8</sup> Objašnjavajući, redom, kako ove tipične karakteristike prava izgledaju, a zatim, kroz celu knjigu, i kako se i da li se fenomeni međunarodnog prava mogu sagledati kroz njihovu prizmu, Jovanović nudi obilje zanimljivih, instruktivnih i znalačkih argumenata i uvida, zaključujući da međunarodno pravo ispunjava relevantne kriterijume da bi se moglo smatrati pravnim sistemom.

6 Up. Jovanović, M. A., 2019, pp. 52, 56, 58.

7 Prema prototipskoj teoriji pojmova, pojam se shvata kao skup određenih karakteristika, koje nisu ni nužne ni dovoljne, već su tipične za pojavu koju poimamo. A tipične karakteristike su one koje su češće prisutne u primercima koji pod taj pojam potpadaju, dok su manje tipične one koje se ređe pojavljuju u najvećem broju primeraka date pojave. Ukoliko jedan primerak ima više tih karakteristika, on je tipičniji predstavnik te pojave („prototip”) nego primerak koji ima manje tih karakteristika. Takođe, ako jedan primerak ima karakteristike koje su tipične za neku drugu pojavu, onda je on manje tipičan primerak svoje vrste (Dajović, 2015, str. 48).

8 “[A] social practice is typically judged as falling within the category of ‘law’ if it consists of rules purporting to coordinate behavior of actors and to settle their disputes; if it possesses at least institutions in charge of judging whether those rules were violated; if the rules in question are guaranteed, normally through some form of coercive mechanisms; and if the rules are, overall, apt for inspection and appraisal in light of justice” (Jovanović, M. A., 2019, p. 76).

U ovom članku/osvrtnu na ambiciozan i hvale vredan pokušaj profesora Jovanovića da na izloženi način pruži sopstveni odgovor na najteže, najvažnije i najkontroverznije teorijsko pitanje koje se može postaviti o bilo kom društvenom ili pravnom fenomenu – pitanje njegove „prirode” – zadržaću se samo na deliću tog odgovora, onom koji se tiče normativnosti (međunarodnog) prava.

Ipak, prvenstvena namera neće biti da kritikujem Jovanovićeve ideje o normativnosti međunarodnog prava, kao takve, već da predložim jedan, čini mi se, prikladniji konceptualni okvir unutar kojeg bi ona mogla bolje da se razume, a koji potvrđuju i neke uvrežene intuicije o međunarodnom pravu. Taj „predlog” čini centralni deo članka, odnosno njegovog trećeg odeljka. Pre toga, u prvom odeljku izložiću detaljnije Jovanovićeve stavove o normativnosti, kao „deliću” prirode međunarodnog prava, a u drugom ću se osvrnuti na glavni problem, koji vidim u nepodesnosti Jovanovićeve analize da objasni normativnost međunarodnog prava. Najzad, u zaključku će biti sumirane osnovne ideje koje su u članku iznete.

## 2. NORMATIVNOST KAO TIPIČNA KARAKTERISTIKA (MEĐUNARODNOG) PRAVA

Na samom početku valja istaći da se kroz analizu normativnosti, kao tipične karakteristike prava, Jovanović poduhvatio ozbiljnog zadatka. Taj zadatak je ozbiljan jer je pojam normativnosti koliko važna,<sup>9</sup> toliko i kontroverzna tema pravne teorije.<sup>10</sup> Međutim, on postaje još ozbiljniji ako se ima na umu da ga naš autor posmatra iz dve različite (iako povezane) perspektive. Jovanović te perspektive formuliše kao odgovore na dva „kako” pitanja u vezi s normativnošću. Prvo je, kako se utvrđuje postojanje jedne norme (međunarodnog) prava („epistemološka perspektiva”), a

9 Prema mišljenju Koulmena i Lajtera analiza koncepta prava mora da objasni dve njegove suštinske karakteristike: prvo, ona mora da razjasni naš utisak da su samo neke norme, između mnogih društvenih normi, pravne norme, tj. da razgraniči pravne od drugih normi (problem važenja prava). I drugo, da objasni kako te pravne norme pružaju svojim adresatima specifičnu vrstu razloga za delanje, upravo zato što su pravne (up. Coleman, J., Leiter, B., *Legal positivism*, in: Patterson D. (ed.), 1996, *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell publishing, pp. 241–242). I drugi značajni autori naglašavaju da je jedan od centralnih zadataka filozofije prava u tome da objasni normativnost prava (up. npr. Perry, S. R., *Hart's Methodological Positivism*, in: Coleman, J., (ed.), 2001, *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford, Oxford University Press, pp. 330–331).

10 I to ne kontroverzna samo u pravnoj teoriji nego i u etici, epistemologiji i drugim disciplinama (up. više o tome Star D., Introduction, in: Star, D. (ed.), 2018, *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press).

drugo je, kako norme (međunarodnog) prava snabdevaju svoje adresate razlozima za delanje („perspektiva praktičke racionalnosti”).<sup>11</sup>

Drugim rečima, pisac polazi od analize međunarodnopravnih normi u svetlu koncepta važenja, analizirajući kako različite „vrste” tih normi nastaju i nestaju, a pošto je preduzeo taj prvi korak, nastavlja tragom pojma koji se (u analizi tipičnog, a to znači nacionalnog prava) na njega nadovezuje, a to je pojam obaveznosti, koji sagledava u svetlu koncepcije normativnosti kao praktičkog rezona, to jest ideje da su pravne norme razlozi za delanje.

U ovom odeljku, osvrnuću se samo na opis drugog Jovanovićevog „kako” normativnosti prava. I to ne zato što prvo „kako”, koje se tiče važenja, nije podložno određenoj kritici<sup>12</sup> ili, još manje, što nije toliko bitno, već iz razloga što je „perspektiva praktičke racionalnosti” u stvari srž njegovog odgovora na problem normativnosti prava uopšte, pa sledstveno i normativnosti međunarodnog prava.

Na početku tog opisa treba naglasiti da Jovanović, poput mnogih drugih, pojam normativnosti konceptualizuje u kategorijama razloga za delanje.<sup>13</sup> To znači da normativni iskaz „x treba da učini radnju R” jeste logički ekvivalentan iskazu „Postoji razlog za x da učini radnju R”.<sup>14</sup>

11 Jovanović, M. A., 2019, p. 78.

12 Uistinu, razložnu kritiku na račun Jovanovićevog shvatanja važenja (međunarodnog) prava i, uopšte, njegove „sistemnosti”, s kojom sam dobrim delom saglasan, izneo je Lefkovic (up. Lefkowitz, D., 2021, Systematicity, Normativity, and The Nature of International Law, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/6268>). To je bitno, jer u međunarodnom pravu se pojam važenja ne može povezati s pojmom normativnosti kao u nacionalnom pravu, zbog horizontalnosti međunarodnog prava.

13 U etici i epistemologiji ne postoji saglasnost oko pitanja da li se normativnost isključivo sagledava u terminima razloga za delanje (up. Star D., 2018). Ipak, budući da ovo pitanje izlazi iz okvira jedne pravnoteorijske rasprave, njime se, kao ni nekim drugim kontroverznim filozofskim pitanjima (poput, primera radi, prirode razloga za delanje) neću baviti.

14 Ovakav stav znači da određeni razlozi imaju normativnu dimenziju. Drugim rečima, radi se o razlozima čija uloga nije da objasne nečije delanje, već da ga opravdaju. Takvi razlozi se u filozofiji nazivaju i normativnim razlozima. Razlika između normativnih i takozvanih eksplanatornih (ili motivišućih) razloga je u tome što ovi prvi opravdavaju naše radnje, dok ih drugi objašnjavaju (i pokreću). Svakako da u stvarnosti jedni isti razlozi mogu biti, i često jesu, i opravdanje i objašnjenje za delanje. Ali za teoriju je veoma značajno da ih razlikuje, budući da je pitanje šta opravdava jednu radnju konceptualno pitanje, a pitanje šta je motiviše empirijsko pitanje (Alvares, M., 2017, *Reasons for Action: Justification, Motivation, Explanation*, in: Edward N. Zalta, (ed.), 2017, *The Stanford Encyclopaedia of Philosophy*. URL: <https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/>). I drugo, tvrdnja da pravo (barem ponekad) motiviše radnje svojih adresata je teorijski trivijalna i njome se bave empirijske discipline, poput sociologije (prava) ili psihologije (prava), a ne analitička

A kada je reč o (pravnim) normama kao razlozima,<sup>15</sup> univerzalni (ne i jedini) mehanizam „stvaranja” razloga je kroz stvaranje obaveza – obaveza bilo koje vrste, naglašava Jovanović, predstavlja razlog za delanje.<sup>16</sup>

Obično se kaže da je norma koja nameće obavezu obavezujuća za adresata u tom smislu da mu ne ostavlja slobodu izbora ponašanja. Međutim, kako Jovanović ispravno primećuje, nisu sve norme koje propisuju obaveze u tom smislu i obavezujuće za adresate. Primera radi, religiozne norme su obavezujuće samo za one koji su posvećeni vernici i koji ih prihvataju – ostali (mogu da) ih ignorišu. Slično je i s normama mode ili etiketije a, na kraju krajeva, i s normama konvencionalnog morala.

Ipak, u pravnoj teoriji se smatra da to nije slučaj s pravnim normama. Za razliku od drugih normativnih poredaka, Jovanović naglašava da je rašireno pravnoteorijsko stanovište da su pravne obaveze proistekle iz važećih pravnih normi obavezujuće (to jest da ne ostavljaju slobodu izbora ponašanja adresatima) i da se na taj način uspostavlja veza između „normativnosti”, „važjenja” i „obaveznosti”.<sup>17</sup>

Autor na ovom mestu poziva u pomoć Razovo objašnjenje normativne snage pravnih normi i obaveza, koje je on izložio u svojoj teoriji o legitimnosti pravnog autoriteta i iskaza tog autoriteta u vidu pravnih normi, kao isključujućih i sadržinski-nezavisnih razloga za delanje. Ono se, ukratko, može opisati na sledeći način.

---

jurisprudencija (Gizbert-Studnicki, T., 2018, On legal things to do: external and internal legal reasons, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/4791>, par. 7).

15 Kakav je odnos normi i ostalih razloga? Parfit samu normativnost posmatra kao dvojaku (Parfit, D., 2011, *On What Matters*, Vol. 1, Oxford, Oxford University Press, pp. 144–146). Iz njegovog razmatranja proizilazi da su sve norme određenih svojstava razlozi, ali da svi razlozi nisu norme. Prema tome, normativnost može biti vezana za normativne razloge ili za norme kao razloge. Norme su poglavito razlozi jer su u vezi s razlozima koji nisu norme, jer služe tim razlozima. Ipak, to ne važi za sve norme, npr. za konstitutivne norme neke igre. Drugi autori, polazeći od etimologije, kažu da su svi razlozi norme, deleći ih na tri vrste: norme kao standardi ili modeli, socijalno prihvaćene (formalna normativnost) i moralne norme (tzv. jaka ili robusna normativnost) (up. Wedgwood R., *The Unity of Normativity*, in: Star, D. (ed.), 2018, *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press, pp. 23–24).

16 „Normativna funkcija usmeravanja ljudskog ponašanja može se postići kroz korišćenje dva različita, ali povezana mehanizma – kroz naredbe ili zabrane (putem obaveze) i kroz ovlašćenja (putem subjektivnih prava). To je posebno tačno za pravo, kao normativni poredak.” Ali, kao što autor naglašava “far more intricate moral problem of accounting for the fact that installed obligation by its nature purports to bind subjects whose behavior it regulates irrespective of his will” (Jovanović, M. A., 2019, p. 130).

17 Jovanović, M. A., 2019, p. 131.

Iskazi onih koji poseduju (pravni) autoritet služe kao razlozi za delanje. Ali to nisu bilo kakvi razlozi. Direktive autoriteta su isključujući razlozi. U najkraćem, to bi značilo da iskaz autoriteta predstavlja razlog prvog reda za *x* da učini radnju *R*, ali takođe i razlog drugog reda da *x* ne postupi prema razlozima prvog reda koji govore u prilog neizvršenju radnje *R*. Dakle, taj iskaz je u isto vreme i razlog prvog reda i razlog drugog reda. Kao razlog drugog reda, on je razlog da se ne dela iz (određenih) razloga prvog reda, to jest isključujući razlog.

Ali on je, takođe, i razlog na osnovu kojeg se dela, razlog prvog reda i to tzv. sadržinski nezavisan – razlog (*content-independent reason*). Raz definiše ove razloge<sup>18</sup> na sledeći način: “A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently ‘extraneous’ fact that someone [...] has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones.”<sup>19</sup> Tako je, na primer, zapovest, kao razlog, nezavisna od sadržine zapovedene radnje, jer ona, u principu, može da bude razlog za bilo kakve radnje, uključujući i one sasvim suprotne sadržine. Slično tome, pravni autoritet može odrediti da se u gradski autobus ulazi na zadnja, a izlazi na prednja vrata, a može zapovediti i obrnuto. U oba slučaja, njegovo pravilo predstavljaće razlog da potisnemo vlastite razloge da postupamo suprotno od pravila, ali i razlog za radnju koja je u skladu s pravilom. Dakle, pravilo ne samo da isključuje delanje na osnovu (kontra)razloga već i usmerava delanje u određenom pravcu, i to na specifičan način, kao sadržinski-nezavisan razlog.<sup>20</sup>

Izvor te posebne normativne snage pravnih normi kao razloga za delanje Raz vidi u pretenziji prava na legitimni autoritet,<sup>21</sup> koja je, prema njegovom mišljenju, deo prirode prava kao takvog. Stoga problem

18 Koncept sadržinski nezavisnih razloga uveo je u jurisprudenciju Herbert Hart (Hart, H. L. A., 1982, *Essays on Bentham*, Oxford, Clarendon Press, pp. 252–255).

19 Raz, J., 1986, *The Morality of Freedom*, New-York, Oxford University Press, p. 35. U nastavku teksta ću pojedine citate navoditi na engleskom, i to u onim slučajevima kada bi se u prevodu „izgubile” nijanse izvornog značenja, koje su bitne za poentu zbog koje se citat koristi.

20 Opširnije o tome vid. Dajović, G., 2009, Skica za jednu teoriju o normativnosti prava, *Pravni život*, 15, tom 5, str. 626 i d.

21 „Pretenzija prava na autoritet manifestuje se činjenicom da su pravne institucije zvanično označene kao ‘autoritativne’, činjenicom da smatraju da imaju pravo da nametnu obaveze pravnim subjektima, svojim zahtevima da im oni duguju lojalnost, i da njihovi podanici treba da poštuju pravo onako kako ono (od njih) zahteva.” Raz, J., 1985, Authority, Law, and Morality, *The Monist*, Vol. 68, No. 3, p. 300. Nav. Prema Jovanović, M. A., 2019, p. 132.

normativnosti prava iziskuje i odgovor na pitanje legitimnosti autoriteta koji pravo donosi.<sup>22</sup>

A kada je jedan pravni autoritet legitiman? Odgovor koji daje Raz je koncepcija autoriteta kao servisa (*service conception of authority*). U najkraćem, ta koncepcija kaže da je racionalno da sopstvenu volju potčinimo volji autoriteta ukoliko je verovatnije da ćemo delati na ispravan način ako se potčinimo autoritetu nego ako delamo na bazi sopstvenog rasuđivanja. Na taj način, ako nam autoritet pomaže da uz njegovu pomoć bolje usaglasimo svoje delanje s ispravnim rezonom, s onim što nalažu relevantni razlozi, nego što bismo to učinili bez njega, onda je on praktički racionalan i onda on ima instrumentalno opravdanje.<sup>23</sup> Uobičajeno se navodi nekoliko karakterističnih situacija u kojima autoritet prava može da zadobije to instrumentalno opravdanje. To su situacije kada se rešava problem koordinacije, kada se ostvaruju zajednički ciljevi ili kada se odgovara na situacije tipa zatvoreničke dileme.

Kakve su implikacije Razove teze o isključujućoj i sadržinski-nezavisnoj prirodi pravnih normi kao razloga za delanje sa stanovišta praktičkog rezonovanja adresata na koje se odnose? Jovanović se u razmatranju tih implikacija oslanja na ideje dve autorke. Izložiću vrlo kratko (kao što je to, uostalom i Jovanović učinio) srž njihove kritike pomenute Razove teze. Prva od njih, Veronika Rodriguez-Blanco (*Rodriguez-Blanco*), kritikuje Razovo stajalište, uzimajući u obzir njegovu „odbranu” isključujuće prirode pravnih normi kao razloga za delanje, kada on tvrdi da se adresat može ponašati prema normi i nesvesno, to jest da može delati ne iz namere da se ponaša po njoj nego iz sasvim drugog razloga, a da se, uprkos tome, može reći da se on ponašao prema isključujućem razlogu. Rodriguez-Blanco primećuje da ta Razova teza nije održiva. Ili, veli ona,

22 Ovim razmatranjima Jovanović, suprotno svom diktumu s početka odeljka o normativnosti, prelazi s epistemološkog pitanja „Kako normativnost prava?”, na moralno pitanje „Zašto normativnost prava?” U potonjem članku, „Odgovoru” na kritičke primedbe nekolicine pisaca u vezi s njegovim tezama u knjizi, Jovanović još jednom ističe da se pitanjem „zašto” bavio kratko, i samo u meri u kojoj je to morao, kako bi objasnio nedostatke Razove koncepcije isključujućih razloga (Jovanović, M., 2021, *On The Nature of International Law: Rejoinder, Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/7283>, par. 26).

23 “The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which [objectively] apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly” (Raz, J., 1996, *Ethics in the Public Domain*, Oxford, Oxford University Press, p. 214; slično i Raz, J., 1986, p. 53).

„sledimo pravna pravila intencionalno, u kojem slučaju ona ne mogu biti isključujući razlozi [...] ili ih ne sledimo intencionalno, u kojem slučaju pravna pravila ne mogu imati karakter razloga za delanje”. Njen zaključak je „ili pravna pravila ne mogu biti isključujući razlozi ili pravna pravila uopšte nemaju karakter razloga za delanje”.<sup>24</sup>

Druga autorka koja Jovanoviću „pomaže” da ospori isključujuću normativnu snagu pravnih normi je Hajdi Hard (*Hurd*). Ona smatra da Razovo objašnjenje vodi ka „paradoksu praktičkog autoriteta”. Razlog za to je da osnovni princip praktičkog rasuđivanja diktira da subjekt dela na osnovu razmatranja i odmeravanja svih raspoloživih normativnih razloga. Međutim, suprotno tome, Razova koncepcija legitimnog autoriteta koja podrazumeva da njegove norme sprečavaju subjekte da delaju na osnovu odmeravanja svih razloga dovodi do toga da „pokoravanje pravu na način kako se to zahteva vršenjem praktičkog autoriteta krši centralni princip racionalnosti”. Jer, ako se sledi taj princip, uvek je opravdano postaviti pitanje „kako i kada može biti racionalno delanje koje je suprotno odmeravanju razloga na način kako ih subjekt vidi, samo zato što mu je rečeno da tako dela?”<sup>25</sup>

Jovanović je, dakle, sklon stavu da pravne norme, ukoliko postoje zato da budu razlozi za naše delanje, treba da budu podložne deliberaciji, u ravni s ostalim normativnim razlozima (“they have to be *deliberatable*”<sup>26</sup>), a što, u suštini, znači da one nisu razlozi zbog kojih njihov adresat nema slobodu izbora.<sup>27</sup> Ukoliko bi bilo drugačije, pravne norme bi se, prema

24 Rodriguez-Blanco, V. 2014, *Law and Authority under the Guise of the Good*, Oxford and Portland, Hart Publishing, p. 157. Nav. prema Jovanović, M. A., 2019, pp. 134–135.

25 Hurd, H. M., 1999, *Moral Combat*, Cambridge, Cambridge University Press, p. 69. Nav. prema Jovanović, M. A., 2019, p. 135.

26 Kao što Jovanović veli u *Odgovoru*, „ako se bilo kakva uloga može pripisati pravnim normama u našem rasuđivanju o tome šta da radimo, ona mora postojati u fazi deliberacije u kojoj izračunavamo koji bi bio najbolji način delanja u datoj situaciji. To jasno ukazuje na to da bi deliberacija i delanje trebalo da budu povezani” (Jovanović, M., 2021, par. 32).

27 Norme nisu, kako to Jovanović kaže, “non-optional for norm-subjects” (Jovanović, 2019, p. 137). On ove svoje tvrdnje ilustruje i zamišljenim primerom poslovnog čoveka iz Tel Aviva, koji odlučuje da jedan dan tokom nedelje posveti šetnji, jer svaki dan inače ide na posao vlastitim autom, i onda, važući razloge za i protiv, sklon je da odluči da to bude subota, pošto je u Izraelu ona neradni dan (premda on, uobičajeno, i subotom ide na posao). U međuvremenu, usvoji se zakon da se uvede sistem par-nepar, za vožnju automobilom generalno – prema kojem je zabranjeno dva dana u nedelji voziti auto s parnom odnosno s neparnom poslednjom cifrom na tablici. Kako takav zakon, postavlja pitanje autor, odražava korektan balans razloga u slučaju pomenutog biznismena, to jest kako je zakon opravdan normalnom tezom o oprav-

njegovom mišljenju, pretvorile „u proste navike lišene bilo kakvog normativnog značenja”.<sup>28</sup>

Ukoliko je s aspekta praktičke racionalnosti tako, onda je pravo samo jedan od normativnih sistema koji racionalnom agentu (pravnom subjektu) može da predstavlja „signal” da nešto treba da učini, ali čija se normativna snaga uvek može odmeravati sa snagom normi drugih normativnih poredaka. I u „najboljem” slučaju, kao što tvrde primera radi Peri (*Perry*)<sup>29</sup> ili Aleksander (*Alexander*)<sup>30</sup>, pravne norme mogu da budu razlozi koji u odmeravanju s drugim razlozima obično, ali ne i nužno, pretežu.<sup>31</sup> Ali koji takvu pretežuću snagu nemaju sami po sebi.

Da bi je imali, to jest da bi bili, kako to Jovanović naziva (preuzimajući termin od Voldrona (*Waldron*)) „*signalers of last resort*” adresati moraju unapred da zauzmu stav takozvanog „poštovanja za pravo” (*respect for law*), kao izvoru nečega što je važno i istaknuto (*salience*).<sup>32</sup> Prema tome, normativna snaga pravnih normi se može objasniti stavom adresata (*respect for law*), koji se ne zasniva prevashodno na legitimnosti autoriteta i institucija (iako je, naravno, najpoželjnije da se na tome zasniva), već više na prudencijalnim razlozima. Ti razlozi su, primera radi, u vezi s deficitom vlastite sposobnosti za donošenje odluka u odnosu na sposobnost odlučivanja koju imaju institucije koje stvaraju pravo, ili su u vezi s prinudnim sankcijama, propisanim za kršenje normi. Najzad, takav stav prema pravu može se zasnovati i na razlozima uzajamne koristi koju adresati imaju jedni od drugih u zajedničkim odnosima u kojima

---

danju da omogućuje biznismenu da na bolji način uskladi svoje delanje s relevantnim razlozima nego bez njega? Kako zakon utiče na njegovo delanje kada ga balans svih ostalih razloga vodi ka odluci kojoj je bio sklon pre njegovog usvajanja, da ne vozi auto, to jest da šeta samo jedan dan nedeljno, i to subotom? (detaljnije o primeru up. Jovanović, M. A., 2019, pp. 135–137).

28 Jovanović, M. A., 2019, p. 137.

29 Up. Perry, S., 1989, Second Order Reasons, Uncertainty, and Legal Theory, *Southern California Law Review*, Vol. 62.

30 “Law cannot itself constitute a second-order, exclusionary reason to disregard all or any non-legal first-order reasons; what it can (and should) do is *demand* that it be responded to as if it had, and *perhaps claim* that it be regarded as having, *overriding normative weight*.” (Alexander, L., 1990, Law and Exclusionary Reasons, *Philosophical Topics*, Vol. 18, No. 1, p. 5; nav. prema Jovanović, M. A., 2019, p. 140).

31 Lefkovic ukazuje, čini mi se ne bez osnova, da se ni ova „ublažena” koncepcija pravnih obaveza kao pretežućih razloga za delanje ne može pomiriti s tezom Hajdi Hard da praktička racionalnost uvek zahteva od subjekta da deluje na osnovu odmeravanja svih raspoloživih razloga (Lefkowitz, D., 2021, par. 20).

32 Waldron, J., Authority for Officials, in: Meyer, L. H., Paulson S. L., Pogge, T. W. (eds.), 2003, *Rights, Culture and the Law – Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford, Oxford University Press, p. 54.

se nalaze,<sup>33</sup> a koja ih onda motiviše da poštuju obaveze iz normi koje te odnose uređuju.<sup>34</sup>

Prema tome, Jovanovićev odgovor na pitanje „kako pravne norme kao razlozi za delanje (treba da) utiču na to delanje?” jeste da su one sadržinski zavisni razlozi, čija težina (snaga) je uvek podobna da se odmerava sa snagom drugih konfliktnih razloga, ali ne i da ih isključi. Sledstveno tome, pravo nije obavezujuće u razovskom smislu te reči (čak ni kada ispunjava uslove iz Razove *normal justification thesis*, to jest kada predstavlja legitimni autoritet), a posledica čega je da pravni razlozi ponekad, nakon odmeravanja, ne uspevaju da budu obavezujuću.

Stoga je Jovanović čvrsto uveren da se obaveznost može „gradirati” jer se i normativnost može gradirati. I „kada se primarno razume kao kapacitet za stvaranje obaveza, pravna normativnost jasno može biti snabdevena relativnom težinom. Ako se sve norme, uključujući pravne, posmatraju kao razlozi za delanje, onda su adresati normi ti koji u konačnici različitim normama pridaju različitu normativnu težinu.”<sup>35</sup>

Konačno, opisana kritika Razove ideje pravnih normi kao isključujućih razloga i „razblažavanja” normativne snage pravnih normi (nacionalnog pravnog sistema kao tipičnog), Jovanoviću služi kao važan dokaz da je i međunarodno pravo, uprkos svojim razlikama u odnosu na nacionalno, zapravo u istom smislu normativno kao i ono.<sup>36</sup> Štaviše, i na prvi pogled paradoksalno, takvo razumevanje normativnosti i obavezne snage (nacionalnog) prava još i bolje pristaje realnostima međunarodnih odno-

33 Ovdje je u pitanju dobro poznata Hartova ideja *fair-play*-a. U recipročnim odnosima svaki *freeriding* podriva te odnose, i one koji se pridržavaju pravila čini njegovim žrtvama, upravo jer se pridržavaju pravila. Hart tu ideju sažeto formuliše na sledeći način: „[k]ada određeni broj ljudi preduzima neko zajedničko delanje u skladu s pravilima, koja ograničavaju njihovu slobodu, oni koji su se podvrgli tim ograničenjima kada se to od njih traži, imaju pravo na slično potčinjavanje onih koji su imali koristi od njihovog potčinjavanja” (Hart, H. L. A., 1955, *Are There Any Natural Rights? The Philosophical Review*, Vol. 64, No. 2, p. 185).

34 Jovanović, M. A., 2019, p. 142. Sledeći ovaj trag analize, Jovanović zaključuje da je svrha većeg dela poglavlja koje je posvetio pravnoj normativnosti u tome da pokaže kako *respect for law* ne može biti objašnjen jedino upućivanjem na neku naročitu normativnu snagu pravnih normi (recimo, razovskog tipa, prema kojem su pravne norme isključujući razlozi za delanje), već da su autoritet prava i njegova efikasnost rezultat „kombinovanog efekta svih tipičnih karakteristika prava” (Jovanović, M., 2021, par. 27).

35 Jovanović, M. A., 2019, p. 150.

36 “Gradation of international legal normativity, thus, has nothing to do either with the source of law from which the installed obligation is derived or with the hierarchical status of the given legal norm” (Jovanović, M. A., 2019, p. 150). I potom u nastavku: „priroda normativnosti kao takve, a samim tim, takođe i (međunarodno) pravne normativnosti, je da priziva govor o gradaciji i relativnosti” (Jovanović, M. A., 2019, p. 152).

sa, jer na nivou međunarodne zajednice ne postoje (ili su rudimentarne) institucije koje stvaraju pravo i nema odnosa nadređenosti i podređenosti između onih koji stvaraju pravo i onih na koje se pravo primenjuje.<sup>37</sup>

Da rezimiram. Polazna tačka u analizi drugog „kako” pravne normativnosti je da pravne norme, kao takve, pripadaju jedinstvenom normativnom „univerzumu”.<sup>38</sup> Zato je i logično da je kao okvir za (kritička) razmatranja pojma normativnosti prava, shvaćenog kao praktičkog rezona, Jovanović odabrao Razovu teoriju normativnosti prava, kao najpoznatiju i najdiskutovaniju takvu teoriju u savremenoj jurisprudenciji. U toj teoriji najinteresantniji pojam za analizu mu je bio Razov koncept pravne norme kao isključujućeg razloga za delanje. Ta Razova ideja korespondira s poznatom Hartovom tezom da kada postoji (pravna) obaveza, tada njen adresat gubi slobodu izbora ponašanja.

Međutim, poznato je da se u međunarodnom pravu od država ne zahteva da potpišu međunarodni ugovor, one mogu da izjave rezerve prema (skoro) bilo kom multilateralnom ugovoru kojem su pristupile ili mogu iz njega naknadno da istupe i, najzad, mogu se uporno protiviti (skoro) bilo kojoj običajnoj normi koju ne nameravaju da slede. Čini se da su ove karakteristike međunarodnog pravnog poretka u suprotnosti s idejom da tamo gde postoji pravo, ne postoji sloboda izbora, već je ponašanje adresata neopcionalno. Kako se onda ove osobine međunarodnog prava mogu pomiriti s razovskom idejom pravnih normi kao isključujućih i sadržinski-nezavisnih razloga za delanje? Rešenje je, smatra naš autor, da se u jedinstvenom „horizontu” praktičke racionalnosti nijedna norma bilo kog normativnog poretka, pa makar to bila i norma tipičnog prava, ne može smatrati kao bezuslovno obavezujuća, odnosno da je praktički iracionalno da ona, kao razlog za delanje, prekludira razmatranje svih drugih razloga, pa čak i moralnih.

### 3. NORMATIVNOST MEĐUNARODNOG PRAVA:

#### KRIKA JOVANOVIĆEVOG KONCEPTUALNOG OKVIRA

Ključni, iako kraći deo poglavlja Jovanovićeve knjige koje je posvećeno normativnosti međunarodnog prava, nosi naslov „Perspective of practical

37 Chehtman, A., 2021, A New and Improved Explanatory Account of International Law, *Revus - Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/6308>, par. 13.

38 Autor u prilog tom stajalištu navodi reči Torbena Spaak: “there is only one sense of normativity, only one sense of ‘ought’, so that although we may with good sense speak of the normativity of law or the normativity of morality, etc., there is no specifically moral or legal or prudential *type* of normativity, but only normativity plain and simple.” (Spaak, T., 2018, Legal Positivism, Conventionalism, and the Normativity of Law, *Jurisprudence*, Vol. 9, No. 2, p. 323).

rationality – how norms provide reasons for action”. Taj deo se bavi, da podsetim, onim drugim „kako” pitanjem u vezi s normativnošću prava, koje sam pomenuo na početku prethodnog odeljka. I kao što sam u njemu već objasnio, autor je, poveden Razovom koncepcijom pravnih pravila kao razloga za delanje, pokušao da odgovori tako što je ispitao pod kojim uslovima i da li su uopšte pravne norme isključujući i sadržinski-nezavisni razlozi za delanje. Svoje ispitivanje zasnovao je na ideji praktičke racionalnosti, koja leži u osnovi Razove instrumentalne ideje o legitimnosti pravnog autoriteta.

Da li je Jovanović ispravno protumačio vrline (i slabosti) Razove koncepcije, da li je u pravu kada, sa stanovišta praktičke racionalnosti, osporava mogućnost da pravne norme mogu biti isključujući razlozi za delanje, da li je ispravno pojmiio pojam obaveznosti, po mom sudu je pitanje od sekundarnog značaja, možda ne za prirodu prava kao takvog, ali za prirodu međunarodnog prava svakako. Primarno je pitanje, barem kada je o normativnosti međunarodnog prava reč, kako je uopšte i pod kojim uslovima moguće da norme međunarodnog prava budu razlozi za delanje, a ne kakva vrsta razloga su te norme. Jer odgovor na prvo pitanje je predušlov za odgovor na drugo. Šta želim da kažem?

Glavno pitanje koje zanima Raza, kada je u pitanju koncept normativnosti prava jeste moralno opravdanje autoriteta koji donosi pravne norme. Jovanović je, čini se, saglasan s Razom (i s nekim drugim autorima) da je jedina genuina normativnost moralna normativnost,<sup>39</sup> da su jedini genuini razlozi za delanje moralni razlozi i da, shodno tome, i normativnost

39 Posmatrati pitanje normativnosti prava na ovaj način, analizirati ga u svetlu moralne normativnosti je sasvim legitiman i relevantan teorijski poduhvat. Naime, kada se radi o nacionalnom pravnom poretku, kao tipičnom pravnom sistemu, to pitanje uvek treba da bude otvoreno, jer u njemu postoje oni koji donose pravne norme i oni za koje se pravne norme donose. I između donosilaca i adresata postoji subordinacija. Zbog čega nalog pravnog autoriteta, kao nadređenog privatnim licima u zajednici, „treba da bude”, zašto je on razlog za delanje, jeste pitanje koje se, s obzirom na autonomiju individue i postulate praktičke razobritosti uvek može postaviti. Građanin, kao adresat važećih pravnih normi, može prilikom delanja da uviđa koje su njegove pravne obaveze, iako za razliku od zvaničnika ne prihvata važeće norme s interne tačke gledišta. I potpuno je smisleno formulisati iskaz da takav građanin ima, primera radi, pravnu obavezu da se vakciniše protiv opasne zarazne bolesti, jer postoji važeća pravna norma koja propisuje obaveznu vakcinaciju svih punoletnih stanovnika. Ali to ne znači da se takav normativni iskaz nužno pojavljuje kao iskaz adresata s internog stajališta. Uistinu, radi se o iskazu koji utvrđuje da postoji obaveza sa stajališta pravnog sistema, ili preciznije, iz perspektive internog stajališta zvaničnika tog sistema (Sciaraffa, S., 2011, *The Ineliminability of Hartian Social Rules*, *Oxford Journal of Legal Studies*, Vol. 31, No. 3, pp. 611–612). I takav iskaz, naravno, ne znači da je to u isto vreme *moralni normativni razlog* za adresata i da ga on ne može preispitivati kao razlog za delanje itd.

prava, u krajnjoj liniji, pravna teorija treba da „rešava” na terenu moralne normativnosti.<sup>40</sup> I Raz na ovo pitanje daje originalan odgovor u vidu svoje instrumentalne koncepcije „autoriteta kao servisa”. Iz te koncepcije, takođe, on izvodi i ideju da su nalozi legitimnog pravnog autoriteta takozvani isključujući razlozi.

Ali da li se isto može reći i za uređivanje odnosa putem normi u jednom „horizontalnom sistemu”, kakav je međunarodno pravo? Ili, preciznije, da li to pitanje u jednom takvom sistemu ima isti značaj kao u subordiniranom sistemu kakav je nacionalni pravni sistem?<sup>41</sup> Jer Jovanović, bez sumnje, smatra da je međunarodno pravo horizontalni poredak „u kojem države, kao glavni akteri, preuzimaju istovremeno ulogu i stvaralaca i subjekata prava [...] a što rezultira osobenom institucionalnom strukturom međunarodnog pravnog poretka, bez centralizovanog zakonodavca, sudova obavezne jurisdikcije i posebnih prinudnih organa.”<sup>42</sup>

Stoga, on konstatuje da postoje veoma značajne empirijske razlike između tipičnog nacionalnog prava i međunarodnog prava, postavljajući retoričko pitanje: da li uopšte možemo da govorimo o „autoritetu” i o normativnom poretku zvanom „pravo” „[...] ako, paradigmatično, nemamo specijalno dizajnirane institucije za nametanje pravila; ako akteri koji stvaraju, izvršavaju pravila i koji su im potčinjeni, uobičajeno jesu jedni te isti; ako hijerarhija i subordinacija nisu redovno stanje stvari?”<sup>43</sup> Naravno, već i iz onoga što je do sada rečeno, jasno je da negativan odgovor na to pitanje našem autoru nije privlačan. Uprkos evidentiranim empirijskim razlikama (ne zanemarujući i određene sličnosti) kod normativnosti, kao tipične karakteristike (nacionalnog) prava, smatra Jovanović, nema ničeg atipičnog u slučaju međunarodnog prava?<sup>44</sup> Do takvog zaključka on dolazi tako što, najprostije rečeno, razovsku normativnost nacionalnog prava „razblažava”, „gradira” i na taj način, uslovno rečeno, adaptira je empirijskim datostima međunarodnog prava. Jovanović konstatuje da „svi relevantni akteri nazivaju neka pravila ponašanja pravilima međunarodnog prava; većina poštuje

40 Da je autor sklon takvom stavu, uočljivo je na različitim mestima (i u knjizi, ali i u odgovoru na članke iz *Revusa*). Najsazetije, Jovanović tvrdi da „prirodu prava ne možemo rasvetliti, pokušavajući da pokažemo kako postoji nešto posebno u vezi s normativnošću pravnih pravila” (Jovanović, M. A., 2019, p. 146).

41 Podsetiću, za trenutak, da tipičan pravni sistem prema Hartovoj teoriji postoji kada postoje sekundarna pravila priznanja, promene i presuđivanja, kada postoje zvaničnici, koji ta pravila prihvataju s interne tačke gledišta, i kada privatna lica u većini slučajeva poštuju norme koje su važeće na osnovu pravila priznanja.

42 Jovanović, M. A., 2019, p. 208.

43 Jovanović, M. A., 2019, p. 147.

44 „Moje objašnjenje pokazuje da je normativnost pravnih pravila ista i na nacionalnom i na međunarodnom nivou[...].” (Jovanović, M., 2021, par. 36).

ta pravila veći deo vremena, čineći međunarodno pravo u celini efektivnim normativnim poretkom; neke institucije se uglavnom doživljavaju kao međunarodni autoriteti; odluke institucija za rešavanje sukoba se obično tretiraju kao obavezujuće i shodno tome se izvršavaju.”<sup>45</sup> I to ga onda navodi na zaključak da “simply put, we have a landscape with all the patterns *typically associated with law as we know it at the municipal level.*”<sup>46</sup>

Ali da li je odista tako?

Meni se čini da nije. Zbog čega? Osnovni razlog je što su specifičnosti međunarodnog prava takve da ne mogu na zadovoljavajući način generalno da se uklope u razovski konceptualni okvir. Naime, „kapacitet” prava da snabdeva svoje adresate razlozima za delanje, Raz izjednačava s njegovom pretenzijom na legitimni autoritet. A to, sa svoje strane, znači da se kao jedini opravdavajući razlozi za delanje (kao derivat autoriteta/normativnosti) smatraju moralni razlozi. Izgleda mi da je Jovanović sklon tom, inače prilično raširenom, gledištu. Ako se ono prihvati, onda je opravdano da se, kao okvir za objašnjenje normativnosti prava generalno razmatra Razov konceptualni okvir.<sup>47</sup> Taj okvir (u terminima isključujućih i sadržinski nezavisnih razloga i teze o normalnom opravdanju legitimnog autoriteta) Jovanović secira, dolazeći do zaključka da norme međunarodnog prava, baš kao i norme nacionalnog pravnog sistema, nemaju normativnu snagu koju im Raz pripisuje.

Međutim, imajući na umu maločas, Jovanovićevim rečima, opisane karakteristike međunarodnog prava, prema mom sudu, pitanje normativne snage (međunarodno) pravnih normi, kao razloga za delanje, je izvedeno pitanje. Primarno je pitanje, kao što sam maločas pomenuo, da li pravne norme uopšte mogu da imaju, i ako mogu, na osnovu čega mogu da imaju normativnu snagu. Da li je ona uvek i nužno određena moralnim razlozima? Ili postoji neki drugi izvor njihove snage (bez obzira kolika je ona), a koji se ne oslanja na koncept (legitimnog) autoriteta?<sup>48</sup>

Šta je poenta? Naime, u jednom takvom poretku normi, kakav je međunarodno pravo, poretku koji je „horizontalan”, u kojem „nemamo specijalno dizajnirane institucije za nametanje pravila”, u kojem „hijerarhija

45 Jovanović, M. A., 2019, p. 147.

46 Jovanović, M., 2021, par. 36.

47 Jer i sam Raz je stajao na tom stanovištu On, naime, izričito tvrdi da su iskazi pravnih zvaničnika o pravnim obavezama pravnih subjekata nužno moralni iskazi. Razlog koji navodi u prilog svojoj tezi je prevashodno konceptualan (Raz, J., 1984, Hart on Moral Rights and Legal Duties, *Oxford Journal of Legal Studies*, 4, pp. 123, 129–31). O ovom pitanju će biti još reči u pododjeljku 3.2.

48 Ovo može da liči na pitanje „zašto” normativnost prava, na koje Jovanović, kako tvrdi, ne odgovara. Ipak, nema sumnje da do teza do kojih je došao, a koje su opisane u prethodnom odeljku, nije mogao doći a da se ne upusti u to pitanje.

i subordinacija nisu redovno stanje stvari” uopšte ne postoji autoritet u razovskom smislu reči. Razlog za to je jednostavan i njega formuliše sâm Raz kada kaže da je „normalno razumevanje [autoriteta takvo] da uključuje hijerarhijski odnos, da uključuje nametanje njegovim podređenim”.<sup>49</sup> Stoga sam mišljenja da se zamršen problem normativnosti međunarodnog prava može rešavati i bez komplikacija kojima se Jovanović izložio, zalazeći u složena pitanja autoriteta i praktičke racionalnosti. Dakle, čini mi se da nije neophodno otići u pravcu kojim je on krenuo (i pritom, stigao dosta daleko). A to nije neophodno, jer je tim pravcem Raz išao zato što je želeo da utvrdi pod kojim uslovima su važeće pravne norme u jednom hijerarhijskom nacionalnom pravnom sistemu za njihove adresate normativni razlozi za delanje naročite snage (isključujuće ili vrlo jake, u ovom momentu je to manje važno). Dakle, Razov odgovor (bez obzira na to da li je on ispravan ili pogrešan) nije od presudnog značaja za međunarodno pravo, kao horizontalni normativni poredak.

#### 4. ALTERNATIVNI KONCEPTUALNI OKVIR NORMATIVNOSTI (MEĐUNARODNOG) PRAVA

Iz razloga koji je upravo predočen, odgovore na ključne probleme normativnosti (međunarodnog) prava treba potražiti na drugoj strani, koristeći takođe konceptualni aparat koji nam je podarila savremena jurisprudencija u pogledu (pojma) nacionalnog prava. Taj aparat, međutim, nije razovski, nego hartovski. Njega ne čine pojmovi autoriteta i isključujućih, sadržinski nezavisnih razloga ili pojam poput Voldronovog *signaler of last resort*. Ključni pojam koji valja uzeti kao polaznu tačku prilikom analize normativnosti prava jeste Hartov pojam takozvanog internog stajališta.

Uveren sam da se problem normativnosti međunarodnog prava pomoću tog pojma može rešiti jednostavnije, uz to, više vodeći računa upravo o posebnostima međunarodnog prava. A na kraju dana, takvim rešenjem stiže se do istog rezultata do kojeg je stigao i autor: međunarodno pravo poseduje normativnost,<sup>50</sup> te i u tom smislu „zaslužuje” da se poima kao pravo. O kakvom konceptualnom okviru se radi i na koji način on pomaže u rešenju problema normativnosti međunarodnog prava, predmet je pododeljaka koji slede.

49 A Razova koncepcija autoriteta kao servisa objašnjava kako i kada je takva vlast (*power*) opravdana (Raz, J., 2006, *The Problem of Authority: Revisiting the Service Conception*, *Minnesota Law Review*, Vol. 90, No. 4, p. 1044).

50 Preciznije, iako se ne može govoriti o autoritetu u onom smislu kako on (*de facto* ili *de iure*) može da se pojavi u unutrašnjem pravu, i dalje se može govoriti o normativnosti međunarodnog prava.

## 4.1. NORMATIVNOST PRAVA I INTERNO STAJALIŠTE

Prema „redukcioniističkom” pogledu na koncept prava znamenitog engleskog pozitiviste Džona Ostina (*Austin*), „normativni” aspekt prava bio je sveden na sposobnost njegovih adresata da predvide primenu sankcije u slučaju kršenja zapovesti.<sup>51</sup> Dakle, Ostin je smatrao da pravo pruža razloge pravnim subjektima da se ponašaju na željeni način pomoću sankcija kojima suverena vlast preti potencijalnim prekršiocima njenih zapovesti.

Na ovaj način, Ostin celokupan odnos između tvorca prava i adresata svodi na naviknutu poslušnost koju adresat iskazuje prema tvorcu prava (suverenu), koji takvu poslušnost ne iskazuje nikom iznad sebe. Drugim rečima, Ostinovo objašnjenje uslova pod kojima postoji jedan pravni poredak i pod kojima je pravo „autoritativno”, oslonjeno je na to da je suveren pojedinac, ili grupa lica, koji je obezbedio (najčešće pomoću straha od sankcije) regularnost u ponašanju adresata, a na osnovu pokornosti koje mu oni izražavaju, takoreći, po navici.<sup>52</sup>

Hartova zamerka ovakvom pogledu na normativnost prava<sup>53</sup> je u tome što Ostinova „teorija zamagljuje činjenicu da postojanje pravila (i dužnosti na osnovu pravila – prim G. D.) ne predstavlja samo osnov za predviđanje nepovoljnih reakcija suverene vlasti prema prekršiocu pravila već takođe i razlog ili opravdanje za takve reakcije i za primenu sankcija.”<sup>54</sup>

Umesto Ostinovog oslanjanja na sankcije kao osnov za objašnjenje „normativnosti” prava, Hart je istakao ideju da su u temelju prava pravila, i to ona vrsta pravila koju je on nazvao *social rules*.<sup>55</sup> Pravila su ta, a ne

51 Ovaj pododeljak zasnovan je na Dajović, G., 2009, Skica za jednu teoriju o normativnosti prava, *Pravni život*, 15, tom 5, str. 13 i d.

52 Iz ovog, vrlo sumarnog prikaza Ostinove koncepcije prava, od prve je jasno zbog čega on međunarodno pravo nije smatrao pozitivnim pravom. U skladu s njegovom klasičnom definicijom pozitivnog prava (ili, preciznije, pozitivnog zakona /*a law*/) kao zapovesti pod pretnjom suverena prema podanicima, Ostin je međunarodno pravo, zajedno s običajima i normama ustavnog prava, svrstao u tzv. pozitivni moral (up. Vranjanac, D., 2000, *Džon Ostin – imperativni model pravnog pozitivizma*, Beograd, Institut za uporedno pravo, str. 48 i d.).

53 Ostinova teorija je bila osnovna meta Hartove kritike. Ali, bez oklevanja, može se prihvatiti Šapirovo stav da je Hart smatrao da su, primera radi, Holmsova, Rosova ili Kelzenova shvatanja prava podjednako „kratkovida” kao i Ostinova, jer „ignorišu ili maskiraju paletu stavova koje ljudi tipično zauzimaju prema pravu” (Shapiro, S. J., 2006, p. 1159).

54 Hart, H. L. A., 1994, *The Concept of Law*, Second Edition with Postscript, Raz & Bulloch (eds.), Oxford, Clarendon Press, p. 84).

55 Hartov termin *social rule* se ne može doslovno prevesti na srpski jezik kao društveno pravilo, jer ono što na srpskom jeziku znači društveno pravilo (tj. sve vrste društvenih normi – moralne, običajne, pravne, verske itd.) nije adekvatno značenju sintagme *social rule*. *Social rule* (možda bi na engleskom precizniji izraz bio *custom-type rule*)

prateća sankcija, kao pretnja neposlušnim adresatima, koja jedino mogu da objasne kako pravo, samo po sebi, može da bude normativno, to jest da predstavlja razlog za naše delanje.

Šta je zapravo suština ove Hartove ideje? Prema njegovoj teoriji pravila (*practice theory of rules*), postojanje socijalnog pravila podrazumeva (a) postojanje regularnog ponašanja većine pripadnika zajednice u određenoj situaciji i (b) praktički stav adresata prema datom obrascu ponašanja – taj praktički stav prema pravilima Hart naziva i „internim stajalištem” (*internal point of view*), a on je posledica tzv. „prihvatanja” pravila kao razloga za delanje i razloga za kritiku delanja drugih. I dok je jasno da prvi element postoji i u Ostinovoj ideji navike ili naviknute poslušnosti, dotle ovog drugog nema i stoga je za Hartovu ideju pravila od ključnog značaja da se objasni upravo taj element.<sup>56</sup>

Neko se socijalno pravilo „prihvata”<sup>57</sup> ako njegovo postojanje i praktikovanje od strane većine članova zajednice<sup>58</sup> za adresata predstavlja razlog za delanje,<sup>59</sup> odnosno ako se koristi kao razlog za kritiku nepravilnog ponašanja i kao opravdanje za socijalni pritisak prema prekršiocima pravila. Pravilo poseduje karakterističan „interni aspekt”, jer adresati „posmatraju takvo ponašanje kao opšti standard koji treba da bude poštovan od grupe kao celine”.<sup>60</sup> Oni imaju, kako to Hart naglašava,

---

predstavlja onu vrstu „naših” društvenih pravila koju mi zovemo običajima, konvencijama i konvencionalnim moralom. To su pravila koja nemaju poreklo u aktu neke institucije i čiji je nužan uslov postojanja da se vrše.

- 56 Hart je dobio opšte priznanje da je s idejom interne tačke gledišta, kao konstitutivnog elementa socijalnog pravila, unapredio razumevanje prava. Tako, prema mišljenju Džozefa Raza, Hart ispravno insistira da je u prirodi prava da ono bude poznato i delom prihvaćeno od njegovih adresata i da normalno igra određenu ulogu u njihovim životima (Raz, J., 1980, *The Concept of Legal System*, second ed., Oxford, Clarendon Press, p. 148). Za MekKormika i Šapira je kontrast između interne i eksterne tačke gledišta, odnosno sama interna tačka gledišta, Hartov najveći doprinos filozofiji prava (MacCormick, N., 1994, *Legal Reasoning and Legal Theory*, Oxford, Oxford University Press, p. 277; Shapiro, S. J., 2006, p. 1157).
- 57 “[Acceptance] consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure” (Hart, H. L. A., 1994, p. 255).
- 58 Naravno, nije nužno da svaki član neke grupe (zajednice) prihvata, to jest posmatra pravila s internog stajališta, ali je nemoguće da svi članovi grupe posmatraju socijalno pravilo s eksterne tačke gledišta, a da ono i dalje postoji.
- 59 Kada se pravilo prihvata, onda se ono uzima kao razlog da se učini radnja koju pravilo nalaže. Dakle, kada subjekti zauzmu „interni” stav prema pravilu, onda oni delaju u skladu s pravilom upravo iz razloga što postoji pravilo (up. Coleman, J., 2001, *The Practice of Principle*, Oxford, Oxford University Press, p. 82).
- 60 U svom članku (koji je prerađena verzija godišnjeg predavanja 2019. iz sad već poznatog ciklusa *Hart Memorial Lecture*, koje jednom godišnje na Oksfordu upriliči

misaoni kritički stav (*reflective critical attitude*) prema ponašanju članova grupe koji pravilo krše.<sup>61</sup>

U svakom društvu i u svakom trenutku postoji tenzija između onih koji prihvataju i svojevóljno sarađuju u održavanju pravila i onih koji odbacuju pravila i paze na njih samo zbog zaprećenih kazni.<sup>62</sup> Uz to, Hart naglašava da nije od značaja da li je prihvatanje (odnosno interno stajalište) da tako kažem, moralno „toplo” ili „hladno” – razlozi koji prema Hartu<sup>63</sup> mogu da motivišu adresate da prihvate pravila s interne tačke su raznovrsni. To može biti racionalna računica o sopstvenom interesu, nasleđeni tradicionalni stav o pravilu, oponašanje drugih itd. Naravno, to mogu biti i moralni razlozi, to jest moralno odobravanje pravila, ali nije nužno da to budu moralni razlozi.<sup>64</sup>

neki od istaknutih filozofa ili pravnih teoretičara), Filip Petit je razradio elemente koji su potrebni da bi se pojavila socijalna pravila (tj. da bi se formiralo interno stajalište). Uz one, eksplicitno pomenute kod Harta (da se radi o zajednici insajdera koji su relativno jednaki i da dobrobit svakog člana zajednice zavisi od drugih članova, u smislu da drugi ne pribegavaju nasilju, obmanama i da su spremni na “mutual forbearance and compromise” – Hart, 1994, p. 195), on je naveo i neke implicitne, među kojima su da članovi zajednice posmatraju sebe na način da su zainteresovani za sopstvenu i za dobrobit članova zajednice i da su racionalni (Pettit, P., 2019, *Social Norms and the Internal Point of View: An Elaboration of Hart’s Genealogy of Law, Oxford Journal of Legal Studies*, Vol. 39, No. 2, pp. 233–235). Svaki od ovih elemenata ima značaja i za razumevanje hartovske ideje internog stajališta prema pravilima u okviru međunarodne zajednice, što će se, nadam se, uočiti u nastavku teksta.

61 Hart, H. L. A., 1994, p. 57.

62 Kao svojevrsno naličje prihvatanja pojavljuje se odbijanje, a pravilo se odbija ako se ne uzima kao standard za sopstveno i za ponašanje drugih, već se o njemu vodi računa samo zato što bi njegovo kršenje moglo da izazove neprijatne posledice. „Svako ko prihvata pravila, prema Hartu, zauzima internu tačku gledišta. Svako ko ne prihvata pravila, bilo što je rđav čovek (*the bad man*) koji zauzima praktičnu ali ne i prihvatajuću tačku gledišta (prema pravilima) ili prosto zato što ih (samo) opaža i otuda ne zauzima nikakav praktičan stav prema njima, zauzima eksternu tačku gledišta” (Shapiro, S. J., 2006, p. 1160).

63 Hart, H. L. A., 1994, p. 203.

64 U savremenim filozofskim debatama moralnim razlozima se smatraju oni koji imaju sledeće tri ključne karakteristike: oni su univerzalni, zatim nisu zavisni od adresata (na neki način su „objektivni”) i najzad, obično se ne odnose na egoistične interese adresata. Prva odlika je još od Kanta nesporna – moralni razlozi (ili tačnije principi i norme koji funkcionišu kao razlozi za delanje) važe uvek i svuda i za sve adresate u istoj datoj situaciji. Drugo, moralni razlozi postoje nezavisno od bilo kakvog osećanja vezanosti adresata ili njegovog stava prema njima, oni, da tako kažem, odražavaju principe koji su „izvan” subjekta. I najzad, i kao svojevrsna posledica prethodnih svojstava, ovi razlozi nisu egoistični, to nisu sebični, samo prema ličnim interesima usmereni razlozi (vid. Culver, K. C., 2001, *Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law’s Normativity, Ratio Juris*, Vol. 14, No. 2, pp. 186–87).

Drugi Hartov ključni teorijski koncept je u direktnoj vezi s opisanom *practice theory of rules*. To je koncept pravila priznanja, kao osobene vrste socijalnih pravila, ali i kao pravila koje stoji u samom temelju tipičnog pravnog sistema. Pravilo priznanja je socijalno, najviše<sup>65</sup> i krajnje<sup>66</sup> pravilo, koje utvrđuje kriterijume važenja ostalih pravila. U skladu s *practice theory*, pravilo priznanja „postoji samo kao složena, ali normalno usaglašena praksa sudova, zvaničnika i privatnih lica u identifikovanju prava, upućivanjem na izvesne kriterijume (važenja prava)”.<sup>67</sup> Ono je jedna vrsta socijalne konvencije, koju pre svega sudovi i ostali zvaničnici poštuju i prihvataju poput svakog drugog socijalnog pravila, s interne tačke gledišta.<sup>68</sup> Međutim, kao i za ostala socijalna pravila, i za pravilo priznanja važi da ne mora, nužno, da se prihvata iz moralnih razloga. Ali je, budući da se radi o konvencionalom pravilu, činjenica da zvaničnici slede to pravilo, nužno, barem deo razloga zbog kojih svako od njih to pravilo poštuje.

Konačno, pojava pravila priznanja i drugih sekundarnih pravila pretvara primitivni poredak socijalnih pravila u pravni sistem, u kojem institucije, zakonodavne, sudske i druge, mogu da stvaraju nova i ukidaju stara pravila. Drugim rečima, pravni sistem sadrži hartovska konvencionalna pravila, ali i pravila čije je poreklo institucionalno, dok se jednostavni poredak sastoji isključivo od hartovskih socijalnih pravila. I premda institucionalna pravila mogu da promene većinu socijalnih pravila, nužno je da u njegovom „središtu” postoje konvencionalna pravila priznanja i promene, jer se pravni sistem, u krajnjoj liniji, zasniva na takvim pravilima koja određuju kako se ostala (važeća) pravna pravila stvaraju, menjaju i primenjuju.<sup>69</sup>

Na ovom mestu će se zastati s prikazom Hartove ideje internog stajališta i pravila priznanja. Naročito kada je reč o ovom drugom hartovskom pojmu, nema potrebe da se zalazi u detalje, pošto on nije od ključnog značaja za objašnjenje normativnosti međunarodnog prava. Jer, čak i ako se

65 Najviše je zato što pravila koja su na osnovu njega važeća ne mogu biti derogirana pravilima koja bi bila važeća na osnovu nekog drugog pravila.

66 Krajnje je zato što ne duguje svoje postojanje nijednom drugom pravilu – njegovo postojanje je zasnovano na činjenici da je prihvaćeno i praktikovano.

67 Hart, H. L. A., 1994, p. 110.

68 Sadržina pravila priznanja menja se od društva do društva. Na primer, u jednostavnoj zajednici, u kojoj je jedini „organ” starešina zajednice, pravilo priznanja toga sistema bilo bi da je pravo sve ono što zapoveda starešina. U arhaičnim pravima često je upućivanje na tekst drevnih pravila predstavljalo pravilo priznanja, dok se u modernom pravnom poretku pravilo priznanja poziva na pisani ustav, na proglašene zakonodavnog tela ili na sudske precedente.

69 Up. Sciaraffa, S., 2011, The Ineliminability of Hartian Social Rules, *Oxford Journal of Legal Studies*, Vol. 31, No. 3, p. 620.

prihvati da u međunarodnom pravu pravilo priznanja postoji,<sup>70</sup> ili preciznije rečeno, da se pomalja, činjenica je da se međunarodno pravo u tom pogledu i dalje razlikuje od nacionalnog pravnog sistema, pošto bi pravilo priznanja u njemu prihvatili svi pravni akteri, dok je u nacionalnom pravu nužno da ga prihvataju zvaničnici, dok su ostali pravni subjekti obavezani važećim pravnim normama, iako to pravilo ne (moraju da) prihvataju.

#### 4.2. DA LI SU PRIHVACENA PRAVILA NORMATIVNI RAZLOZI?

Izložena Hartova ideja o internom stajalištu, *prima facie*, izgleda kao prikladna osnova za objašnjenje normativnosti međunarodnog prava. Ipak, pre nego što se ona analizira u kontekstu specifičnosti međunarodnog prava u odnosu na nacionalni pravni sistem (za koji je inicijalno skrojena), nužno je razmotriti jedan prigovor<sup>71</sup> koji se u pravnoj teoriji na račun te ideje dugo i postojano iznosi, a koji je za temu ovog članka posebno važan.

Taj prigovor načelno se „vrti” oko sledeće dileme. Kako specifična činjenica da ljudi aktuelno slede određeni obrazac ponašanja, to jest da postoji izvesna socijalna praksa (prava) može da bude osnov njene obaveznosti ili normativnosti? Ili drugačije rečeno, kako fakt da ljudi nešto po pravilu čine, može bilo kome da bude normativan, opravdavajući razlog da čini to isto? Jer upravo se to tvrdi kada se kaže da konvencionalna praksa može da stvara razloge za delanje, tačnije, obaveze za adresate. Naime, prema Hartovoj „konvencionalističkoj tezi”, kada postoji prihvaćeno socijalno pravilo, adresat nužno smatra da ono treba da opravdava naše ponašanje, odnosno kritike drugih u slučaju njegovog prekršaja, a deo razloga za to je što i drugi adresati tako smatraju. Stoga je pitanje na koje konvencionalistička teza treba da odgovori, ukoliko hoće da bude uverljiva osnova normativnosti, da li interno stajalište spram određenog standarda ponašanja može da učini od njega normativni standard, odnosno razlog za opravdanje našeg ponašanja. Pojedini pravni filozofi su izričiti u tvrdnji da je to nemoguće,<sup>72</sup> pošto se

70 Što svakako nije nesporna činjenica (up. o tome Lefkowitz, D., 2021).

71 Postoje svakako i drugi prigovori, ali ovaj je potencijalno najkobniji za ulogu koju koncept internog stajališta može da ima u pogledu objašnjenja normativnosti prava.

72 Green, L., 1996, The Concept of Law Revisited, *Michigan Law Review*, Vol. 94, May, p. 1697. Ili, kako to formuliše Bogosjan: „Jedna stvar je reći da određeno ponašanje ima smisla sa subjektivne tačke gledišta. Druga je stvar reći da ga je moguće objektivno opravdati. Generalno, iz proste činjenice da neko sledi pravilo, ne može da sledi ništa normativno” (Boghossian, P., Rules, Norms and Principles: A Conceptual Framework, in: Araszkiwicz, M., Banaś, P., Gizbert-Studnicki, T., Pleszka, K. (eds), 2015, *Problems of Normativity, Rules and Rule-Following*, Cham, Heidelberg, New York, Dordrecht, London, Springer, p. 10). Slično up. i Coleman, J., Leiter, B., Legal

njome očigledno krši takozvani „Hjumov zakon” da treba ne može da se izvede iz jeste.<sup>73</sup>

Hartovski odgovor na ovo pitanje bi mogao da se formuliše na sledeći način. Pravni subjekti imaju obavezu da se ponašaju u skladu s pravom jedino iz perspektive onih koji prihvataju pravilo priznanja i pravila promene datog pravnog sistema.<sup>74</sup> Kako veli Hart, „(zvaničnici) na (pravna pravila) gledaju kao na pravni standard ponašanja, pozivaju se na njega u kritikovanju drugih ili u opravdanju zahteva i u priznavanju kritika i zahteva drugih. Koristeći pravna pravila na ovaj normativni način, oni bez sumnje pretpostavljaju da će sudovi i drugi zvaničnici nastaviti da odlučuju i ponašaju se na regularan i stoga predvidljiv način, u skladu sa pravilima sistema.”<sup>75</sup>

Drugim rečima, oni koji prihvataju pravilo priznanja donose normativni sud da su subjekti prava obavezni da poštuju pravila pravnog sistema. Štaviše, kako primećuje Skiarafa (*Sciaraffa*), „oni pri donošenju takvog suda ne krše Hjumov *dictum*, jer prihvataju normativnu premisu da su pravila koja zadovoljavaju kriterijume postavljena u sistemskim pravilima priznanja i promene obavezna. I iz ove normativne premise, specifični normativni zaključci o zakonskim obavezama mogu uslediti bez kršenja hjumovskog *dictuma*.”<sup>76</sup>

Ipak, čak i ako hartovska ideja internog stajališta, kao osobenog „normativnog” stava, ne krši Hjumov zakon, naličje pomenutog prigovora je da li je to uopšte prava normativnost? Drugim rečima, postoji li normativnost, osim moralne, to jest da li norme mogu da nas snabdevaju razlozima za delanje, ako to nisu moralni razlozi?<sup>77</sup> Ili su pravni razlozi samo, da tako kažem, „prividni” razlozi za delanje? Jer Hartova teza je od koristi

---

Positivism, in: Patterson, D. (ed.), 1996, *A Companion to Philosophy of Law and Legal Theory*, pp. 241, 247.

73 “[K]nowledge of the law is normative whereas knowledge of social facts is descriptive. How can normative knowledge be derived exclusively from descriptive knowledge? That would be to derive judgments about what one legally ought to do from judgments about what socially is the case” (Shapiro, S., 2011, p. 47). Ako bi se ostalo samo na ovakvoj formulaciji pitanja, bilo bi jasno da Hartov konvencionalizam ruši „Hjumov zakon”. Ipak, kao što ću pokušati ukratko da objasnim u nastavku teksta, to nije slučaj.

74 Kako veli i sam Jovanović, “[F]or any norm, including legal, to be binding, it has to generate ‘sense of obligation’ *i.e.* authoritativeness among norm-subjects. It is plainly clear that not every valid legal rule can be said to be binding in the aforementioned sense.” (Jovanović, M. A., 2019, p. 149).

75 Hart, H. L. A., 1994, p. 138.

76 Sciaraffa, S., 2011, p. 611.

77 U pravnoj teoriji postoji značajan broj istaknutih autora koji zastupaju to stanovište, od kojih su najpoznatiji Raz, Dvorkin, Mekormik itd.

za objašnjenje normativnosti prava, ako može da objasni normativnost, mimo moralnih razloga. Na ovo pitanje postoji nekoliko različitih odgovora, od kojih ću ukratko opisati tri koja su odabrana na osnovu činjenice da mi se čine komplementarim.

Da bi se predstavio prvi odgovor, pogledajmo, najpre, šta je bila Hartova intencija kada je postulirao interno stajalište, kao uslov postojanja pravnog sistema. Nesporno je da tom idejom Hart nije nameravao da objasni moralnu normativnost prava. Štaviše, iz njegovog pozitivističkog diskursa, Hart uopšte ne može taj zadatak da posmatra kao zadatak pravne teorije. Kao što Skot Šapiro (*Shapiro*) ističe, “Hart’s aim in introducing the internal point of view was [...] to render the thoughts and discourse of legal actors comprehensible. The internal point of view, in other words, does not explain the *morality* [...] of legal activity, but rather its very intelligibility.”<sup>78</sup>

Za Harta, uostalom, nije uverljiva ideja, poput Dvorkinove (*Dworkin*), Mekormikove (*MackKormick*) ili Razove, da interni stav prema pravilima mora da bude prihvaćen iz moralnih razloga kako bi uopšte pravna pravila posedovala kapacitet da budu razlozi za delanje.<sup>79</sup> U stvari, ono što je suština njegove ideje nije da su izvor normativne snage internog stajališta moralni razlozi. Za njega je ono samo izvor normativne snage prava.<sup>80</sup> Kako se to može objasniti?

Sam Hart, retko koristi termin „normativan” i „normativnost”. Tako, on ističe da njegova teorija “give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and *in that sense* ‘normative’) aspect”.<sup>81</sup> Dakle, taj „smisao” normativnosti može se izjednačiti s tim da je pravo, kao socijalna institucija, „pravilima vođena” aktivnost. Drugim rečima, pravo je sistem pravila poput, primera radi, pravila košarkaške igre. Jer, da bi košarka kao igra, nastala i trajala, određeni broj „učesnika” (službenih lica i košarkaša) mora da zauzme interno stajalište prema pravilima košarkaške igre. Međutim, pravilo da se u košarci ne igra nogom ili da napad može da traje najviše 24 sekunde da bi bilo prihvaćeno, ne zahteva moralni stav učesnika prema tim pravilima.

78 Shapiro, S. J., 2006, p. 1166. Slično i Pettit, 2019, p. 230.

79 Hart, H. L. A., 1994, p. 257. U prethodnom pododeljku je objašnjeno da Hart smatra kako se interno stajalište prema pravilima može zauzeti iz različitih razloga. Jedini razlog za koji on smatra da postoji nužno kod svakog ko zauzima interno stajalište je što i drugi to čine. To proizilazi iz same prirode konvencionalnih pravila.

80 “To take the internal point of view toward a rule is to see the rule not necessarily as the *object* of some reasons—*i.e.*, what those reasons count in favor of or against—but as a *source* of reasons” (Kaplan, J., 2017, Attitude and the normativity of law, *Law and Philosophy*, Vol. 36, No. 5, p. 476).

81 Hart, H. L. A., 1994, p. 239.

Drugačije rečeno, košarka postoji jer dovoljan broj ljudi prihvata njena pravila, najčešće i bez posebnog razloga, a to je upravo ono što Hartova teorija utvrđuje i objašnjava kada je u pitanju pravo. Stoga je košarka, baš kao i svaka druga igra, „zavisna” od stava onih koji je praktikuju, a njena pravila se primenjuju samo na učesnike i ona opravdavaju<sup>82</sup> samo njihovo ponašanje tokom igre.<sup>83</sup> To, naravno, ne znači da je pravo igra. Postoje mnoge i značajne razlike između prava i igara. Ali čini se da ne postoje značajne razlike kad je reč o pomenutom aspektu „normativnosti”. Naravno, u pravu, baš kao ni u košarki, nije u pitanju moralna normativnost.<sup>84</sup>

Sve u svemu, ukoliko je pravo normativno stoga što je praksa koja se sastoji od pravila, nema ničeg misterioznog u Hartovom objašnjenju normativnosti prava pozivanjem na interno stajalište. Jer taj koncept je upravo i skrojen da objasni nastanak i egzistenciju pravila.<sup>85</sup>

Drugi odgovor je na neki način vezan i za Jovanovićevo vlastito određenje pravnog poretka. Podsetiću šta sâm Jovanović kaže o funkciji prava: pravo koordinira ponašanja i rešava sporove u zajednici, kreirajući pravne norme (pre svega, one koje su obavezujuće) kao razloge za delanje.<sup>86</sup>

Naslanjajući se na takvo shvatanje funkcije prava, pojedini teoretičari priznaju da se normativnost prava može zasnovati nezavisno od morala, ako se u njegovoj osnovi postave koordinirajuće konvencije.

Konvencionalizam koji, u svojoj osnovi, postavlja pravilo priznanja kao koordinirajuću konvenciju u Luisovom smislu te reči može da sačuva autonomnost pravne obaveznosti, jer „u odnosu na tipičan problem koordinacije<sup>87</sup> svejedno je koje je rešenje (tog problema) odabrano; važno je samo da svi streme istom rešenju [...] Na taj način bi efektivno bilo

82 Gizbert-Studnicki smatra da je svako opravdanje „domensko”. On kaže: „Opravdanje je uvek relativno u odnosu na domen. To što je neka radnja M moralno opravdana znači da postoji moralni razlog da se učini M. Da je data radnja L pravno opravdana znači da postoji pravni razlog da se učini L. Svaki normativni sistem (moral, religija, pravo, bonton) može pružiti različite razloge za delanje [...] S pravne tačke gledišta, jedino relevantno pitanje je da li je neka radnja opravdana pozivanjem na pravne razloge.” (Gizbert-Studnicki, T., 2018, par. 17).

83 Ovo „minimalističko” shvatanje normativnosti pravila igre do izvesne mere može da korespondira sa već pominjanom (vid. fn. 15) Parfitovom distinkcijom između normativnosti zasnovane na normama i normativnosti zasnovane na razlozima za delanje (up. Parfit, D., 2011, pp. 144–146).

84 I stoga, što je to, da tako kažem, „minimalna” ili „slaba” normativnost, Hart je i stavlja pod navodnike.

85 Kaplan, J., 2017, pp. 484–85.

86 Jovanović, M. A., 2019, p. 78.

87 Problem koordinacije bi se u najkraćem mogao odrediti na sledeći način: kako osigurati neku formu uniformnosti postupaka pojedinaca u situacijama kada je takva uniformnost u njihovom najboljem interesu i kada je oni sami kao takvu prepoznaju

moguće razlikovati pravnu od moralne obaveze: normativnost prava ne bi zavisila od njegovog kapaciteta da osigura moralno poželjan društveni poredak, već od sposobnosti da rešava probleme koordinacije.”<sup>88</sup>

Ipak, slabost ovog odgovora jeste u tome što on, u najboljem slučaju, predstavlja parcijalno objašnjenje normativnosti prava. Jer, kao što konstatuje Šapiro, primera radi, jedan ustav se ne posmatra kao arbitrarno rešenje problema koordinacije, već mnogi smatraju da je “the text of the Constitution sacred and that they had a moral obligation to heed it, regardless of what everyone else did”.<sup>89</sup>

Najzad, treći relevantan odgovor je skorašnjeg datuma. Njega je, u već spominjanom tekstu, formulisao filozof Filip Petit (*Pettit*). Taj odgovor je prepun sofisticiranih konceptualnih detalja, a u grubim crtama prikazan, svodi se na sledeće. Petit polazi od činjenice da se članovi zajednice, iz sebičnih razloga i zbog vlastitog interesa, ponašaju kooperativno u odnosu s drugim članovima. Prema njemu, ljudska bića su spontano kooperativna, jer takav stav ima svoje evolucione, selekzione prednosti.<sup>90</sup> Naime, svakome je stalo do toga kakvu će reputaciju da ima u očima drugih članova zajednice. Takva tvrdnja ga dovodi do zaključka da se različiti obrasci kolektivno korisnog, premda ponekad i pojedinačno „opterećujućeg” ponašanja<sup>91</sup> (da se drži data reč, da se ne pribegava nasilju, da se drugome ne nanosi šteta itd.), nužno pojavljuju u svakoj zajednici. Svaki takav obrazac regularnog ponašanja, prema Petitu, ispunjava sledeće uslove: (1) skoro svako u zajednici se ponaša u skladu s R (gde je R regularnost u ponašanju), barem u odnosu s onim članovima zajednice koji su se u prethodnim

---

i priželjkuju. Primer s pravilom o vratima na koja se ulazi, odnosno izlazi iz autobusa je jednostavna ilustracija rešenja problema koordinacije.

- 88 Schiavello, A., *Rules, Conventionalism and Normativity: Some Remarks Starting from Hart*, in: Araszkiwicz, M., Banaś, P., Gizbert-Studnicki, T., Pleszka, K. (eds), 2015, *Problems of Normativity, Rules and Rule-Following*, Cham, Heidelberg, New York, Dordrecht, London, Springer, p. 226.
- 89 Shapiro, S., 2011, p. 109. Ipak, i na ovaj argument bi se moglo odgovoriti kontraargumentom, poput onog Marmorovog, da pravilo priznanja nije koordinirajuća nego konstitutivna konvencija i da se kroz to pravilo ustav može prihvatiti nezavisno od moralnih razloga za njegovo (ne)prihvatanje (up. Marmor, A., *Legal conventionalism*, in: Coleman, J. (ed.), 2001, *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford, Oxford University Press). Na ovom mestu, nema prostora ni potrebe da se ulazi u detalje ove kontraargumentacije. Kako god, naredni „odgovor”, kako će se pokazati, proširuje eksplanatornu snagu Hartove ideje izvan opsega koordinirajućih konvencija.
- 90 Pettit, P., 2019, p. 235.
- 91 Uprkos tome što su kolektivno korisni, svi takvi obrasci ponašanja biće pojedinačno opterećujući: verovatno ćemo svi želeti [...] da ih oportunistički prekršimo, dok ga istovremeno drugi poštuju [...] To što su to obrasci ponašanja baš takvi još ne znači, naravno, da su oni norme, a kamoli društvene norme” (Pettit, P., 2019, p. 237).

sličnim situacijama ponašali u skladu s R; (2) skoro svako očekuje da će mu ponašanje u skladu s R doneti povoljnu reputaciju od strane ostalih i/ili da će mu suprotno ponašanje doneti nepovoljnu reputaciju; (3) skoro svako je podržan kada se ponaša u skladu s R, očekujući takve reputacione pogodnosti i troškove.<sup>92</sup>

Kada se ovakve pravilnosti u ponašanju pojave pod uticajem „reputacionog faktora“, prirodno se, kako to precizira Pettit, pojavljuju hartovska primarna (ili socijalna pravila), kao opažena<sup>93</sup>, internalizovana<sup>94</sup> i ratifikovana<sup>95</sup> pravila od strane članova zajednice, i to na način da kod svakog od njih postoji osećaj lične obavezanosti (*personal commitment on the part of each*). Posledica toga je da u tom stadijumu razvoja zajednice, ne samo da postoje norme koje su opažene, internalizovane i ratifikovane kao norme i koje nalažu saradnju njenih članova, već i sami članovi zajednice „virtually pledge ourselves to abide by those norms, making conformity a matter of personal commitment“.<sup>96</sup>

92 Pettit, P., 2019, p. 239. „Tri uslova koja (regularni obrasci ponašanja) zadovoljavaju znače da se te vrste pravilnosti razlikuju ne samo od običnih konvencija već i od niza drugih društvenih pravilnosti koje mogu nastati u bilo kom društvu“ (*Ibid.*).

93 „That a norm in the sense characterised earlier is *perceived* by all, as a matter of common awareness, means that it deserves to be cast as a properly social norm. It will be clear to you, as it will be clear to each, that conformity is the local norm, as we say“ (Pettit, P., 2019, p. 242). „A possible reason for thinking that the internal point of view already enters at this point is that there is a salient difference between acting to avoid a reputational penalty for being out of line with others and acting to avoid, say, a physical penalty for being out of line. A concern with the reputational penalty involves a concern for how you stand in the opinion of others, whereas a concern with the physical penalty may not involve anything of that character.“ (Pettit, P., 2019, p. 243).

94 „In order for the norm to be *internalised*, the members of the relevant group must generally prefer that X-ing be the established pattern— rather than any feasible, salient alternative, if indeed there is one—and must, in consequence, be disposed to think ill of someone who fails to abide by it and well of someone who lives up to it“ (Pettit, P., 2019, p. 245). Internalizacija norme je „najava“ internog stajališta koja će stav prema pravilima onih koji ga „usvoje“ da razlikuje od stava onih koji pravila posmatraju kao „autsajderi“.

95 „*To ratify* a norm [...] is to accept that you cannot object to anyone’s avowing a favourable attitude towards it in your name as a member of the group[...] Social ratification, as envisaged here, would introduce yet a further dimension to their way of viewing the norms. It would lead them to see the norms as standards that they support as a community and are obliged, for that reason, to honour as members [...] In (this society), it turns out that we not only each see the norms as attractive from an individual perspective, internalising them readily, we also see them as attractive in our social identity, joining with others in supporting and celebrating them.“ (Pettit, 209, p. 248).

96 Pettit, P., 2019, p. 255. Pettit naglašava da *personal commitment* nije posebna karakteristika socijalnih normi, kao što su to opažanje, internalizacija i ratifikacija. Činjenica da su norme stvar opažanja, internalizacije i ratifikacije zapravo, sve zajedno, znače da one uključuju i to svojstvo ličnog obavezivanja, obaveznosti sa strane adresata. (*Ibid.*).

Najzad, ono što treba naglasiti je da Petit smatra kako je *personal commitment*, koji interno stajalište podrazumeva „perfectly ordinary, pre-moral sense of commitment in which the members of the society will be personally committed to conforming to cooperative norms, granting others a claim to censure any failure on their part to do so”.<sup>97</sup> Drugim rečima, članovi zajednice se „obavezuju da će delati onako kako to norme zahtevaju i ako se na taj način obavežu, može se reći da pozivaju jedni druge da ih smatraju odgovornim za zajedničke norme ili primarna pravila”.<sup>98</sup>

Bilo kako bilo, i bez obzira na to da li neki od pomenutih odgovora smatramo plauzibilnim odgovorom na primedbe hartovskom internom stajalištu, kao objašnjenju normativnosti prava,<sup>99</sup> ostaje činjenica da su oni solidna odbrana internog stajališta, kao mogućeg objašnjenja normativnosti prava, makar i da nije u pitanju „prava” (čitaj, „moralna”) normativnost. Jer i ta „slaba” normativnost je od značaja za ponašanje adresata, jer i ona pruža opravdavajuće razloge za delanje (makar sa njihovog stajališta). Uostalom, kao što sam Hart kaže: „[B]ez obzira na to da li su pravni propisi moralno dobri ili rđavi, pravedni ili nepravedni, subjektivna prava i dužnosti zahtevaju pažnju kao žarišne tačke u delovanju prava, koje su za ljudska bića od vrhunskog značaja i nezavisno od moralne vrednosti pravnih propisa. Zbog toga nije istina da iskazi o subjektivnim pravima i dužnostima u stvarnom svetu imaju smisla jedino ako postoji neki moralni osnov da bi se utvrdilo njihovo postojanje.”<sup>100</sup>

Ako je tome tako, čini mi se da se, tim pre, hartovsko interno stajalište može „iskoristiti” da bi se objasnila normativnost horizontalnog poretka, kakav je međunarodno pravo. Stoga, pošto je teren „raščišćen”, u sledećem pododeljku ću ukratko pokušati da objasnim kako, u hartovskom ključu shvaćena, normativnost „tipičnog” prava može da se primeni na poredak međunarodnog prava.

#### 4.3. NORMATIVNOST MEĐUNARODNOG PRAVA I INTERNO STAJALIŠTE

Na osnovu izloženog prikaza Hartove ideje internog stajališta kao objašnjenja uslova za postojanje *social rules* i za razumevanje prava, kao normativnog sistema uopšte, te nakon pokušaja da se odgovori na najvažniju kritiku da ta ideja ne pruža valjan osnov da se (pravna) pravila mogu shvatiti kao normativni razlozi za delanje, došao je trenutak da se pokaže

97 Pettit, P., 2019, p. 233.

98 *Ibid.*, p. 254.

99 Po mom sudu, izloženi odgovori su, u stvari, do neke mere i komplementarni.

100 Hart, H. L. A., 1994, p. 269.

može li i na koji način ta hartovska ideja biti plodotvorna kao objašnjenje normativnosti međunarodnog prava.

Kako Jovanović konstatuje, postoje skeptička gledišta prema kojima su normativnost međunarodnog prava, odnosno njegova obaveznost, u izvjesnoj meri defektni u odnosu na normativnost i obaveznost „pravog prava”. Razlozi za taj skepticizam navode se u činjenici da države u najvećoj meri mogu da optiraju da li će se podvrgnuti određenim multilateralnim režimima, ili da li će sklopiti određeni međudržavni ugovor, ili da li će se protiviti međunarodnom običaju koji smatraju neprihvatljivim. Zato je korisno da se pokaže da li je moguće, da bi se odgovorilo skepticima, pokazati da su međunarodnopravna pravila „postavljena na istu osu koja povezuje pojmove normativnosti [...] i obaveznosti”.<sup>101</sup>

Po mom sudu, na pomenuti „skeptički izazov” se, upravo u duhu Jovanovićevog predloga, najbolje može odgovoriti koristeći hartovski konceptualni okvir. To je, nedvosmisleno, slučaj kada se radi o međunarodnopravnim običajima. Naime, običaji uopšte su paradigmatičan primerak Hartovih socijalnih pravila čiji je nužan uslov postojanja, uz praktikovanje, i prihvatanje običaja s interne tačke gledišta, kao standarda ponašanja. U tom smislu, ne vidim da postoji dovoljno relevantna razlika između međunarodnopravnih i drugih običaja, koja bi diskvalifikovala hartovsko objašnjenje njihove egzistencije i normativnosti.

A kako stoji stvar s drugim normama međunarodnog prava? Šta je, recimo, s pravilima tzv. *ius cogens*? Podsetiću šta o njima kaže Bečka konvencija o pravu ugovora. U svom članu 53, ona definiše normu *jus cogens* kao „a norm *accepted and recognized* by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” (podvukao G. D.) Utisak da se ovom odredbom norme međunarodnog prava „hijerarhizuju”, poput normi nacionalnog prava, pojačava se kada se pročita član 64, koji propisuje: “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” Međutim, nezavisno od kontroverzi koje postoje u pravnoj teoriji oko toga da li se zbilja ovim odredbama uspostavlja svojevrsna hirerhija međunarodnopravnih normi,<sup>102</sup> čini mi se da je sam početak prve navedene odredbe za pitanje normativnosti ovih normi interesantniji, budući da se govori o njihovom „prihvatanju i priznavanju” od strane međunarodne zajednice država. I da je on dovoljan da potvrdi tezu da su i ove norme

101 Jovanović, M. A., 2019, p. 144.

102 Jovanović, M. A., 2019, p. 120 i d.

međunarodnog prava „normativne,” u hartovskom smislu reči, jer ih adresati priznaju i prepoznaju kao norme, to jest kao razloge za delanje.<sup>103</sup>

Međutim, u svetlu svega što je do sada rečeno nameće se sledeće pitanje. Ako se normativnost međunarodnog prava posmatra u ključu internog stajališta, ali „razblažena” (ili „pojačana”, zavisi od ugla iz kojeg se posmatra), time da se ona ne odnosi na sekundarna pravila priznanja i promene, nego da se zapravo može vezati za najveći broj međunarodno pravnih normi, nije li onda Hart u pravu kada tvrdi da je međunarodno pravo sličnije primitivnom poretku socijalnih pravila nego razvijenom pravnom sistemu? Odgovor na to pitanje je i da i ne.

Odgovor je „da” jer, hartovski posmatrano, tipičan nacionalni pravni sistem ima sistemnost koju međunarodnopravni poredak nema.<sup>104</sup> Ipak, to i dalje samo govori nešto što nam je već dobro poznato: međunarodni poredak nije tipičan pravni sistem.

S druge strane, odgovor je „ne”. Naime, i sam Hart priznaje da u početnom stadijumu razvoja pravnog sistema (u kojem, recimo, može da se nalazi međunarodno pravo) „ne postoji ništa što bi odgovaralo jasnoj distinkciji između normi prava i (pozitivnog) morala, koja se javlja u razvijenom društvu”.<sup>105</sup> Ta distinkcija postaje jasna tek kada se sekundarna pravila priznanja i promene jasno uspostave i odvoje od primarnih pravnih pravila, čije važenje zasnivaju. Ipak, što je naročito važno, u Hartovom opisu pravnog sistema ne postoji ništa upečatljivo što bi objasnilo zašto su ta sekundarna pravila razvijenog pravnog sistema pravna pravila (kao što Hart i mnogi drugi tvrde), a ne pravila konvencionalnog morala ili čisto običajna pravila. Kako Voldron umesno primećuje: „Potrebno sredstvo da bi se to učinilo (objasnila pravnost sekundarnih pravila, prim. G. D.) jednostavno nije prisutno u teoriji savremenog pravnog pozitivizma verovatno iz vrlo dobrog razloga što nije ni potrebno, jer ne bi služilo nikakvoj korisnoj ili zanimljivoj teorijskoj svrsi. Možda bi prosto valjalo priznati tu činjenicu, nego se pretvarati da je gvozdена odvojenost prava i morala nužna na svim nivoima pozitivističke jurisprudencije.” I nastavlja, „internal aspect of rules offer exactly what we need for a relaxed, and thus reasonably sophisticated, approach to these matters; they enable us to talk in a grown-up way about the social foundations of a system of norms that

103 Čini mi se da ovaj argument načelno ne gubi na uverljivosti, čak i ako se prihvati da norme *ius cogens* ne moraju da prihvate svi članovi međunarodne zajednice, već samo većina. Kažem „načelno”, jer bi pod tim uslovima trebalo dodatno da se objasni kako ni kod socijalnih normi nije potrebno da bi one postojale i obavezivale sve, da od svih budu interno prihvaćene. Za takvo objašnjenje ovde nema ni prostora ni potrebe.

104 Na stranu u ovom momentu ostavljam činjenicu da Jovanović sistemnost ne smatra tipičnom karakteristikom prava, dok Hart misli suprotno.

105 Hart, H. L. A., 1994, p. 169.

is legal, and about the complexity of both the social phenomena and the emergent legal phenomena that this involves”.<sup>106</sup>

Imajući na umu sve što je upravo rečeno, kakav je onda konačan odgovor na pitanje da li su međunarodne norme pravne norme? Iako je izvor te dileme kao i kod prethodne, njeno razrešenje može biti, u isto vreme jednostavno i komplikovano. Oba odgovora pominje sam Jovanović, kada veli: „jedno od glavnih pitanja u pravnoj antropologiji je kako utvrditi koja pravila u jednostavnim društvima bez institucija koje stvaraju norme imaju status pravnih. Prema internom pristupu, pravni antropolog oslanja se na samokarakterizaciju (članova) društva koje proučava. Suprotan, eksterni pristup može proizaći iz opisa društvenog života jednostavnog društva, ali istraživač može na kraju krajeva da koristi kriterijum koji ne koriste sami članovi društva da odele pravno od ne-pravnog.”<sup>107</sup> Prvi, interni odgovor je jednostavan i potvrđan: članovi međunarodne zajednice karakterišu norme o kojima je reč kao pravo. Drugi, eksterni odgovor je komplikovan do te mere da je posmatračima sa strane, poput akademskih pravnika, potrebna ponekad i cela jedna knjiga da bi na ovo pitanje dali potvrđan odgovor. Recimo, upravo kako je to učinio i profesor Jovanović.

\*\*\*

Konačno, osim konceptualnih prednosti koje predloženi pojmovni okvir analize normativnosti međunarodnog prava ima u odnosu na onaj koji je u Jovanovićevoj knjizi zastupan, a koje su se, nadam se, do sada mogle uočiti, na kraju ću sumarno izneti još par njegovih preimućstava.

Prvo, umesto da se, kao što je to učinio Jovanović, jedna tipična karakteristika nacionalnog pravnog sistema „razblaži” kako bi se prilagodila stvarnosti atipičnog slučaja, u ovom okviru se događa obrnuto, to jest upravo onako kako Jovanovićev odabrani metod analize pojma prava kao prototipskog pojma nalaže: jedna karakteristika tipičnog prava<sup>108</sup> (nacionalnog prava) se analizira u svetlu empirijskih i konceptualnih specifičnosti atipičnog prava (međunarodnog prava) i „adaptira” se prema tom atipičnom slučaju. Dakle, predočena analiza je, čini se, više u duhu autorovog bazičnog pristupa, nego njegova sopstvena.

Drugo, naše intuicije, a najposle i empirijski uvidi u pogledu međunarodnog prava, govore nam da se ono razvija i da u tom razvoju zadobija sve više odlika koje poseduje i zreli oblik pravnog poretka. I ne slučajno,

106 Waldron, J. 2006, Are constitutional norms legal norms, *Fordham Law Review*, Vol. 75, No. 3, pp. 1711, 1713.

107 Jovanović upućuje na MacCormack, G., 1978, Anthropology and Legal Theory, *The Juridical Review*, p. 217 (up. Jovanović, M. A., 2019, p. 72).

108 Interno stajalište, koje je uslov za postojanje prava i njegovu normativnost.

baš kao kod genealogije tipičnog pravnog sistema, jedna od ključnih početnih tačaka u tom razvoju je upravo interno prihvatanje određenih normi kao standarda ponašanja. Dakle, to je svojstvo koje svaka instantijacija prava na početku, tokom svog razvoja ka punokrvnom pravnom sistemu i na kraju tog razvoja, poseduje. I to važi i za međunarodno pravo.

Najzad, ako se pažljivije osmotre uslovi koji su potrebni da postoje da bi se unutar jedne zajednice formiralo i ojačalo interno stajalište spram određenih socijalnih pravila, a naročito onaj uslov koji se odnosi na relativnu homogenost članova zajednice,<sup>109</sup> jasno je da sve jača „pravnost” međunarodnog prava jeste posledica sazrevanja svesti članova međunarodne zajednice o zajedničkim vrednostima i interesima, koji se reflektuju u internom prihvatanju određenih pravila, baš kao što je to slučaj s članovima zajednice (barem, zajednice zvaničnika) unutar jedne države. A činjenica da ta svest još nije dovoljno jaka i da se međunarodnopravne norme često krše upravo od strane članova te zajednice, koji ih (navodno) prihvataju, nije toliko osobena za međunarodno pravo koliko se, u prvi mah, može učiniti. Jer, prisetimo se da su neke ustavnopravne norme (recimo, takozvana pravila promene ili druga temeljna pravila državne organizacije), takođe efikasne samo ukoliko su interno prihvaćene. Jednostavno, efikasnost međunarodnopravnih normi je tesno vezana za njihovu prihvaćenost od strane članova međunarodne zajednice, na sličan način kako je efikasnost najviših ustavnopravnih pravila promene i presuđivanja uslovljena njihovim prihvatanjem.<sup>110</sup>

## 5. ZAKLJUČAK

Prilikom analize normativnosti međunarodnog prava, Miodrag Jovanović je nastojao da analizira s njom integrisane ili tesno povezane pojmove razloga za delanje, obaveznosti i važenja. Kao što je, nadam se, jasno vidljivo iz prethodnih redova, taj izbor je značio putovanje s par ozbiljnih

109 Vid. fn. 59.

110 Najprivlačnija karakteristika Hartove teorije je, kako to formuliše Voldron, njegovo insistiranje da se u temelju svakog pravnog sistema nalaze određena bazična pravila koja funkcionišu kao konvecije, a ne kao ozakonjena pisana pravila. I premda takve konvecije deluju „fragilno” u poređenju s izričitim i formalno usvojenim pravilima pisanog ustava, Hart nas podučava da je svaki pravni sistem zasnovan na nečemu što je upravo nešto tako fragilno (Waldron, 2006, pp. 1719–10). Prema tome i pisani ustav je mrtvo slovo na papiru ukoliko među najvišim zvaničnicima sistema ne postoji interno prihvaćeno pravilo da treba poštovati njegove norme ili ukoliko se neke ustavne norme promene i presuđivanja nisu za njih i prihvaćene konvencionalne norme. Uprkos toj činjenici, „pravnost” ustavnopravnih, za razliku od međunarodnopravnih normi, retko se dovodi u pitanje.

„krivina”. I kao na svakom takvom putu, ukoliko se u krivinu uđe olako ili kroz nju pokuša da se prođe prebrzo, putniku se dogodi da s puta izleti. Po mom sudu, dve najopasnije „krivine” za autora bile su pitanje važenja međunarodnog prava (i postojanje pravila priznanja u okviru međunarodnog prava) i pitanje da li je normativnost jedna i jedinstvena (i uvek genuino zasnovana na moralnim razlozima) ili nije.

Iako se u ovom radu nisam posebno bavio prvim Jovanovićevim „kako” normativnosti prava, blisko mi je u vezi s tim pitanjem mišljenje koje o tome iznosi David Lefkovic (*Lefkowitz*). On, naime, smatra da se važenje normi međunarodnog prava, koje bi se izvelo iz „međunarodnog” pravila priznanja, ne može posmatrati na isti način kao u nacionalnom pravu. Razlozi koje u prilog takvom shvatanju on navodi su, prvo, da je međunarodno pravo „horizontalni poredak” (s čim se, kao što je napomenuto, i Jovanović slaže), to jest da su, mahom, stvaraoci međunarodnopravnih normi u isto vreme i njihovi adresati i, drugo, da bi pravilo priznanja koje bi se formulisalo tako da, kao važeće, priznaje norme koje se praktikuju, bilo konceptualno suvišno.<sup>111</sup>

Druga okuka je, nakon toga, već bila na, kako se meni čini, stranputici, jer se u prvu krivinu ušlo preoštro. Primenjujući konceptualni aparat, prikladan za subordinirani, nacionalni pravni sistem, Jovanović se upustio u detaljniju analizu pojmova, poput isključujućih i sadržinski nezavisnih razloga kao iskaza legitimnog autoriteta. Ne potcenjujući domete takve njegove analize, konstatovao sam da ona jednostavno nije najprikladnija za međunarodnopravni poredak normi, koji je prema rečima samog Jovanovića, jedan „horizontalni”, nesubordinirani poredak, u kojem su i stvaraoci i subjekti prava jedni te isti.

Stoga sam, umesto autorovog, ponudio skicu drugačijeg okvira za analizu problema normativnosti međunarodnog prava, zasnovanu na hartovskim konceptima internog stajališta i prihvatanja pravila. Svestan da su neka važna pitanja i argumenti unutar te skice ostali nerazrađeni i nedorečeni, a da neki drugi nisu ni dotaknuti, ipak verujem da sam nagovestio da ta skica može biti plodotvorniji okvir za problem koji je Jovanović tematizovao u poglavlju svoje knjige koje je posvetio normativnosti prava.

Da zaključim. Utisak pisca ovog teksta je da je Jovanović, govoreći o normativnosti međunarodnog prava u svojoj knjizi „*The Nature of International Law*”, manje grešio zbog onoga što je rekao, a više zbog onoga što je propustio da kaže. U članku sam, imajući na umu upravo ideje samog autora, pokušao da ukažem na taj propust i da pružim drugačiji mogući i, po mom sudu, pogodniji konceptualni okvir za analizu problema normativnosti međunarodnog prava. Međutim, to nikako ne umanjuje

111 Lefkowitz, D., 2021, par. 12.

drugi, generalni utisak, da njegova knjiga predstavlja originalnu i podsticajnu raspravu o temi koja je praktično važna i teorijski zahtevna. Koliko je ta knjiga originalna, rečeno je već na početku, a koliko je podsticajna, nadam se da čitalac može da se uveri čitajući tekst u kojem su izneti obrisi drugačijih ideja od autorovih, a kojih ne bi bilo da me knjiga Miodraga Jovanovića nije podstakla da o tim idejama promišljam.

## LITERATURA

1. Alexander, L., 1990, Law and Exclusionary Reasons, *Philosophical Topics*, Vol. 18, No. 1.
2. Besson S., Tasioulas, J., Introduction, u: Besson, S., Tasioulas, J. (eds.), 2010, *The Philosophy of International Law*, Oxford, Oxford University Press.
3. Boghossian, P., Rules, Norms and Principles: A Conceptual Framework, in: Arszkiewicz M., Banaś, P., Gizbert-Studnicki, T., Pleszka, K. (eds), 2015, *Problems of Normativity, Rules and Rule-Following*, Cham, Heidelberg, New York, Dordrecht, London, Springer.
4. Chehtman, A., 2021, A New and Improved Explanatory Account of International Law, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/6308>.
5. Coleman, J., 2001, *The Practice of Principle*, Oxford, Oxford University Press.
6. Coleman, J., Leiter, B., Legal positivism, in: Patterson, D. (ed.), 1996, *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell Publishing.
7. Culver, K. C., 2001, Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law's Normativity, *Ratio Juris*, Vol. 14, No 2.
8. Dajović, G., 2009, Skica za jednu teoriju o normativnosti prava, *Pravni život*, tom 5, br. 15.
9. Dajović, G. 2011, Hartova teorija prava – osnovne crte, *Strani pravni život*, 3.
10. Dajović, G., 2015, *Ogled o metajurisprudenciji*, Beograd, Pravni fakultet Univerziteta u Beogradu.
11. Gizbert-Studnicki, T., 2018, On legal things to do: external and internal legal reasons, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/4791>.
12. Green, L., 1996, The Concept of Law Revisited, *Michigan Law Review*, Vol. 94, May.
13. Hart, H. L. A., 1955, Are There Any Natural Rights? *The Philosophical Review*, Vol. 64, No. 2.
14. Hart, H. L. A., 1982, *Essays on Bentham*, Oxford, Clarendon Press.
15. Hart, H. L. A., 1994, *The Concept of Law*, Second Edition with Postscript, Raz & Bulloch (eds.), Oxford, Clarendon Press.
16. Hurd, H. M., 1999, *Moral Combat*, Cambridge, Cambridge University Press.
17. Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press.

18. Jovanović, M., 2021, On The Nature of International Law: Rejoinder, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/7283>.
19. Kaplan, J., 2017, Attitude and the normativity of law, *Law and Philosophy*, Vol. 36, No. 5.
20. Lefkowitz, D., 2021, Systematicity, Normativity, and the Nature of International Law, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/6268>.
21. MacCormack, G., 1978, Anthropology and Legal Theory, *The Juridical Review*.
22. MacCormick, N., 1994, *Legal Reasoning and Legal Theory*, Oxford, Oxford University Press.
23. Marmor, A., Legal conventionalism, in: Coleman, J. (ed.), 2001, *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford, Oxford University Press.
24. Parfit, D., 2011, *On What Matters*, Vol. 1, Oxford, Oxford University Press.
25. Perry, S., 1989, Second Order Reasons, Uncertainty, and Legal Theory, *Southern California Law Review*, Vol. 62.
26. Perry, S. R., Hart's Methodological Positivism, in: Coleman, J. (ed.), 2001, *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford, Oxford University Press.
27. Pettit, P., 2019, Social Norms and the Internal Point of View: An Elaboration of Hart's Genealogy of Law, *Oxford Journal of Legal Studies*, Vol. 39, No. 2.
28. Raz, J., 1980, *The Concept of Legal System*, second ed., Oxford, Clarendon Press.
29. Raz, J., 1985, Authority, Law, and Morality, *The Monist*, Vol. 68, No. 3
30. Raz, J., 1986, *The Morality of Freedom*, New-York, Oxford University Press.
31. Raz, J., 1996, *Ethics in the Public Domain*, Oxford, Oxford University Press.
32. Raz, J., 2006, The Problem of Authority: Revisiting the Service Conception, *Minnesota Law Review*, Vol. 90, No. 4.
33. Raz, J., Reasons: Explanatory and Normative, in: Sandis, C. (ed.), 2009, *New Essays on the Explanation of Action*, Basingstoke, Palgrave Macmillan.
34. Rodriguez-Blanco, V., 2014, *Law and Authority under the Guise of the Good*, Oxford and Portland, Hart Publishing.
35. Rodriguez-Blanco, V., 2021, Philosophising on international law: Jovanović's conception of normativity and rationality, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, <https://journals.openedition.org/revus/6461>.
36. Schiavello, A., Rules, Conventionalism and Normativity: Some Remarks Starting from Hart, in: Araszkievicz, M., Banaś, P., Gizbert-Studnicki, T., Pleszka, K. (eds), 2015, *Problems of Normativity, Rules and Rule-Following*, Cham, Heidelberg, New York, Dordrecht, London, Springer.
37. Sciaraffa, S., 2011, The Ineliminability of Hartian Social Rules, *Oxford Journal of Legal Studies*, Vol. 31, No. 3.
38. Shapiro, S. J., 2006, What is the internal point of view, *Fordham Law Review*, Vol. 75, No. 3.
39. Shapiro, S., 2011, *Legality*, Harvard, Harvard University Press.
40. Star, D., Introduction, in: Star, D. (ed.), 2018, *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press.

41. Spaak, T. 2018, Legal Positivism, Conventionalism, and the Normativity of Law, *Jurisprudence*, Vol. 9, No. 2.
42. Twining, W., 2009, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press.
43. Vranjanac, D., 2000, *Džon Ostin – imperativni model pravnog pozitivizma*, Beograd, Institut za uporedno pravo.
44. Waldron, J., Authority for Officials, in: Meyer, L. H., Paulson S. L., Pogge, T. W. (eds.), 2003, *Rights, Culture and the Law – Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford, Oxford University Press.
45. Waldron, J., 2006, Are constitutional norms legal norms, *Fordham Law Review*, Vol. 75, No. 3.
46. Wedgwood, R., The Unity of Normativity, in: Star D. (ed.), 2018, *The Oxford Handbook of Reasons and Normativity*, Oxford, Oxford University Press.

## NORMATIVITY OF INTERNATIONAL LAW

Goran Dajović

### ABSTRACT

In *The Nature of International Law*, Miodrag Jovanović, generally speaking, tries to explain the concept of international law. He analyzes few typical characteristics of the prototype concept of law (institutionality, normativity, coercion and justice-aptness), and then he looks at contemporary international law through “the lenses” of these characteristics. The article pays special attention to his analysis of the normativity of (international) law. The main intention is not to criticize Jovanović’s theses about the normativity of law, as such, but to point out that they are not the best possible framework for explaining the normativity of international law. Therefore, a different and more appropriate conceptual framework is presented than the one he offered in the key of Raz’s idea of legal norms as exclusionary reasons for action and practical rationality. This framework is grounded on Hart’s well-known idea of an internal point of view. The presented argumentation shows that within such a framework, the normativity of international law could be better explained and understood, and also it seems that certain ingrained intuitions about international law fit well into it.

**Key words:** international law, normativity, authority, exclusionary reasons, internal point of view.

Dostavljeno Uredništvu: 6. septembra 2021. godine

Prihvaćeno za objavljivanje: 6. decembra 2021. godine

Tatjana Papić\*

## IN DEFENSE OF UNCERTAINTY: VALUES BEHIND INDETERMINATE RULES OF INTERNATIONAL LAW

*Abstract:* The paper discusses uncertainty in international law from the perspective of its indeterminate rules against an often held view that such rules are bad news for international law. First, it shows that indeterminate rules are not a pathology, but inevitable in international law due to the diversity of states, their different interests, as well as complexities of some of the issues those norms attempt to regulate. Second, the paper claims that there is an upside in indeterminate rules if international law is conceptualized through its argumentative side. These values are explained through concrete examples of indeterminate provisions from the Treaty on the Non-proliferation of Nuclear Weapons and the UNSC Resolution 2249, a classical example of “constructively ambiguous” text. Relying on the works of Waldron and Hakimi, the paper explains how indeterminate rules accommodate disagreements, and consequently provide at least minimal regulation of certain contested issues, sustain international community, and, moreover, demonstrate how international law operates.

**Key words:** uncertainty, indeterminate rules, compliance with international law, argumentative practice, interpretation, disagreement, non-proliferation of nuclear weapons, Resolution 2249, self-defense.

### 1. INTRODUCTION

This paper will discuss uncertainty in international law, from the perspective of the uncertainty of the content of some its rules. It is a contri-

---

\* Professor of Law, Union University Law School Belgrade; e-mail: tatjana.papic@pravnikafakultet.rs

The first draft of this paper was presented at the Belgrade Legal Theory Group Symposium on the book of *The Nature of International Law* by Miodrag Jovanović, held at the Faculty of Law University of Belgrade on 18 June 2021. I am grateful to the participants of this symposium and anonymous reviewers of *Pravni zapisi* for their comments. I also wish to thank Ivana Vukčević, who provided me with research support pertaining to international investment law practice. Usual disclaimer applies.

bution to the symposium on the Miodrag Jovanović's book *The Nature of International Law*.<sup>1</sup>

The issue of uncertainty in international law has been raised throughout Jovanović's book; the concluding chapter ("In Lieu of a Conclusion – A Note on (Un)certainty") is dedicated to it. Jovanović finds international law to be uncertain in many regards: sources, determining the content of a rule, conflicts between different international law regimes, precedential weight of individual rulings, consistent application of valid rules, credible fact-finding, compliance with international rulings.<sup>2</sup> This is not an unsurprising conclusion. For any legal scholar, including the one who favors international law,<sup>3</sup> admitting that there is uncertainty in international law is an evitable result of a minimal intellectual honesty. What one does with such a conclusion is another matter.

Jovanović argues that multifaceted uncertainty in international law does not undermine the main claim of his book that "international law possesses all typical features of the central case of law as a 'genre'."<sup>4</sup> He finds uncertainty not to be confined to international law, but to also exist in national laws.<sup>5</sup> To that end he gives an example from constitutional law, pointing out that "there is regularly some level of uncertainty regarding secondary rules of constitutional law and their capacity to resolve first-order uncertainties"<sup>6</sup> explaining that both in constitutional systems with or without institutionalized model of judicial review, different constitutional actors, judges, and lawyers disagree on the content and interpretation of constitutional law. Moreover, even when there is a final judicial decision on a constitutional issue its execution "depends on the political will of more powerful state actors, which may be a further source of uncertainty."<sup>7</sup>

Further, Jovanović seems to argue that one of the tasks of international law is to mitigate uncertainty.<sup>8</sup> He expressly states that eliminating all uncertainties is unattainable, but also hints that it is undesirable, as he mentions

1 Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, New York, Cambridge University Press.

2 Jovanović, M., pp. 229–231 (by quoting Kammerhofer, J., 2011, *Uncertainty in International Law – A Kelsenian Perspective*, London, Routledge).

3 It is a common place among international lawyers and scholars – as claimed by David Kennedy – "to see themselves and their work as favoring international law and institutions in a way that lawyers in many other fields do not – to work in banking is not to be in favor of banking." Kennedy, D., 1994, *A New World Order: Yesterday, Today, and Tomorrow*, *Transnational Law and Contemporary Problems*, Vol. 4, No. 2, p. 335.

4 Jovanović, M., 2019, p. 228.

5 *Ibid.*, pp. 232, 233.

6 *Ibid.*, p. 232. Footnotes omitted.

7 *Ibid.*, p. 233.

8 *Ibid.*, p. 231.

“unintended negative effects” of such scenario.<sup>9</sup> Jovanović does not say what these unintended negative effects of absolute clarity would be for international law. My plan is to offer some arguments in that respect, by focusing on uncertainty flowing from indeterminate rules of international law.

Indeterminate rules, a denomination used by Thomas Franck, are those whose message is unclear;<sup>10</sup> this pertains but is not limited to their textual clarity.<sup>11</sup> In any case, indeterminate rules<sup>12</sup> create uncertainty. However, it should be noted that uncertainty is not always a result of indeterminacy. It can stem from a divergent interpretation of otherwise determinate rules, inconsistent practice in application of rules, inconclusiveness of the factual data relevant for the application of a rule, identification of different rules as relevant for deciding on application of rule to the case at hand, etc.<sup>13</sup> While the arguments that will be presented in this paper can also be relevant in these situations, my primary goal is to generally address uncertainty flowing directly from indeterminate rules in international law.

## 2. SKETCHING THE ARGUMENTS

I intend to show, relying on the work of Waldron and Hakimi, that uncertainty stemming from indeterminate rules of international law, is not all bad news, that it is not a pathology, but rather an inevitability, which moreover testifies to the nature and the way international law operates and serves its other important functions. The arguments in the paper are developed on the claim that we can find a value in indeterminate international rules. This might sound as counterintuitive, if not all wrong, as virtues of law should most certainly be its clarity and predictability.<sup>14</sup> Namely, a

---

9 *Ibid.*, p. 231, resorting to Hart in support of this argument (Hart stated that “the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition”).

10 Franck, T., 1990, *The Power of Legitimacy Among Nations*, Oxford, Oxford University Press, p. 52; Franck, T., 1988, Legitimacy in the International System, *American Journal of International Law*, Vol. 82, No. 4, p. 714.

11 See the example of provision on the use of force from the UN Charter (Art. 2(4) and 51) explained in this regard in *ibid.*, p. 721.

12 Throughout the paper I use the term indeterminate rules to encompass both rules in strict sense, meaning concrete stipulations, and rules in broad sense, meaning texts (such as resolutions of the UN Security Council) which provide different stipulations, which taken together create indeterminacy.

13 I owe this point to one of the anonymous reviewers of this paper.

14 See Brunnée, J., Troope, S., 2011, Interactional International Law: An Introduction, *International Theory*, Vol. 3, No. 2, pp. 307–318, 310 (holding clarity as one of the criteria of law). See also Abbott, K. *et al.*, 2000, The Concept of Legalization, *Interna-*

precise rule sets what is expected of a subject in a particular circumstantial setting. Moreover, indeterminacy of rules is said to undermine compliance with international law. It has been forwarded that “the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance.”<sup>15</sup> Thus, imprecise, flexible, and contextual rules are taken to work against the compliance with international law and to undermine its normativity.<sup>16</sup> How can we then find any value in such indeterminate rules? To be able to do that an observer needs to be able to conceptualize the law beyond the body of rules. In other words, one needs to go beyond the understanding of law as a formal set of “crisp and determinate rules”,<sup>17</sup> and to take into consideration its procedural, rational, and argumentative side, as argued by Waldron.<sup>18</sup>

Namely, law “frames, sponsors, and institutionalizes” the culture of argument.<sup>19</sup> Indeterminate rules cultivate this culture, as they accommodate disagreements stemming from different interests of states or complexity of the issue they want to regulate. They open more space for debate, *i.e.*, conflicting arguments on the meaning of a specific rule, which in turn can provide an insight into the values laying in the core of a rule.<sup>20</sup> Moreover, arguments are valuable,<sup>21</sup> as they are an integral element of law’s operation,<sup>22</sup> what in international law, as I will explain, provides multidimensional benefits.

---

*tional Organizations*, Vol. 54, No. 3, pp. 401–419, 412–413 (claiming that the clarity is essential for the force of law).

15 Franck, T., 1988, p. 714.

16 *Ibid.* (arguing that “[i]ndeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance”). Moreover, Franck claimed that “[t]he degree of determinacy of a rule directly affects the degree of its perceived legitimacy”. *Ibid.*, p. 716. See also Guzman, A., 2005, Saving Customary International Law, *Michigan Journal of International Law*, Vol. 27, No. 1, pp. 115–176, 124 (claiming that the lack of precision – of customary international law rules – “undermine[s] the force of the rules and generate skepticism about their importance”) and Koskeniemi, M., 2001, Solidarity Measures: State Responsibility as a New International Order?, *British Yearbook of International Law*, Vol. 72, No. 1, pp. 337–356, 341 (arguing that “vague clauses would give too much room for political abuse.”)

17 Waldron, J., 2008, The Concept and the Rule of Law, *Georgia Law Review*, Vol. 43, No. 1, p. 59.

18 *Ibid.*

19 *Ibid.*, p. 56.

20 See Çali, B., 2009, On Interpretivism and International Law, *European Journal of International Law*, Vol. 20, No. 3, pp. 808–809.

21 *Ibid.*, pp. 49–50.

22 *Ibid.*, p. 60.

To be clear, I do not think that international law should strive to enhance uncertainty to accommodate a need for debate, no matter how valuable I consider it to be. On the contrary, international law should attempt to send clear messages on the required conduct. But when such regulation is not possible, due to reasons pertaining to different interests of states and complexity of issues to be regulated, uncertainty flowing from a specific rule should not be seen as its flaw, and thus a flaw of international law, but as an opportunity for finding out what values lie at heart of such regulation, sustaining required balance and understanding how international law operates.

This paper develops as follows. Part 3 discusses inevitability of indeterminate rules that create uncertainty, which stems from diversity of states, different values they ascribe to and complexities of certain issues some rules strive to regulate. It also describes different sets of indeterminate rules, explaining them by using a provision from the Treaty on the Non-proliferation of Nuclear Weapons (NPT),<sup>23</sup> and the text of the UNSC Resolution 2249<sup>24</sup> as examples. Part 4, relying on the works of Waldron and Hakimi, presents general arguments in support of the claim that we can find value in indeterminate rules. It argues that they accommodate disagreements, which have a distinctive value when structured by international law's argumentative practice.<sup>25</sup> Using the above examples of indeterminate rules analyzed in Part 2, it shows how these indeterminate rules help preserve balance, protect values that lay at the core of the international law project, and reveal how it operates. Part 5 concludes the discussion.

### 3. INDETERMINATE RULES: INESCAPABLE UNCERTAINTY OF THE CONTENT OF SOME RULES OF INTERNATIONAL LAW

#### 3.1. GENERAL CONSIDERATIONS

Many rules of international law seem to send a clear message, *i.e.* they are determinate.<sup>26</sup> Some of the examples include rules of diplomatic and

---

23 Adopted on 12 June 1968, entered into force 5 March 1970, *United Nations Treaty Series (UNTS)*, Vol. 726, p. 161. Hereinafter: NPT.

24 UNSC Resolution 2249, UN Doc. S/RES/2249 (20 November 2015).

25 Waldron, J., 2008, p. 56; Hakimi, M., 2020, Why Should We Care About International Law?, *Michigan Law Review*, Vol. 118, No. 6, p. 1301.

26 Franck, T., 1988, p. 718.

consular relations,<sup>27</sup> law of the sea<sup>28</sup> and air,<sup>29</sup> ozone layer,<sup>30</sup> copyright and trademarks,<sup>31</sup> treatment of prisoners of war.<sup>32</sup> Indeed, many international law treaties are expressly crafted in order to “increase determinacy and narrow issues of interpretation through the ‘codification’ and ‘progressive development’ of customary law.”<sup>33</sup> Such are the Vienna Convention on the Law of Treaties (VCLT)<sup>34</sup> and Vienna Convention on Diplomatic Relations,<sup>35</sup> as well as certain important aspects of the UN Convention on the Law of the Sea.<sup>36</sup> Franck claimed that such determinate rules elicit high level of compliance.<sup>37</sup> However, it is questionable if this can exclusively be attributed to their determinacy, as there may be other explanations why states routinely comply with these rules.

On the other hand, there are indeterminate international rules. Indeterminate rules do not only appear in international law since “some degree of indeterminacy is inevitable in any body of rules [...] and may even have its uses in promoting agreement and achieving flexibility.”<sup>38</sup> After all, rules strive to generally regulate conduct and are later applied in a specific factual setting. So, we inevitably end up with international rules with

27 See provisions on inviolability of diplomatic and consular premises in the Vienna Convention on Diplomatic Relations (adopted on 18 April 1961, entered into force on 24 April 1964, *UNTS*, Vol. 500, p. 212), Art. 22 and Vienna Convention on Consular Relations (adopted on 24 April 1963, entered into force 19 March 1967, *UNTS*, Vol. 596, p. 261), Art. 31.

28 For example, see the provisions on innocent passage (Art. 17) of the United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force 16 November 1994, *UNTS*, Vol. 1833, p. 397): “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”

29 See the provision on the jurisdiction of the aircraft Art. 3(1) from the (Tokyo) Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted on 14 September 1963, entry into force 4 December 1969, *UNTS*, Vol. 704, p. 219): “The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.”

30 The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987, entered into force 1 January 1989, No. 26369.

31 Universal Copyright Convention (revised version), adopted on 24 July 1971, entered into force 10 July 1974, *UNTS*, Vol. 943, p. 178.

32 Convention Relative to the Treatment of Prisoners of War, adopted on 12 August 1949, entered into force 21 October 1950, *UNTS*, Vol. 75, p. 135.

33 Abbott, K. *et al.*, 2000, p. 414.

34 Adopted on 23 May 1969, entered into force 27 January 1980, *UNTS*, Vol. 1155, p. 331. Hereinafter: VCLT.

35 See *supra* 27.

36 See *supra* 28.

37 Franck, T. 1988, p. 718.

38 Franck, T. 1990, pp. 53–54.

“different levels of inherent legal certainty”<sup>39</sup> or indeterminate rules which are vague and/or ambiguous. Moreover, “many of the ‘rules’ and ‘principles’ are general, question-begging, and contradictory”<sup>40</sup> opening space for disagreement on their interpretation.

In any case, indeterminate rules make it difficult to see what they require of their addressees. Consequently, it is hard to assess the extent of compliance with them. Due to this, some authors seem to cast doubt on the legal force of such rules.<sup>41</sup> However, it is evident that indeterminacy, is usually not a result of the poor legal drafting, but a deliberate choice driven by either domestic or international considerations.<sup>42</sup> Given different needs, means, values and interests of the states involved, many rules of international law end up being not only indeterminate, but also contextual and fluid. Namely, they come in sets of variable stipulations dependent of a context, allowing states some discretion in deciding on what measures to take to meet the obligations or in limiting the application of a particular obligation in the scope or effect.<sup>43</sup>

The indeterminacy of a significant number of rules of international law is unavoidable, because in the process of their creation states try to incorporate their different perspectives on the issue they want to regulate

---

39 Shany, Y., 2006, *Toward a General Margin of Appreciation Doctrine in International Law?*, *European Journal of International Law*, Vol. 16, No. 5, p. 913.

40 Brownlie, I., 2003, *Principles of Public International Law*, Oxford, Oxford University Press, p. 602 (Brownlie stated this in respect to treaty interpretation, but it seems that this description can stand for many other rules of international law).

41 Abbott, K. *et al.*, 2000, p. 414; Brunnée, J., Troope, S., 2011, pp. 311, 313 and 315.

42 Abbott, K. *et al.*, 2000, p. 415.

43 Hakimi, M., 2020, p. 1291 (giving examples of the Paris Agreement to the United Nations Framework Convention on Climate Change, adopted on 12 December 2015, entered into force on 4 November 2016, UN Doc. C.N.63.2016), Arts. 2(2) & 4(2); International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, *UNTS*, Vol. 999, p. 3), Art. 2(1); General Agreement on Tariffs and Trade (adopted on 30 October 1947, entered into force 1 January 1948, *UNTS*, Vol. 55, p. 194), Arts. XX & XXI and International Convention for the Regulation of Whaling (adopted on 2 December 1946, entered into force on 10 November 1948, *UNTS*, Vol. 161, p. 72), Arts. X(3) & VIII). The relevance of contextuality in deciding the scope and effect of obligations is also seen before international courts, for example in the application of the doctrine of the margin of appreciation. See Shany, Y., 2006; Donoho, D. L., 2011, *Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, *Emory International Law Review*, Vol. 15, No. 2, pp. 391–466; Arai-Takahashi, Y., *The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry*, in: Føllesdal, A., Peters, B., Ulfstein, G., (eds.), 2013, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, pp. 62–105.

and use international law to accommodate their interests. Sometimes, reaching an agreement on the issue would only be possible by using broad language and general terms, which results in postponing the resolution of the issue.<sup>44</sup> Also, sometimes the very issues to be regulated are complex, and not fitting into simple binary categories of right and wrong behaviors.<sup>45</sup> All of this results in vague or ambiguous provisions.

### 3.2. EXAMPLES OF INDETERMINATE RULES

Broadly speaking, indeterminacy of rules can stem from their vagueness and/or ambiguity.<sup>46</sup> I will not go into a nuanced analysis of these categories of indeterminacy.<sup>47</sup> For the purposes of this paper, I will just plainly delineate them. A rule is vague when there is no pre-established answer to the issue it regulates.<sup>48</sup> On the other hand, a rule is ambiguous, if it has multiple meanings.<sup>49</sup> As concepts of vagueness and ambiguity are different, a rule can be both – vague and ambiguous – at the same time.<sup>50</sup> In each case, it is indeterminate.

For these reasons, examples that follow should not be understood as clear-cut cases of vagueness and ambiguity, but simply as examples of indeterminate rules.

#### 3.2.1. Vagueness

Examples of a vague rule can be found in provisions providing for general duties or regulating behavior on the basis of a certain standard. This is not bad *per se*, as all rules attempt to generally regulate future behavior in a specific factual setting.<sup>51</sup> For example, the Treaty on the Non-proliferation of Nuclear Weapons (NPT) contains *general* obligation

---

44 Bilder, R., 1962, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, *American Journal of International Law*, Vol. 56, No. 3, p. 654.

45 Franck, T., 1988, pp. 722–724.

46 See more in Poscher, R., Ambiguity and Vagueness in Legal Interpretation, in: Solan, L., Tiersma, P., (eds.), 2011, *Oxford Handbook on Language and Law*, Oxford University Press, ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1651465](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651465)), 3. 11. 2021). In philosophical literature, indeterminacy has been said to encompass three different categories – ambiguity, vagueness, and contestability. See more in Waldron, J., 1994, Vagueness in Law and Language: Some Philosophical Issues, *California Law Review*, Vol. 82, No. 3, p. 512.

47 For more on this, see Poscher, R., 2011, pp. 2–7.

48 *Ibid.*, 2011, p. 30. For origins and accounts of vagueness see more in *ibid.*, pp. 15 –20.

49 *Ibid.*, p. 2. See also Waldron, J., 1994, p. 515–516.

50 Poscher, R., 2011, p. 4; Waldron, J., 1994, pp. 513–514.

51 Franck, T. 1990, pp. 53–54.

requiring parties “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race [...] and to nuclear disarmament”.<sup>52</sup> This obligation was interpreted by the ICJ as the one of a result – requiring states to reach *a deal* on nuclear disarmament<sup>53</sup> – not of means, which would only require them to just try to agree and, if unsuccessful, to move on.<sup>54</sup> In other words, the only clear thing under this provision is that states cannot agree not to disarm and proceed with their business. But beyond that, the concrete content of this duty remains unclear.<sup>55</sup>

Many examples of vagueness stem from the fact that international rules incorporate certain standard of behavior. Bilateral investment treaties provide such standards by requiring, for example, “fair and equitable treatment of the investor”.<sup>56</sup> The same stands for human rights treaties – for example, the International Covenant on Civil and Political Rights (ICCPR)<sup>57</sup> or the European Convention on Human Rights (ECHR)<sup>58</sup> – which allow for restrictions of certain rights, *inter alia*, when this is “necessary in a democratic society”.<sup>59</sup> In fact, many international rules come as standards and not as crisp normative prescriptions.

---

52 Art. VI, NPT, *supra* note 23, in full: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

53 See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, p. 226, pp. 263–264, para. 99. Namely the ICJ stated duty from Art. VI “to go beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”

54 Hakimi, M., 2017, p. 36.

55 *Ibid.*

56 See OECD, 2004, Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, No. 2004/03, OECD Publishing (<http://dx.doi.org/10.1787/675702255435>, 12. 5. 2021).

57 Adopted on 16 December 1966, entered into force 23 March 1976, *UNTS*, Vol. 999, p. 171. Hereinafter: ICCPR.

58 Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force 3 September 1953, *European Treaty Series*, No. 5.

59 See for *e.g.*, Art. 21 of ICCPR: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” See also Art. 8 of ECHR: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by

### 3.2.2. Ambiguity

There are international law rules that are ambiguous, mainly because states want to provide legal framework for action, but they have different views about certain aspects of the situation. They are “constructively ambiguous”,<sup>60</sup> and they are deliberately so. The work of the UN Security Council (UNSC) provides ample examples of this technique.<sup>61</sup> Resolution 2249<sup>62</sup> adopted after 2015 Paris terrorist attacks is one example of indeterminate text.

This resolution condemned a series of attacks by the Islamic State (IS). It was worded to suggest that the UNSC gave authority for the use of force against the IS, while in fact not providing a legal basis for the use of force against IS either in Syria or in Iraq.<sup>63</sup> It called upon states “to take all necessary measures”<sup>64</sup> on the territory controlled by IS, which is usually a codeword for the use of force,<sup>65</sup> without authorizing it or deciding that it is to be taken.<sup>66</sup> It was said that this resolution basically did not add or diminish what states could already do under the customary rule on *ius*

---

a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

60 This phrase is generally attributed to the US Secretary of State, Mr. Henry Kissinger. See Byers, M., 2020, Still Agreeing to Disagree: International Security and Constructive Ambiguity, *Journal on the Use of Force and International Law*, p. 2. (<https://doi.org/10.1080/20531702.2020.1761656>, 15. 5. 2020).

61 Byers, M., 2020, pp. 5–17. See also Byers, M., 2004, Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity, *Global Governance*, Vol. 10, No. 2, pp. 165–186.

62 See *supra* note 24.

63 See detailed analysis in Akande D., Milanovic, M., 2015, The Constructive Ambiguity of the Security Council’s ISIS Resolution, *EJIL: Talk!* (<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>, 21. 5. 2020).

64 UNSC Resolution 2249, see para. 5 of the Resolution which “[c]alls upon Member States that have the capacity to do so *to take all necessary measures*, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL [...] and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council [...] and to eradicate the safe haven they have established over significant parts of Iraq and Syria.”

65 Akande, D., Milanovic, M., 2015.

66 See more in Akande, D., Milanovic, M., 2015.

*ad bellum*.<sup>67</sup> In other words, it referred to the rights of states to use force without itself giving an authorization for such use of force.<sup>68</sup> Here we see that ambiguity was present *ab initio*, as a result of a conscious choice and it served to incorporate different legal grounds invoked by states for their actions against IS.

### 3.3. INTERPRETING INDETERMINATE RULES

Any indeterminate rule allows broader discretion in its interpretation by the affected state. However, this discretion can be bound in different ways. First, one can use refined methods of interpretation embodied in the VCLT. Second, when there is a judicial body which can authoritatively decide on the interpretation – such is the case within the Council of Europe (in respect of ECHR), European Union, World Trade Organisation – imprecision of a rule does not need to be a license for state's discretion but contributes to a wider authority of such a body to determine the meaning of the standard.<sup>69</sup> The same applies when the International Court of Justice (ICJ) has the jurisdiction to decide on the interpretation and application of a rule.

For example, the ICJ<sup>70</sup> gave a specific content<sup>71</sup> to a vague notion of an “equitable solution”, which is provided as a goal of the delimitation of the continental shelf between states with opposite or adjacent coasts in the UN Convention on the Law of the Sea.<sup>72</sup> Similarly, the European Court

---

67 Akande, D., Milanovic, M., 2015; Byers, M., 2020, p. 16. Cf. Hakimi, M., 2018, The Jus Ad Bellum's Regulatory Form, *American Journal of International Law*, Vol. 112, No. 2, pp. 151–190, 188–189 (arguing that “[i]n adopting 2249, the Council—the institution with legal primacy on the use of force—communicated that it did not consider the Article 2(4) prohibition to be controlling in this case. The resolution is a decision on the law, even if it does not reflect or inform the general standards. Its apparent purpose and effect were to diminish the claims and concerns about the operation's illegality.”)

68 This is similar to resolutions 1368 and 1373 (2001), adopted after 9/11 attacks, which reaffirmed, in preambular paragraphs, the inherent right of individual and collective self-defense without authorizing US and its allies to use force in Afghanistan.

69 Abbott, K. *et al.*, 2000, p. 415.

70 See cases before the ICJ, *Case Concerning the North Sea Continental Shelf* (FR Germany/Denmark; FR Germany/The Netherlands), Judgement of 20 February 1969, *ICJ Reports*, p. 3; *Case Concerning the Continental Shelf* (Tunisia/Libyan Arabjamahiriya), Judgment of 24 February 1982, *ICJ Reports 1982*, p. 18 and *Case Concerning the Continental Shelf* (Libyan Arabjamahiriya/Malta), Judgement of 3 June 1985, *ICJ Reports 1985*, p. 13.

71 Franck, M., 1988, p. 724.

72 Art. 83(1) of the UN Convention on the Law of the Sea: “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by

of Human Rights, *inter alia*, specified the ECHR's notion "necessary in a democratic society".<sup>73</sup> This standard is provided as one of the criteria<sup>74</sup> for limitations of certain rights and freedoms (right to privacy (Art. 8), freedom of religion (Art. 9), expression (Art. 10), assembly and association (Art. 11)) under the ECHR.<sup>75</sup> Another example of authoritative bodies specifying a vague notion comes from international investment arbitration practice,<sup>76</sup> which provided substance to the very general "fair and equitable treatment", the standard used in international treaties for protection of investments.<sup>77</sup>

- agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."
- 73 Simply speaking, the ECtHR applied the principle of proportionality to determine the content of the notion "necessary in a democratic society": "It must now be decided whether the 'interference' complained of corresponded to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', whether the reasons given by the national authorities to justify it are 'relevant and sufficient'". See ECtHR, *Sunday Times v. the United Kingdom*, no. 6538/74, Judgment of 29 March 1979, para. 62.
- 74 All limitation clauses contain the requirement of "necessary in a democratic society", while enumerated protected legitimate aims differ from provision to provision; also, the legality requirement is provided as "prescribed by law" in Art. 9–11, while in Art. 8 it is "in accordance with law". For the sake of brevity, I am only reproducing the limitation clause of Article 9(2): "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
- 75 However, it can be argued that the way in which the ECtHR defined the notion of "necessary in a democratic society" is also unclear as it used other vague standards (such as "a pressing social need", existence of "relevant and sufficient reasons") to define it. See Gerards, J., 2013, How to Improve the Necessity Test of the European Court of Human Rights, *International Journal of Constitutional Law*, Vol. 11, No. 2, pp. 466–490. Be that as it may, the ECtHR still made the content of the notion "necessary in a democratic society" more concrete through its adjudication.
- 76 See, for example, ICSID cases, *Tecnicas Medioambientales Tecmed S. A. v. United Mexican States*, no. ARB(AF)/00/2, Award of 29 May 2003, para. 154; *Lemire v. Ukraine*, no. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, paras. 284–285, *Electrabel v. Hungary*, no. ARB/07/19, Award of 25 November 2015, para. 165 (citing *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006).
- 77 Key elements of the fair and equitable treatment generally include obligations of due process, transparency, stability, predictability, reasonable expectations of the foreign investor, freedom from coercion and harassment. In addition to these criteria, tribunals also take into consideration lack of arbitrariness and non-discrimination, which may also fall under other substantive investment treaties' standards. See Yannaca-Small, K., "Fair and Equitable Treatment: Have Its Contours Fully Evolved?" in: Yannaca-Small, K., (ed.), 2018, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed., Oxford, Oxford University Press, p. 510. See also Dolzer, R., 2013, Fair and Equitable Treatment: Today's Contours, *Santa Clara Journal of International Law*, Vol. 12, No. 1, p. 15.

However, at times, as explained by Hakimi, the authoritative interpretation will not help much to resolve alleviate disagreement between the parties about the meaning and application of an international agreement.<sup>78</sup> Take the example of the case *Gabčíkovo-Nagymaros Project* between Hungary and Slovakia before the ICJ, which originated from the 1977 treaty between Hungary and Czechoslovakia concerning the construction and operation of the Gabčíkovo-Nagymaros Project (a system of dams, locks and other installations along the river Danube).<sup>79</sup> Due to environmental concerns, Hungary suspended the work on the Project and terminated the treaty, while Slovakia<sup>80</sup> unilaterally adopted and implemented an alternative plan for the Project.<sup>81</sup> The states agreed to take their dispute over the Project to the ICJ, which found that both of them acted unlawfully. While concluded that the “literal application” of the treaty should not prevail over “the purpose of the [t]reaty, and the intentions of the parties in concluding it”,<sup>82</sup> the Court did not offer its interpretation of the treaty in new circumstances. The ICJ held that it was up to the states to find integrated solution, taking into the account the objectives of the 1977 treaty, “the norms of international environmental law and the principles of the law of international watercourses”,<sup>83</sup> also suggesting they should resort to a third-party assistance and expertise in the future negotiation on the Project.<sup>84</sup> After the ICJ judgement, both states remained at their previous positions.<sup>85</sup> Obviously, while there was an international adjudicative forum available, it did not help articulate a clear message from agreed rules.

---

78 Hakimi, M., 2017, *The Work of International Law*, *Harvard International Law Journal*, Vol. 58, No. 1, pp. 20–21.

79 ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1977, *ICJ Reports 1997*, p. 7 (hereinafter: *Gabčíkovo-Nagymaros Case*). This project was joint investment planned the production of hydroelectricity, the improvement of navigation and the protection against flooding. It provided a single and indivisible operation arrangement by building the system of locks, one at Gabčíkovo (in Czechoslovakia) and the other at Nagymaros (in Hungary). Simultaneously, the contracting agreed to ensure that the quality of water in the Danube was not degraded as a result of the Project, and that obligations for the protection of nature regarding the construction and operation of the project would be observed. See *ibid.*, p. 17, para. 15.

80 At one point, Czechoslovakia had dissolved, and Slovakia had inherited its claim.

81 It began the work on damming the Danube in its territory.

82 *Gabčíkovo-Nagymaros Case*, pp. 78–79, para. 142.

83 *Ibid.*, p. 78, para. 141.

84 *Ibid.*, p. 79, para. 143.

85 After the ICJ judgement, both states remained to hold their previous positions. Slovakia continued to insist on the implementation of 1977 treaty, while Hungary opposed the Project as an outdated and harmful to the environment, insisting that the ICJ judgment does not put an obligation for it to build a dam. See more in Llamzon, A., 2007, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, *European Journal of International Law*, Vol. 18, No. 5, p. 834. While

In vast majority of instances of interpretation and application of international law rules, there is no international adjudicative body, so these processes are entirely left to states. At times, the meaning of the rule would remain unsolved between two or multiple different interpretations.<sup>86</sup> These are the situations where many observers would say international law is powerless to restrain states and secure compliance with its rules. However, in my mind, such conclusion oversimplifies the role of international law in inter-state relations. Namely, discretion of states in interpreting and applying an international law rule is not unlimited. They are bound by other rules of international law (such as rules of interpretation from the VCLT,<sup>87</sup> which enjoy the status of customary international law<sup>88</sup>), and the principles of international law. In these situations, the argumentative side of international law comes into the spotlight, as states usually use its interpretative tools to justify their interpretations of a specific rule. In this way, while disagreeing, states remain in the realm of international law. One would rarely see a blatant disregard for international law and a lack of at least basic justification based on it, as was the case with the US recognition of Israeli sovereignty over Golan Heights in April 2019 by the Trump administration.<sup>89</sup> Such stepping outside the realm of international law as an argumentative process is far more threatening for the international law project<sup>90</sup> than different interpretations of a specific rule. These instances testify to a normative decline of international law<sup>91</sup> or decline of its authority.<sup>92</sup>

---

the negotiation between parties were initiated, with their ups and downs, to this day the agreed solution for the Project has not been reached. For the aftermath of the judgment, see *ibid.*, pp. 833–835. This led some commentators to claim that “it is arguable that the Court was abdicating the very responsibility that the parties had assigned to it”. Evans, M., Okowa, P., 1998, Recent Cases: Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *International and Comparative Law Quarterly*, Vol. 47, No. 3, p. 697. Still, the ruling of the ICJ can be perceived to be a pragmatic one, as there would be very serious financial and political implications if it decided to rule that the contractual regime was frustrated. *Ibid.*, p. 697.

86 For the argument that international law accommodates both cooperation and conflict see, Hakimi, M., 2017a.

87 See VCLT, Arts. 31 and 32.

88 See ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Reports*, p. 53, pp. 69–70, para. 48; Dörr, O., Article 31. General Rule of Interpretation, in: Dörr, O., Schmalenbach, K., (eds.), 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg – Dordrecht, Springer, pp. 523–525.

89 State Diplomatic and Consular Relations, 2019, United States Recognizes Israeli Sovereignty Over the Golan Heights, *American Journal of International Law*, Vol. 113, No. 3, p. 617.

90 Hakimi, M., 2020, p. 1294ff.

91 Scott, S., 2018, The Decline of International Law as a Normative Ideal, *Victoria University of Wellington Law Review*, Vol. 49, No. 4, pp. 627–643.

92 Hakimi, M., 2020, p. 1300.

So, while different interpretations of rules can indeed threaten the compliance and undermine legitimacy and effectiveness of international law rules, it seems that it is far more important that states remain within the framework of international law when applying and interpreting them.<sup>93</sup> This is essential for two reasons. First, it is constructive of international community,<sup>94</sup> as by using the tools and ground rules of international law states remain participants in a joint enterprise. Second, argumentative practice which is built on disagreements about interpretation and application of a specific rule may contribute to finding out which values lay at its core and secure the balance among different states and their distinctive interests. I will proceed to explain how.

#### 4. FINDING VALUE IN INDETERMINATE RULES: ACCOMMODATING DISAGREEMENT

In the preceding section, I have argued that the existence of indeterminate rules in international law is inevitable due to diversity of states, their largely different values, and complexities of issues that rules attempt to regulate. Here, I will offer arguments why we should not look at the uncertainty stemming from indeterminate rules only as a danger undermining legitimacy and efficacy of international law, but also as an opportunity. I will base my arguments on the work of Waldron and Hakimi.

My primary claim is that indeterminate rules accommodate disagreement, which holds an independent and distinctive value in law, as argued by Waldron.<sup>95</sup> I will extensively quote him here:

*The fallacy of modern positivism is its exclusive emphasis on the command-and-control aspect of law, without any reference to the culture of argument that it frames, sponsors, and institutionalizes. The institutionalized recognition of a distinctive set of norms may be an important feature, but at least as important is what we do in law with the norms that we identify. We do not just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a continual process of argument, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us.*<sup>96</sup>

---

93 *Ibid.*

94 For more arguments on this see Hakimi, M., 2017, Constructing an International Community, *American Journal of International Law*, Vol. 111, No. 2, pp. 317–356; Hakimi, M., 2018.

95 Waldron, J., 2008, p. 56.

96 Waldron, J., 2008, p. 56. Emphasis added. I am aware there are other takes on law but discussing them is beyond the scope of this paper. For different approaches to

Relying on Dworkin<sup>97</sup> and MacCormick,<sup>98</sup> Waldron explained that disagreements about the law on a specific matter are an integral element of the legal order, so that any attempt to conceptualize the law must accommodate these disagreements. “Moreover, [law] must be able to explain this disagreement not just as a jurisprudential puzzlement or pathology, but as a distinctive aspect of legal practice.”<sup>99</sup> Law’s procedural, rational, and argumentative aspects provide such explanation.<sup>100</sup> Waldron has persuasively shown that these important aspects of law<sup>101</sup> would be neglected if not denigrated, if we emphasize “only the clarity that crisp and determinate rules provide and the settlement and predictability that follow from their straightforward application”.<sup>102</sup> Thus, if we are not to neglect international law’s procedural, rational, and argumentative side, we should be careful not to view indeterminate international law rule as its flaw.<sup>103</sup>

Undoubtedly, indeterminate rules are likely to enhance opportunity for states’ self-interested interpretation and application of such rules.<sup>104</sup> This, in turn, opens the door to disagreement, *i.e.*, to conflicting arguments on the meaning of a specific rule. However, these arguments are valuable,<sup>105</sup> as they are “integral part of how law works”.<sup>106</sup> In other words, while indeterminate rules accommodate and reinvigorate arguments regarding their content, “arguing in law is desirable [...] even when it does not appear to settle an issue in dispute or to have an operational effect”.<sup>107</sup> However, in order to be productive disagreements about the content of a rule cannot be detached from other relevant rules and principles of

---

and conceptualizations of international law, see Ratner, S., Slaughter, A-M., 1999, *The Method Is the Message*, *American Journal of International Law*, Vol. 93, No. 2, pp. 410–423. For differences in international law scholarship between Europe and the United States see Verdirame, G., 2007, *The Divided West: International Lawyers in Europe and America*, *European Journal of International Law*, Vol. 18, No. 3, pp. 553–580.

97 Dworkin, R., 2004, *Hart’s Postscript and the Character of Political Philosophy*, *Oxford Journal of Legal Studies*, Vol. 24, No. 1, pp. 1–37.

98 MacCormick, N., 2005, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, Oxford, Oxford University Press.

99 Waldron, J., 2008, p. 50.

100 *Ibid.*, p. 59.

101 As well as the notion of the rule of law.

102 Waldron, J., 2008, p. 59.

103 Waldron, J., 1994, pp. 539–540 (on general claim that indeterminate terms “should not necessarily be regarded as a flaw in a legal provision”).

104 Abbott, K. *et al.*, 2002, p. 413, fn. 26.

105 Waldron, J., 2008, pp. 49–50.

106 *Ibid.*, p. 60.

107 Hakimi, M., 2020, p. 1301.

international law. Disagreements need to be framed within international law,<sup>108</sup> which provides ground rules<sup>109</sup> and language<sup>110</sup> to justify relevant yet diverging positions on the interpretation of a specific rule. Here the argumentative<sup>111</sup> side of international law comes into play, and it provides various benefits.

Namely, argumentative practice has independent value in international law.<sup>112</sup> It can help secure the balance required for the functioning of the international law and reveal the values at heart of international law arrangements.<sup>113</sup> Additionally, international argumentative practice is about other things as well. As Hakimi has shown, it helps in (a) building and showing respect,<sup>114</sup> (b) constituting transnational or international community<sup>115</sup> and (3) holding decision-maker accountable.<sup>116</sup> So, even when a rule of international law does not settle a disputed issue nor has an operational effect,<sup>117</sup> it still does these important things. Finally, international argumentative practice provides evidence of how international law works.<sup>118</sup> So, while indeterminate rules do not provide clear message to

---

108 See more in *ibid.* For the example of international law channeling disputes, including those politically charged, see Papić, T., The Political Aftermath of ICJ's Kosovo Opinion, in: Milanović, M., Wood, M., (eds.), 2015, *The Law and Politics of Kosovo Advisory Opinion*, Oxford, Oxford University Press, pp. 240–267. See also Papić, T., 2021, De-recognition of States: The Case of Kosovo, *Cornell Journal of International Law*, Vol. 53, No. 4, p. 691.

109 Hakimi, M., 2017b, p. 328 (“International law establishes a set of ground rules—texts, processes, methods, sources of authority, and so on—that structure cross-border interactions”).

110 Cohen, H., 2012, Finding International Law, Part II: Our Fragmenting Legal Community, *New York University Journal of International Law and Politics*, Vol. 44, pp. 1049–1107 (“Law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora using very specific language and procedures.” *Ibid.*, p. 1067). See also Yasuaki, O., 2003, International Law in and with International Politics: The Functions of International Law in International Society, *European Journal of International Law*, Vol. 14, No. 1, pp. 105–139, 130–134.

111 International law structures an argumentative practice. Most prominent proponent of this view is Koskenniemi, see Koskenniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press.

112 Hakimi, M., 2020. For different positions, claiming argumentative practice to be a cheap talk see Goldsmith, J., Posner, E., 2005, *The Limits of International Law*, New York, Oxford University Press, pp. 170–184.

113 For interpretative take on international law, see Çali, B., 2009.

114 Hakimi, M., 2020, pp. 1302–1303.

115 *Ibid.*, pp. 1303–1304.

116 *Ibid.*, p. 1305.

117 *Ibid.*, p. 1301.

118 Hakimi, M., 2017a.

fulfil “command-and-control” aspect of law, they nevertheless serve these important functions.

Most disagreements on the content of the rule are indeed framed within international law arguments. States do not tend to dismiss a rule, but instead conceal facts, offer alternative interpretations on its application, or strive to provide justification based in international law for the conduct they have chosen to pursue.<sup>119</sup> In all these instances the legitimacy of a rule can be said to be upheld.<sup>120</sup> Moreover, disagreements framed within international law do not undermine the normativity of international law but show the importance of its argumentative side, which helps preserve required balance in a complex reality of international encounters which different interests and values states ascribe to, which result in different policies, approaches and legal interpretations.<sup>121</sup> I will use the examples of indeterminate rules already described in previous part – the vague provision on the general duty to negotiate from Article VI of the NPT and the ambiguous text of the UNSC Resolution 2249 – to demonstrate this point.

While being indeterminate, *i.e.* vague, the duty of good faith negotiation on measures leading to cessation of nuclear race and to nuclear disarmament stabilizes the NPT, as explained by Hakimi.<sup>122</sup> As disarmament is not a feasible option, a duty to disarm would make the key nuclear weapons states likely to withdraw from the treaty or disregard its mandate.<sup>123</sup> The duty to negotiate disarmament keeps them in. At the same time, it provides a platform for dissatisfied developing non-nuclear weapons states to continue to express their discontent with unequal treatment of nuclear and non-nuclear weapon states by the NPT.<sup>124</sup> This enables them to refrain from more destabilizing steps, such as withdrawing from the NPT altogether.<sup>125</sup> The failure to disarm on the part of nuclear weapons states is used by non-nuclear weapons states “to justify resisting new

119 Franck, T., 2006, p. 96.

120 *Ibid.*, p. 95 (relying on Hart, Franck claimed this to be “another important, but hidden, indicator of a law’s legitimacy: that those who violate its strictures invariably claim not to be doing so.”) See examples regarding UN Charter rules on the use of force in *ibid.*, pp. 95–98.

121 See Hakimi, M., 2017a.

122 *Ibid.*, pp. 36–37.

123 *Ibid.*, p. 37.

124 For the analysis of different position toward non-compliance with the NPT, with the special emphasis on the position of the members of the Non-Aligned Movement to Iran’s violation of the NPT of 2002, see Ogilvie-White, T., 2007, International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance, *European Journal of International Law*, Vol. 18, No. 3, p. 458.

125 Hakimi, M., 2017a, p. 37.

non-proliferation obligations, which in their view fall disproportionately on them.”<sup>126</sup> In another words, they propose to do more on non-proliferation when nuclear weapon states do more on disarmament.<sup>127</sup> In this way, the duty to negotiate, while indeterminate, provides a platform for disagreement on disarmament, which keeps the NPT “in check and help preserve the current, uneasy but longstanding balance”<sup>128</sup>

Indeterminacy, stemming from the ambiguity of the text of UNSC Resolution 2249 – which did not legally authorize the military action against IS in Syria and Iraq but pretended to do so – accommodated disagreements among states on the legal basis for the actions against IS and provided a legitimate platform for action endorsed by the prime institutional authority on the use of force, the UNSC. First, the ambiguity allowed the Resolution 2249 to be unanimously adopted. Second, it provided states with an opportunity to incorporate different legal grounds for taking military actions against IS.<sup>129</sup> Russia was relying on the consent by the Syrian government, as was the US-led coalition regarding action taken within Iraq.<sup>130</sup> Regarding actions taken in Syria, US was relying on the collective self-defense argument, but also made individual self-defense argument, as did the UK<sup>131</sup> and France.<sup>132</sup> Syria, of course, regarded military actions of Western states in Syria as unlawful because they were conducted without its consent.<sup>133</sup>

By incorporating all legal grounds raised to justify actions already taking place, the Resolution 2249 allowed all parties involved in Syria to get closer politically,<sup>134</sup> without changing their existing legal narratives on their operations in Syria. In other words, it accommodated their disagreements on the legal ground for action. This is not a small thing. As Akande and Milanovic have explained, this resolution was designed to “provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal

---

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 For references on different usages of Resolution 2249, see Hakimi, M., 2018, p. 189, fn. 195.

130 Akande, D., Milanovic, M., 2015.

131 See the transcripts of the debate of 26 November 2015 in the House of Commons, oral answers of the Attorney General “Syria: Legality of Airstrikes”, pp. 1468–1469 (<https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm>, 21. 5. 2021).

132 Akande, D., Milanovic, M., 2015.

133 *Ibid.*

134 *Ibid.*

authority from the Council itself<sup>135</sup>. Moreover, the Resolution gave the imprimatur of international law, and hence provided a multilateral legitimacy to actions taken against IS and to the actions states were about to take.<sup>136</sup> At the same time, it worked to undermine the claims and concerns about the illegality of action against IS in Syria.<sup>137</sup> In any case, a legitimate front against terrorist attacks by IS was created. It was not a united or joint front, as states disagree on the legal grounds for action, but an amalgamated one, which was still able to provide a response to the threat of terrorism.

While indeterminacy of some rules can be healed by interpretation using the customary rules of interpretation embodied in the VCLT or by the work of adjudicative bodies, at times the indeterminacy of rules cannot be removed by the legal analysis, no matter how competent and meticulous. In these instances, the reading of the rule is in fact solely based on policy grounds. This has been demonstrated by Milanovic to be the case with rules on the use of force (*jus ad bellum*) against non-state actors, specifically the exercise of the right to self-defense (Article 51 of the UN Charter) against them.<sup>138</sup> This right is an exception to the prohibition on the use of force (Article 2(4) of the UN Charter), which operates exclusively among states.<sup>139</sup> After 9/11 non-state actor (Al-Qaida) attacks against the US, there was a broad consensus that the US lawfully exercised its right to self-defense in Afghanistan, where Al-Qaida was operating from. Milanovic has shown that the practice and *opinion juris* of states on the issue is so ambiguous that it is impossible to discern between two possible readings of Article 51: the one that requires attribution of Al-Qaida's attacks to Afghanistan<sup>140</sup> or the one that does not (in which case the

135 *Ibid.*

136 *Ibid.* This is the usual consequence of ambiguous resolutions unanimously adopted, for example UNSC Resolution 1441, UN Doc. S/RES/1441 (8 December 2002), see Byers, M., 2004, p. 173.

137 Hakimi, M., 2018, p. 189. Similar arguments have been made in respect to resolution 1441. *Ibid.*, p. 174.

138 Milanovic, M., 2010, Self-Defense and Non-State Actors: Indeterminacy and the Jus Ad Bellum, *EJIL: Talk!* (<https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>, 25. 5. 2021).

139 Milanovic, M., 2010; Hakimi, M., 2017a, pp. 21–22.

140 However, the general rules of attribution of non-state actors to state cannot accommodate the practice of states and *opinion juris* in respect to the US invasion in Afghanistan it can be that “the general rules of attribution have either changed, or *lex specialis* rules of attribution have emerged, whether confined to ‘terrorist’ armed attacks or to the *jus ad bellum* more broadly, to allow for looser standard of attribution, such as harboring terrorists or complicity in their actions.” Milanovic, M., 2010. See also Ratner, S., 2002, Jus Ad Bellum and Jus in Bello after September 11, *American Journal of International*

conduct against the state where a non-state actor operates justifies violations of its sovereignty).<sup>141</sup> These two readings are not only conceptually different but also have broader implications.<sup>142</sup> The rule on self-defense against non-state actors remains “utterly indeterminate”,<sup>143</sup> which is caused by the indeterminacy of state practice and *opinio juris*. This boils down to choosing a reading of Article 51 based solely on policy grounds.<sup>144</sup>

I agree with Milanovic that there is nothing wrong in admitting the law’s indeterminacy and acknowledging that the decision needs to be made purely on policy grounds. Still, each policy option needs to be shaped within the framework of international law, which contributes to the understanding of values behind the rule on self-defense, the practice of states and the way international law operates to constrain them.

## 5. CONCLUSION

Undoubtedly, the way one views uncertainty in international law will depend on the assumption one adopts on the nature of international law. If one conceptualizes the law exclusively as a body of rules, one will be less inclined to find any value in indeterminate rules which bring uncertainty. On the other hand, if one sees the law also as a “dynamic set of processes”,<sup>145</sup> there would be ample space to find the value of such rules. I clearly belong to this second camp.

International law has both regulatory and constitutive effects. It influences state’s behavior, not just by providing the criteria for legal actions (regulatory), but also by requiring them to justify their policy choices in terms of international law (constitutive).<sup>146</sup> Thus, international law is not only about

---

*Law*, Vol. 96, No. 4, pp. 905–921; Tams, C., 2009, The Use of Force against Terrorists, *European Journal of International Law*, Vol. 20, No. 2, pp. 359–397.

141 Different arguments have been advanced in this respect from the territorial state being complicit or actively supporting the non-state actor in its armed attack; it failed to exercise due diligence, or it did exercise it, but nonetheless it was unable to prevent the attack. See more in Trapp, K., 2007, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, *International and Comparative Law Quarterly*, Vol. 56, No. 1, pp. 141–156; Milanovic, M., 2010; Milanovic, M., 2009, State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücker, *Leiden Journal of International Law*, Vol. 22, No. 2, pp. 307–324.

142 Milanovic, M., 2010.

143 *Ibid.*

144 *Ibid.*

145 Ratner, S., Slaughter, A-M., 1999, The Method Is the Message, *American Journal of International Law*, Vol. 93, No. 2, p. 410.

146 For more on the constitutive side of international law see Hurd, I., 2017, *How to Do Things with International Law*, Princeton, Princeton University Press.

the rules which regulate a conduct of states in international realm (again, regulatory), but also about “how we explain, justify, argue about, bolster, and undermine particular governance decisions, which must be made in concrete settings in which different policy objectives invariably intersect and only some people’s priorities take precedence” (again, constitutive).<sup>147</sup>

Indeterminate international rules accommodate disagreements among states, which stem both from the divergence of their interests and the complexity of issues they try to regulate. This, in turn, enables at least minimal regulation of certain contested issues but, as Hakimi has shown, also builds international community, helps in discerning the values laying at the heart of the rule and, moreover, explains how international law operates. As Besson claimed, “[k]nowing precisely where we stand is not always the point of a provision: instead, the point may be to ensure that certain reasonable debates take place in our society rather than to settle them entirely.”<sup>148</sup>

Without any space for debate, we can hardly claim that the international law project would be worth pursuing.<sup>149</sup> For these reasons, I agree with and expound on what Jovanović is hinting at: that absolute clarity in international law is not desirable. Striving for absolute certainty (even if such a thing were possible) would not only impoverish international law of its argumentative, procedural, and rational side, but would also work against regulatory pull of international law in contested areas and would ultimately undermine functioning of international legal community.

This is not to say that international law should strive to enhance uncertainty; on the contrary, it should strive to mitigate it. But in cases when indeterminacy of rules is inevitable due to complexities of issues they try to regulate, or to the diversity of states, who subscribe to different values and have diverse interests, we should be careful not to view uncertainty as a shortcoming undermining the international law project itself. Indeterminate rules provide an opportunity for debate, which has been demonstrated to have an independent value in law.<sup>150</sup> However, this claim is contingent upon a debate on the interpretation of an indeterminate rule being contained within other rules and principles of international law, and mindful of the history, object, and purpose of the given practice. From this perspective, uncertainty brought by indeterminate international rules is not bad news. We should accept it, embrace it and make use of it for preserving other important aspects of international law which go beyond mere compliance with its rules.

---

147 Hakimi, M., 2020, p. 1306.

148 Besson, S., 2005, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford and Portland, Oregon, Hart Publishing, p. 117.

149 Hakimi, M., 2020, p. 1286.

150 Waldron, J., 2008, p. 56.

## BIBLIOGRAPHY

1. Abbott, K. *et al.*, 2000, The Concept of Legalization, *International Organizations*, Vol. 54, No. 3, pp. 401–419.
2. Arai-Takahashi, Y., The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry, in: Føllesdal, A., Peters, B., Ulfstein, G., (eds.), 2013, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, pp. 62–105.
3. Besson, S., 2005, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford and Portland, Oregon, Hart Publishing.
4. Bilder, R., 1962, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, *American Journal of International Law*, Vol. 56, No. 3, pp. 633–684.
5. Brownlie, I., 2003, *Principles of Public International Law*, Oxford, Oxford University Press.
6. Brunnée, J., Troope, S., 2011, Interactional International Law: An Introduction, *International Theory*, Vol. 3, No. 2, pp. 307–318.
7. Byers, M., 2004, Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity, *Global Governance*, Vol. 10, No. 2, pp. 165–186.
8. Byers, M., 2020, Still Agreeing to Disagree: International Security and Constructive Ambiguity, *Journal on the Use of Force and International Law*, pp. 1–24 (<https://doi.org/10.1080/20531702.2020.1761656>, 15. 5. 2020).
9. Çali, B., 2009, On Interpretivism and International Law, *European Journal of International Law*, Vol. 20, No. 3, pp. 805–822.
10. Cohen, H., 2012, Finding International Law, Part II: Our Fragmenting Legal Community, *New York University Journal of International Law and Politics*, Vol. 44, pp. 1049–1107.
11. Dolzer, R., 2013, Fair and Equitable Treatment: Today's Contours, *Santa Clara Journal of International Law*, Vol. 12, No. 1, pp. 7–33.
12. Donoho, D. L., 2011, Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights, *Emory International Law Review*, Vol. 15, No. 2, pp. 391–466.
13. Dörr, O., Article 31. General Rule of Interpretation, in: Dörr, O., Schmalenbach, K., (eds.), 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg, Dordrecht, Springer, pp. 521–570.
14. Dworkin, R., 2004, Hart's Postscript and the Character of Political Philosophy, *Oxford Journal of Legal Studies*, Vol. 24, No. 1, pp. 1–37.
15. Evans, M., Okowa, P., 1998, Recent Cases: Case Concerning the Gabčíkovo-Nagy-*maros* Project (Hungary/Slovakia), *International and Comparative Law Quarterly*, Vol. 47, No. 3, pp. 688–697.
16. Franck, T., 1988, Legitimacy in the International System, *American Journal of International Law*, Vol. 82, No. 4, pp. 88–106.
17. Franck, T., 1990, *The Power of Legitimacy Among Nations*, Oxford, Oxford University Press.

18. Gerards, J., 2013, How to Improve the Necessity Test of the European Court of Human Rights, *International Journal of Constitutional Law*, Vol. 11, No. 2, pp. 466–490.
19. Goldsmith, J., Posner, E., 2005, *The Limits of International Law*, New York, Oxford University Press, pp. 170–184.
20. Guzman, A., 2005, Saving Customary International Law, *Michigan Journal of International Law*, Vol. 27, No. 1, pp. 115–176.
21. Hakimi, M., 2017, Constructing an International Community, *American Journal of International Law*, Vol. 111, No. 2, pp. 317–356.
22. Hakimi, M., 2017, The Work of International Law, *Harvard International Law Journal*, Vol. 58, No. 1, pp. 1–46.
23. Hakimi, M., 2018, The Jus Ad Bellum's Regulatory Form, *American Journal of International Law*, Vol. 112, No. 2, pp. 151–190.
24. Hakimi, M., 2020, Why Should We Care About International Law?, *Michigan Law Review*, Vol. 118, No. 6, pp. 1283–1306.
25. Hurd, I., 2017, *How to Do Things with International Law*, Princeton, Princeton University Press.
26. Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, New York, Cambridge University Press.
27. Kammerhofer, J., 2011, *Uncertainty in International Law – A Kelsenian Perspective*, London, Routledge.
28. Kennedy, D., 1994, A New World Order: Yesterday, Today, and Tomorrow, *Transnational Law and Contemporary Problems*, Vol. 4, No. 2, pp. 329–375.
29. Koskenniemi, M., 2001, Solidarity Measures: State Responsibility as a New International Order?, *British Yearbook of International Law*, Vol. 72, No. 1, pp. 337–356.
30. Koskenniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press.
31. Llamzon, A., 2007, Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *European Journal of International Law*, Vol. 18, No. 5, pp. 815–852.
32. MacCormick, N., 2005, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, Oxford, Oxford University Press.
33. Milanovic, M., 2009, State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücker, *Leiden Journal of International Law*, Vol. 22, No. 2, pp. 307–324.
34. Ogilvie-White, T., 2007, International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance, *European Journal of International Law*, Vol. 18, No. 3, pp. 453–476.
35. Papić, T., 2021, De-recognition of States: The Case of Kosovo, *Cornell Journal of International Law*, Vol. 53, No. 2, pp. 101–152.
36. Papić, T., The Political Aftermath of ICJ's Kosovo Opinion, in: Milanović, M., Wood, M., (eds.), 2015, *The Law and Politics of Kosovo Advisory Opinion*, Oxford, Oxford University Press, pp. 240–267.
37. Poscher, R., 2010, Ambiguity and Vagueness in Legal Interpretation, in: Solan, L., Tiersma, P., (eds.), 2011, *Oxford Handbook on Language and Law*, Oxford

- University Press ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1651465](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651465), 3. 11. 2021).
38. Ratner, S., 2002, Jus Ad Bellum and Jus in Bello after September 11, *American Journal of International Law*, Vol. 96, No. 4, pp. 905–921.
  39. Ratner, S., Slaughter, A-M., 1999, The Method Is the Message, *American Journal of International Law*, Vol. 93, No. 2, pp. 410–423.
  40. Scott, S., 2018, The Decline of International Law as a Normative Ideal, *Victoria University of Wellington Law Review*, Vol. 49, No. 4, pp. 627–643.
  41. Shany, Y., 2006, Toward a General Margin of Appreciation Doctrine in International Law?, *European Journal of International Law*, Vol. 16, No. 5, pp. 907–940.
  42. State Diplomatic and Consular Relations, 2019, United States Recognizes Israeli Sovereignty Over the Golan Heights, *American Journal of International Law*, Vol. 113, No. 3, pp. 613–619.
  43. Tams, C., 2009, The Use of Force Against Terrorists, *European Journal of International Law*, Vol. 20, No. 2, pp. 359–397.
  44. Trapp, K., 2007, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, *International and Comparative Law Quarterly*, Vol. 56, No. 1, pp. 141–156.
  45. Verdirame, G., 2007, The Divided West: International Lawyers in Europe and America, *European Journal of International Law*, Vol. 18, No. 3, pp. 553–580.
  46. Waldron, J., 1994, Vagueness in Law and Language: Some Philosophical Issues, *California Law Review*, Vol. 82, No. 3, pp. 509–540.
  47. Waldron, J., 2008, The Concept and the Rule of Law, *Georgia Law Review*, Vol. 43, No. 1, pp. 1–61.
  48. Yannaca-Small, K., Fair and Equitable Treatment: Have Its Contours Fully Evolved? in: Yannaca-Small, K., (ed.), 2018, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford, Oxford University Press, pp. 501–531.
  49. Yasuaki, O., 2003, International Law in and with International Politics: The Functions of International Law in International Society, *European Journal of International Law*, Vol. 14, No. 1, pp. 105–139.

## TREATIES AND UN DOCUMENTS

1. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (adopted on 14 September 1963, entry into force 4 December 1969, *United Nations Treaty Series (UNTS)*, Vol. 704, p. 219.
2. Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force 3 September 1953, *European Treaty Series*, No. 5.
3. Convention Relative to the Treatment of Prisoners of War, adopted on 12 August 1949, entry into force 21 October 1950, *UNTS*, Vol. 75, p. 135.
4. International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force 23 March 1976, *UNTS*, Vol. 999, p. 171.

5. Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987, entry into force 1 January 1989, No. 26369.
6. Treaty on the Non-proliferation of Nuclear Weapons, adopted on 12 June 1968, entered into force 5 March 1970, *UNTS*, Vol. 726, p. 161.
7. United Nations Convention on the Law of the Sea, adopted on 10 December 1982, entry into force 16 November 1994, *UNTS*, Vol. 1833, p. 397.
8. Universal Copyright Convention (revised version), adopted on 24 July 1971, entered into force 10 July 1974, *UNTS*, Vol. 943, p. 178.
9. UNSC Resolution 1441, UN Doc. S/RES/1441 (8 December 2002).
10. UNSC Resolution 2249, UN Doc. S/RES/2249 (20 November 2015).
11. Vienna Convention on Consular Relations, adopted on 24 April 1963, entered into force 19 March 1967, *UNTS*, Vol. 596, p. 261.
12. Vienna Convention on Diplomatic Relations, adopted on 18 April 1961, entered into force on 24 April 1964, *UNTS*, Vol. 500, p. 212.
13. Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force 27 January 1980, *UNTS*, Vol. 1155, p. 331.

## CASE LAW

1. ECtHR, *Sunday Times v. the United Kingdom*, no. 6538/74, Judgment of 29 March 1979.
2. ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Reports*, p. 53.
3. ICJ, *Case Concerning the Continental Shelf* (Libyan Arabjamahiriya/Malta), Judgment of 3 June 1985, *ICJ Reports 1985*, p. 13.
4. ICJ, *Case Concerning the Continental Shelf* (Tunisia/Libyan Arabjamahiriya), Judgment of 24 February 1982, *ICJ Reports 1982*, p. 18.
5. ICJ, *Case Concerning the North Sea Continental Shelf* (FR Germany/Denmark; FR Germany/The Netherlands), Judgment of 20 February 1969, *ICJ Reports*, p. 3.
6. ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1977, *ICJ Reports 1997*, p. 7.
7. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 226.
8. ICSID, *Electrabel v. Hungary*, no. ARB/07/19, Award of 25 November 2015.
9. ICSID, *Lemire v. Ukraine*, no. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010.
10. ICSID, *Tecnicas Medioambientales Tecmed S. A. v. United Mexican States*, no. ARB(AF)/00/2, Award of 29 May 2003.

## INTERNET SOURCES

1. Akande, D., Milanovic, M., 2015, The Constructive Ambiguity of the Security Council's ISIS Resolution, *EJIL: Talk!* (<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>, 21. 5. 2020).

2. House of Commons, oral answers of the Attorney General “Syria: Legality of Airstrikes”, 26 November 2015, pp. 1468–1469 (<https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm>, 21. 5. 2021).
3. Milanovic, M., 2010, Self-Defense and Non-State Actors: Indeterminacy and the Jus Ad Bellum, *EJIL: Talk!* (<https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>, 25. 5. 2021).
4. OECD, 2004, Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, No. 2004/03, OECD Publishing (<http://dx.doi.org/10.1787/675702255435>, 12. 5. 2021).

## U ODBRANU NEIZVESNOSTI: DOBRE STRANE NEODREĐENIH PRAVILA MEĐUNARODNOG PRAVA

Tatjana Papić

### APSTRAKT

U članku se obrađuje pitanje neizvesnosti u međunarodnom pravu, i to neizvesnosti koja proističe iz neodređenih pravila međunarodnog prava. Pokazujući da su ovakva pravila neminovnost, koja proističe iz različitih interesa država ili složenosti pitanja koja regulišu, članak tvrdi da neodređena pravila nisu nikakva patologija niti mana međunarodnog prava, već da ona sa sobom nose određene vrednosti. Uočavanje ovih vrednosti podrazumeva sagledavanje prava mimo pukog korpusa različitih formalnih pravila i uzimanje u obzir njegovih proceduralnih, racionalnih i argumentativnih odlika. Tako, oslanjajući se na radove Valdrona i Hakimi i fokusirajući se na argumentativnu stranu međunarodnog prava, autorka ukazuje na te vrednosti kroz primere neodređenih pravila: opšte obaveze iz Ugovora o neširenju nuklearnog oružja (1968) i Rezolucije Saveta bezbednosti 2249, usvojene posle terorističkih napada u Parizu 2015, čiji je tekst školski primer „konstruktivne višeznačnosti”.

**Ključne reči:** neizvesnost, neodređena pravila, usaglašenost s međunarodnim pravom, argumentativna praksa, tumačenje, neslaganje, sukob, Ugovor o neširenju nuklearnog oružja, Rezolucija 2249, samoodbrana.

#### Article History:

Received: 7 October 2021

Accepted: 6 December 2021

ORIGINAL SCIENTIFIC ARTICLE

Miloš Hrnjaz\*

## NATURE OF CUSTOMARY INTERNATIONAL LAW: ALL WE NEED IS PRACTICE

**Abstract:** *The main objective of this paper is to critically assess the dominant additive theory of the formation of Customary International Law by using the concept of discursive normative practice and the work of Gerald Postema. My central conclusion is that the use of this concept provides an explanation of the process of formation of Customary International Law that is superior to the additive theory which consists of two elements – practice and opinio juris. On the other hand, Postema’s theory also has its own weaknesses, and this paper explores ways to improve it.*

**Key words:** International Law, Customary International Law, International Court of Justice, sources of international law, discursive normative practice.

### 1. INTRODUCTION

The paper is aligned with the still dominant paradigm in the theory of international law that sees both the practice and *opinio juris* as constituent components of the process of formation of Customary International Law (CIL).<sup>1</sup> The aspect it seeks to critically assess is the way practice, usually understood as one of the two elements that are fundamental to the formation of CIL, is being explained and dealt with by international law scholars and the International Court of Justice (ICJ). The main argument of the paper is that jurisprudence of the ICJ and most of the international law doctrine fail to provide an appropriate explanation of the process of formation of CIL.

In accordance with the work of Gerald Postema, I will argue in this paper that practice of international law-makers is the only element in the

\* Associate Professor, University of Belgrade – Faculty of Political Science; e-mail: milos.hrnjaz@fpn.bg.ac.rs

This article is the result of the work on the project “Political Identity of Serbia in Global and Regional Context” (ref number 179076) funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

1 I will use the term ‘additive theory’ for this dominant paradigm throughout the article.

formation of CIL.<sup>2</sup> However, this practice is very specific form of practice – discursive normative practice (DNP). In short, this means that actors are involved in the process of formation of CIL by offering normatively relevant claims and counterclaims on their deeds in global relations.<sup>3</sup> However, contrary to Postema's argumentation, I will argue that the process of formation of CIL must be seen as a deliberate process during which international lawmakers decide which behaviour will be legal in global relations.

The paper is drafted based on the following structure: the second section is devoted to the formal sources of international law and CIL. The third deals with the structure of CIL and the critical assessment of the dominant view of the practice as an element of CIL, including the relevant jurisprudence of the ICJ. In the fourth section of the paper, I will elaborate on Postema's use of the concept of DNP and its relevance for the nature and formation of CIL. Concluding remarks are provided at the end of the paper.

## 2. CUSTOMARY INTERNATIONAL LAW AS A FORMAL SOURCE OF INTERNATIONAL LAW

The stance on the nature of CIL is determined by the author's position on the nature of international law. More specifically, and in line with the main goal of this paper, in order to analyse the nature of CIL it is necessary to provide basic information on the process of creation of international law. Even though the source thesis is controversial<sup>4</sup> and has many fierce opponents among the international law scholars,<sup>5</sup> it is still commonly used to describe the process of international law-making.<sup>6</sup> The difference between the so-called material and formal sources of international law is sometimes

---

2 Postema, G. J., Custom in International Law: A Normative Practice Account, in: Perreau-Sassine, A., Murphy, J. B. (eds.), 2007, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, pp. 279–306; Postema, G. J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, pp. 707–738. More on the meaning of this notion and its importance for the process of creation of CIL see in Section 4.

3 For more details on this concept and its relevance for the formation of CIL see Section 4.

4 Besson, S., D'Aspremont, J. (eds.), 2018, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, pp. 3–8.

5 See e.g. Kelsen, H., 2003, *Principles of International Law*, The Lawbook Exchange; Ross, A., 2008, *A Textbook of International Law: General Part*, The Lawbook Exchange.

6 D'Aspremont, J., 2011, *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press.

used to explain in greater detail the process of creating law from non-law. Namely, even though there are some authors who describe material sources of international law as concrete acts in which formal sources of law could be found,<sup>7</sup> the concept of material sources of law is used in this paper as the factor of influence of the international community on the process of formation and substance of international law norms.<sup>8</sup> Kolb, for example, defines material sources “as a sociological fact explaining why, and in relation to what needs, the legislator has adopted a particular piece of legislation (in international law, a particular treaty or a customary rule)”.<sup>9</sup> It is not easy to provide clear answers to the question what those factors of influence of international community or motives of the legislators in concrete circumstances are. Usually, however, the power of the actors, their interests and interdependence, ethics and other factors are mentioned as key in this regard.

Be that as it may, material sources of law are still not sufficient for the creation of law from non-law. In order for this to happen, some additional criteria need to be fulfilled. Miodrag Jovanović argues that “a social practice is typically judged as falling within the category of ‘law’ if it consists of rules purporting to coordinate the behaviour of actors and to settle their disputes; if it possesses at least institutions in charge of judging whether those rules were violated; if the rules in question are guaranteed, normally through some form of a coercive mechanism; and if the rules are, overall, apt for inspection and appraisal in light of justice”.<sup>10</sup> Other authors support the argument that a competent institution needs to adopt the rule in an already accepted form and through a defined procedure.<sup>11</sup>

Therefore, material sources of law could become the law, but legislators need to use complex legal techniques to give them legal form. This complex and agreed process through which norms of international law are

7 Brownlie, I., 1998, *Principles of International Law* (5<sup>th</sup> edition), Oxford, Oxford University Press; Thirlway, H., 2014, *The Sources of International Law*, Oxford, Oxford University Press.

8 Hrnjaz, M., 2016, *Nastanak i utvrđivanje postojanja međunarodne običajne norme: praksa Međunarodnog suda pravde*, doktorska teza, Univerzitet u Beogradu – Fakultet političkih nauka, str. 25.

9 Kolb, R., *Legal History as a Source of International Law: From Classical to Modern International Law*, in: Besson, S., D’Aspremont, J. (eds.), 2018, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, pp. 279–80.

10 Jovanović, M., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, p. 76.

11 Hart, H. L. A., 1961, *The Concept of Law*, Oxford, Clarendon Press; Lukić, R., 2012, *Sistem filozofije prava*, Pravni fakultet Univerziteta u Beogradu.

created, modified or annulled is usually called formal sources of international law.<sup>12</sup> Sometimes, however, the problem could be the determination of the exact moment when material sources of law become formal sources. This is especially relevant for non-written sources of law such as CIL. In addition, there are numerous other controversies regarding the issue of formal sources of law in international law. For example, the international community does not have a constitution in which formal sources of international law could be stipulated. One of the consequences of this fact is the fierce disagreement in the doctrine of international law on the issue of the exact list of its formal sources. The (in)famous Article 38 of the ICJ Statute mentions international treaties, customary law and general principles of law; while some authors tend to see this as a closed list of formal sources of international law,<sup>13</sup> others argue that the list is in fact much broader.<sup>14</sup> There are, of course, many authors who believe that the intention of the creators of PCIJ (and later ICJ) Statute was not to produce a list of formal sources of international law, but only to help the Court by defining the applicable law to the Court.<sup>15</sup> This last statement is perfectly correct; however, it does not mean that the list mentioned in Article 38 has not become the list of formal sources of international law in the meantime, thanks to the will of law-makers.

Be that as it may, the main objective of this paper is to provide more details on the issue of CIL and it seems that there is a consensus that CIL is the formal source of international law.<sup>16</sup> However, it also seems that the consensus ends there, since everything but the fact that CIL exists is the subject of a hot debate among international law scholars.<sup>17</sup> The above Article 38 of the ICJ Statute provides the following definition of international custom – “evidence of general practice accepted as law”.<sup>18</sup> This definition was heavily criticised in the doctrine of international law. Rosalyn Higgins, for example, explained that it should be the other

---

12 Besson, S., *Theorizing Sources of International Law*, in: Besson, S., Tasioulas, J. (eds.), 2010, *The Philosophy of International Law*, Oxford University Press, p. 169.

13 Thirlway, H., 1972, *International Customary Law and Codification*, Leiden, Sijthoff & Noordhoff, Leiden.

14 Pellet, A., *Article 38*, in: Zimmermann, A., Oellers, K. F., Tomushat, C., Tams, C. J. (eds.), 2012, *A Statute of International Court of Justice, A Commentary*, Oxford, Oxford University Press.

15 See, e.g. D'Aspremont, J., 2011, *Formalism and the Sources of International Law, A Theory of Ascertainment of Legal Rules*, Oxford, Oxford University Press.

16 At least to those who do not refuse the concept of formal sources of international law.

17 More on this issue see: Hrnjaz, M., 2016, pp. 52–155.

18 Statute of the International Court of Justice (Statute of the Court | International Court of Justice (icj-cij.org) 9. 10. 2021).

way around – an international custom is not evidence of general practice accepted as law, general practice accepted as law is rather evidence of the existence of a custom.<sup>19</sup>

Besides the issue of definition, the name of this formal source has been disputed as well – is it correct to call it international custom?<sup>20</sup> It is crucial to stress that there is a distinction between a custom and a law as two different normative systems. CIL is interesting *inter alia* because it creates a bridge between the two, since it is a law derived from a custom. Hence, it is necessary to shed some light on this type of process of international law-making. Customary rules are usually placed between the rules of nature as a direct consequence of human nature, and valid legal rules made by rational human activity and through proper legal procedure.<sup>21</sup> James Bernard Murphy explains that both a habit and a convention are at the foundation of the custom:

*[...] customary habits are compared to natural instincts because they operate spontaneously, automatically, and tacitly. Custom here means a kind of second nature: our customary habits operate as unobtrusively as our breathing. In this sense, custom is like natural instinct except that it is learned in a particular social context. Yet custom is also described as a set of informal conventions, a set of practices of social coordination that arise from informal agreements without being imposed by enacted law.*<sup>22</sup>

However, one should bear in mind that a custom understood as an informal convention still lacks the quality of a valid law. Of course, some customs do become law, but not all. Some laws are actually enacted to cancel, change or sanction particular customs. Murphy further states that “law arises because of the profound shortcomings of customary social order: groups with incompatible customs come into conflict, interpretations of shared customs come into conflict, and rapid social change creates urgent demands for new customs. Law is not the foundation of social order but a remedy for the deficiencies of custom.”<sup>23</sup> At the same time, he is asking the key question: “But how can we clearly distinguish the stipulated order of law from the spontaneous order of

19 Higgins, R., 1995, *Problems and Process: International Law and How We Use It*, Oxford, Oxford University Press, p. 18.

20 Petersen, N., 2007, Customary Law Without Custom? Rules, Principles and the Role of State Practice in International Norm Creation, *American University International Law Review*, Vol. 23, Issue 2, pp. 275–310.

21 Hrnjaz, M., 2016, str. 52.

22 Murphy, J. B., Habit and Convention at the Heart of Custom, in: Perreau-Sassine, A., Murphy, J. B. (eds.), 2007, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, p. 54.

23 *Ibid.*, p. 76.

custom if some law is customary?”<sup>24</sup> The answer he provides is worth of a longer quote:

*No society can undertake to provide legal enforcement of all customs, so every society must decide which customs will be doubly enforced, both by customary sanctions and by legal sanctions. Customary law therefore refers to that subset of customs deliberately chosen for special enforcement. In this sense, customary law reflects not just the habitual and spontaneous order of custom but also the deliberately stipulated order of law. Moreover [...] only someone in a position of authority can stipulate what kind of customs will be treated as lawful.*<sup>25</sup>

Therefore, one should not forget that a custom and customary law are not the same thing. In the case of international law, this seems self-evident since the definition of international custom from Article 38 mentions practice accepted as law. The fact that for the creation of CIL custom needs to be deliberately stipulated as law arguably led the great majority of international law scholars and international judicial institutions to accept the theory of two elements of customary international norms – practice and *opinio juris*.<sup>26</sup> Almost all international law handbooks embrace this mainstream theory of formation of CIL.<sup>27</sup> Furthermore, in 2018 the International Law Commission adopted the Report on the topic of Identification of Customary International Law with Conclusion 2 (Two constituent elements): “To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)”.<sup>28</sup> In Conclusion 3, the Commission further stated: “Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element”.<sup>29</sup> In the Fifth report on the identification of customary international law, Special Rapporteur Sir Michael Wood noticed that “Conclusion 2 received wide support from States, thus once more confirming their approval of the two-element approach underpinning the conclusions and its applicability in all fields of international law”.<sup>30</sup>

---

24 *Ibid.*

25 *Ibid.*

26 I am using *opinio juris* and subjective element of CIL as synonyms in this text.

27 See, for example: Dixon, M., 2013, *Textbook on International Law* (7<sup>th</sup> edition), Oxford, Oxford University Press; Shaw, M., N., 2017, *International Law* (8<sup>th</sup> edition), Cambridge, Cambridge University Press; Klabbbers, J., 2017, *International Law* (2<sup>nd</sup> edition), Cambridge, Cambridge University Press.

28 Draft Conclusions on Identification of Customary International Law, 2018, International Law Commission, A/73/10.

29 *Ibid.*

30 International Law Commission, Fifth report on the identification of customary international law, A/CN.4/717, 14 March 2018, p. 12. Special Rapporteur explicitly men-

It is, therefore, reasonable to conclude that the two elements theory of CIL formation has a very wide support of States, international scholars and international judicial institutions. Nevertheless, numerous challenges concerning the relationship between the two elements and the assessment of evidence of their existence still remain. For example, Birgit Schlütter claims that “various writings divided the bulk of theories produced on the formation of customary international law merely according to whether theoretical approaches favour either the element of *opinio juris* or the requirement of state practice, or both or neither”.<sup>31</sup> Mendelson and Mulleson, and Byers are among the authors who underline the importance of practice in the formation of CIL.<sup>32</sup> Anthea Roberts, Bin Cheng and Michael Scharf are some of the many authors that could be labelled as representatives of those who emphasise the importance of *opinio juris*.<sup>33</sup> Then again, there are many authors who could be viewed as representatives of the so-called alternative approaches to this issue (Frederic Kirgis with his sliding scale approach<sup>34</sup> or John Tasioulas<sup>35</sup>).<sup>36</sup>

Finally, many authors claim that these disputes on the relationship between the two elements of CIL are impossible to resolve. Koskenniemi is arguably the most famous among them. He argues that “neither element can be dismissed or preferred to the other without this engendering immediately the objection that custom is either apologist (because it makes

---

tioned the support of Russian Federation, the United Kingdom, Chile, Sudan, Israel, Thailand, Viet Nam, Slovakia and Belarus, but, according to the best of our knowledge, there was no country which questioned the relevance of two elements theory.

- 31 Schlütter, B., 2010, *Developments in the Customary International Theory and the Practice of International Court of Justice and the International ad hoc Tribunals for Rwanda and Yugoslavia*, Leiden, Martinus Nijhoff Publishers, p. 15.
- 32 See, for example: Mendelson, M., 1999, *The Formation of Customary International Law*, Leiden, Martinus Nijhoff Publishers; International Law Association, 2000, Committee on Formation of Customary (General) Law (Final report of the Commission), London; Byers, M., 2003, *Custom, Power and the Power of the Rules: International Relations and Customary International Law*, Cambridge, Cambridge University Press.
- 33 See, for example: Roberts, A. E., 2001, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *The American Journal of International Law*, Vol. 95, pp. 757–791; Scharf, M. P., 2010, Seizing the “Grotian moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change, *Cornell Journal of International Law*, Vol. 43, pp. 439–463.
- 34 Kirgis, Jr F. L., 1987, Custom on a Sliding Scale, *American Society of International Law*, Vol. 81, pp. 146–151.
- 35 Tasioulas, J., 1996, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, *Oxford Journal of Legal Studies*, Vol. 16, pp. 85–128.
- 36 More on these various approaches and their critical assesment: Hrnjaz, M., 2016, str. 82–104.

no distinction between might and right) or utopian (because we cannot demonstrate its norms in a tangible fashion). Because both elements seek to delimit each other's distorting impact, the theory of custom needs to hold them independent from each other. But this it cannot do."<sup>37</sup>

While Koskenniemi commented on some of the theoretical issues that had to do with the relationship of the two CIL elements, the International Committee of the Red Cross (ICRC) commented on the separation of the two elements in practice: "It proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction."<sup>38</sup> Since the separation of the two elements still dominates the doctrine of international law and the practice of international judicial institutions, and states details on the dominant view on practice as an element of CIL will be provided in this contribution. By doing this, the weak spots of this approach will be detected as well.

### 3. THE PRACTICE AS AN ELEMENT OF CUSTOMARY INTERNATIONAL LAW

In this chapter, I will try to sketch the position of practice as an element of CIL in the dominant additive theory of formation of international customary norms. At the same time, I will underline several weak spots of this theory and set the scene for an alternative theoretical understanding of this process, dominantly relying on the work of Gerald Postema and the concept of discursive normative practice (DNP). Among these weak spots of additive theory the requirement of uniform practice and the disputed relationship between practice and *opinio juris* will be underlined.

Once again, the definition of CIL from Article 38 of the ICJ Statute states that international custom is general practice accepted as law. Hence, the definition does not say much about the criteria for the existence of the element of practice of international custom, except that practice needs to be general. Many issues remain unresolved: what counts as practice; what it means that practice needs to be general; whose practice it is; what the other requirements for practice as the element of CIL are, etc.<sup>39</sup>

It is stated in Conclusion 5 of the International Law Commission's Report on the identification of CIL that "State practice consists of conduct

---

37 Koskenniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press, pp. 410–411.

38 Henckaerts, J., Doswald-Beck, L. (eds.), 2005, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, p. XLVI.

39 Some of these issues will be just broadly sketched and others will be analyzed in more details.

of the State, whether in the exercise of its executive, legislative, judicial or other functions”.<sup>40</sup> One could conclude from this that the practice of a chief of state, government, minister of foreign affairs, or final judgments, count as practice of the state. State legislation also counts as state practice. Furthermore, statements from chief legal advisers, ministries of foreign affairs and state officials in international organisations, as well as written proceedings before international judicial institutions and many other acts of state officials also count as state practice. Jurisprudence of the ICJ has, *inter alia*, recognised treaties,<sup>41</sup> unilateral acts of states,<sup>42</sup> national legislation<sup>43</sup> and jurisprudence of national courts<sup>44</sup> as practice that could form CIL.<sup>45</sup>

One of the controversial issues in the Report on the formation of CIL was, however, whether exclusively a state’s practice should count towards the formation of CIL. Conclusion 4 of the Report stated as follows:

1. *The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.*
2. *In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.*
3. *Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.*<sup>46</sup>

Some states commented on this particular issue during the preparation of the Report. For instance, Austria was of the opinion that these conclusions do not “sufficiently reflect the growing participation of universal as well as regional international organisations in international relations

40 Draft Conclusions on Identification of Customary International Law, International Law Commission, A/73/10, 2018, p. 2.

41 ICJ, *Case concerning Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment of 12 April 1960, *ICJ Reports*, 1960, p. 6.

42 ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *ICJ Reports*, 1974, p. 3.

43 ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, *ICJ Reports*, 2002, p. 3.

44 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, *ICJ Reports*, 2012, p. 99.

45 More on the jurisprudence of the ICJ in this regard: Hrnjaz, M., 2016, str. 178–184.

46 Draft Conclusions on Identification of Customary International Law, International Law Commission, A/73/10, 2018, p. 2.

and therefore also in the formation of customary international law”.<sup>47</sup> Israel, on the other hand, made an argument that “as a rule, international law, including customary international law, is created almost exclusively by States. Therefore, generally speaking, no practice or *opinio juris* of other entities, such as international organisations, should serve as the basis for the identification of customary international law.”<sup>48</sup> USA joined this position even more firmly, making critical comments regarding the concrete role of the International Committee of the Red Cross in the domain of formation and identification of Customary International Humanitarian Law.<sup>49</sup> Since the issue of the practice of non-state actors and the formation of CIL is well beyond the purpose of this paper, it is perhaps enough to state that arguments made by most of the states were conservative to say the least, if one looks at the contemporary role of non-state actors both in the field of international relations and international law. This fact is especially obvious in certain fields of international law such as international humanitarian law.

The next important issue that needs to be resolved are the requirements that practice as an element of CIL needs to fulfil. As already discussed, all that the definition from Article 38 provides is that practice needs to be general. But what does that mean? First of all, it is certain that it means that practice does not need to be universal. In the world that consists of almost 200 states, and in the situation where an enormous amount of international law norms is constantly being developed in various new fields, this fact is crucial. The demand that all states/actors be involved in the practice in order for it to be able to qualify as the practice of CIL would make the formation of CIL practically impossible. But, the question of what it means that in concrete cases practice needs to be general, remains relatively unanswered.

In the *North Sea Continental Shelf* case, the ICJ ruled *inter alia* that “State practice should have been [...] *extensive*”.<sup>50</sup> It also used the term very widespread,<sup>51</sup> as confirmed in later cases such as the *Maritime Delimitation* case between Qatar and Bahrain.<sup>52</sup> The examples of *Fisheries* and

---

47 International Law Commission, Identification of customary international law (comments and observations received from governments), 14 February 2018, A/CN.4/716, p. 13.

48 *Ibid.*, p. 15.

49 *Ibid.*, pp. 18–22.

50 ICJ, *North Sea Continental Shelf Case*, Judgement 20 February 1969, *ICJ Reports*, 1969, p. 3, p. 43, para. 74.

51 *Ibid.*, para. 134.

52 ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits 16 February 2001, *ICJ Reports*, 2001, p. 102.

*North Sea Continental Shelf* cases illustrate the fact that the demand that practice be general must be assessed on a case-by-case basis. In *Fisheries*, for example, the Court analysed only the practices of Norway, France and the UK, but it is reasonable to presume that it concluded either that the practice of especially interested states needed to be investigated, or that other states had silently agreed to the practice of Norway. In the *North Sea Continental Shelf* case, on the other hand, the Court concluded that 15 cases in which the principle of equidistance has been used as the principle of delimitation between states “represented a very small proportion of those potentially calling for delimitation in a world as a whole”.<sup>53</sup> These examples provide arguments for the standpoint that practice as an element of CIL always needs to be interpreted in a broader context. No pattern of behaviour is self-evident.

I believe that this conclusion is even more obvious if one looks at the criterion firmly based in the jurisprudence of the ICJ stating that practice as an element of formation of CIL needs to be uniform. It should be said here that any normative order exists solely because there are numerous patterns of behaviour in the practice of agents. One of the functions of the law as a normative order is to prescribe the rules that will make patterns of behaviour legal or illegal. As stated above, legal norms could be based on customs that already exist.<sup>54</sup> However, the problem is how to recognise the pattern of behaviour which has been deliberately chosen to become CIL if the practice is not uniform and many patterns of behaviour exist in parallel? And what does it actually mean that practice needs to be uniform?

In its early jurisprudence, in the case between Norway and the United Kingdom on the right of fisheries near the Norwegian coast, the ICJ concluded that “the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose”.<sup>55</sup> In the *Asylum* case, the Court stated that “The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage”.<sup>56</sup> In the case between India and Portugal, the Court further confirmed that practice needs to be “consistent and uniform”.<sup>57</sup> These conclusions have become the part of international law handbooks dealing with CIL.

53 ICJ, *North Sea Continental Shelf Case*, p. 3, p. 44, para. 75.

54 See Section 2 for more details.

55 ICJ, *Fisheries case*, (United Kingdom v. Norway), Judgment of 18 December 1951, *ICJ Reports*, 1951, p. 116, p. 138.

56 ICJ, *Asylum*, (Colombia/Peru), Judgment of 20 November 1950, *ICJ Reports*, 1950, p. 266, p. 276.

57 ICJ, *Case concerning Right of Passage over Indian Territory*, p. 40.

Nevertheless, the practice of ICJ does not provide a clear answer to the question of what it means that practice needs to be uniform. Namely, in the above mentioned *Fisheries* case, the ICJ did respond to the UK's argument that Norwegian practice of maritime delimitation was not sufficiently consistent. The Court, however, concluded: "[...] that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court."<sup>58</sup> But how can one make a distinction between "few uncertainties or contradictions" in practice and those that could prevent the formation of CIL?

It is arguably even more difficult to resolve the issue of uniform practice in the case of prohibitive rules and restraint of behaviour. In such situations, what does it mean that states generally speaking ought to refrain from doing something? And if they do so, how do we know that their restraint is part of the practice as an element of CIL formation? Even more importantly, in the case of prohibitive rules of international law it is sometimes difficult to determine what the (customary) rule is, and what the violation of that rule would be. Rosalyn Higgins noted that there are customary (even *ius cogens*) norms, such as prohibition of torture, that are systematically violated by states on a regular basis.<sup>59</sup> What is the general practice then – torture or restraint from torture? Since it was not easy to answer this question, Higgins posed another one: Does that mean that "there is in fact no prohibition of torture under customary international law?"<sup>60</sup> She tried to resolve the issue by making the following argument:

*New norms require both practice and opinio juris before they can be said to represent customary international law. And so it is with the gradual death of existing norms and their replacement by others. The reason that the prohibition of torture continues to be a requirement of customary international law is [...] because opinio juris as to its normative status continues to exist[...] A new norm cannot emerge without both practice and opinio juris; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their opinio juris.*<sup>61</sup>

Even after this quote, many questions remained unanswered. First of all, it is not at all clear why practice and *opinio juris* are both needed for

---

58 ICJ, *Fisheries case*, Judgment, 1951, p. 138.

59 Higgins, R., 1995, *Problems and Proces: International Law and How We Use It*, p. 20.

60 *Ibid.*

61 *Ibid.*, p. 22.

the formation and disappearance of CIL. Someone could instead argue that if both elements are needed for the formation of CIL, then the loss of either must be enough for its disappearance. But, even more importantly, if one goes back to the example of torture, is it possible to argue that, during the formation of the customary norm on the prohibition of torture, both elements – general practice and *opinio juris* – existed? It is not easy to make the argument that states did not systematically torture people before the formation of this customary norm, and that they started to do exactly that after the customary norm of prohibition of torture was created. It seems that a better explanation could be that states both tortured and refrained from torture in various situations, and that they deliberately chose the prohibition of torture to become, at one moment, the customary norm of international law.<sup>62</sup>

It is, therefore, not by accident that the ICJ has had so many problems with the issue of restraint of behaviour, the criterion stating that practice needs to be uniform, and the formation of CIL. In arguably the most famous *Nicaragua* case (which was also mentioned by Judge Higgins), the Court was confronted with the issue of customary nature of the prohibition of the use of force in international relations. The Court was faced with the issue of whether it was possible to have the customary rule on the prohibition of the use of force despite numerous international armed conflicts in the world. Therefore, the Court famously stated as follows (its statement is worth of a longer quote):

*It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force [...] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*<sup>63</sup>

62 Perhaps this argumentation sounds counterintuitive, but more details on this issue will be provided in Section 4.

63 ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America). Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14, para. 186.

It is difficult to overstate the importance of this quote for understanding the process of formation and change of CIL. The first thing that ought to be noted is that the Court stated that practice should not be expected to be perfect, in the sense of complete consistency with the rule. Similar to the norm of the prohibition of torture, judges were of course painfully aware of numerous violations of the rule on the prohibition of threat or use of force in international relations. They concluded that, for the establishment of a customary norm, practice does not need to be in absolute, rigorous conformity with the rule, but rather consistent with the rule in general. The Court, therefore, started with the argument that “few uncertainties and contradictions” were not an obstacle to the formation of CIL (*Fisheries*), stating also that practice needed to be in conformity with the rule in general. However, it never offered additional arguments or criteria by which to measure whether practice in general is in conformity with the rule. It did, however, state something else: the customary rule continues to exist if (numerous) violations of the rule are treated as violations and not as new rules. Many authors claimed that these conclusions should be understood as an emphasis on the subjective element of CIL.<sup>64</sup> Maybe uniform practice is not so crucial if there is a strong *opinio juris* behind the rule? But even if one denies the correctness of this conclusion, it seems that after the *Nicaragua* case it is not possible to argue that practice and *opinio juris* could be ascertained independently. Other authors questioned the so called inductive and deductive methodology of the CIL ascertainment and called for a new interpretation of the Court’s methodology in this field – assertion.<sup>65</sup>

Stefan Talmon defines the deductive approach in the identification of CIL as “inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle”.<sup>66</sup> He claims that there are at least four situations in which it is not possible to use the inductive methodology for the identification of CIL (Talmon uses this term for the identification of CIL “as inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*”<sup>67</sup>):

- 1) State practice is non-existent because the question is too new;
- 2) State practice is conflicting or too disparate, and thus inconclusive;

---

64 For more details, see Section 2.

65 Talmon, S., 2015, Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion, *European Journal of International Law*, Vol. 26, No. 2, pp. 417–433.

66 *Ibid.*, p. 420.

67 *Ibid.*

- 3) The *opinio juris* of states cannot be established;
- 4) There is a discrepancy between state practice and *opinio juris*.<sup>68</sup>

However, this argumentation is not persuasive. In these four situations, there is no specific customary international rule which would regulate a particular situation. Hence, the ICJ may indeed use deductive legal reasoning to apply broader customary international rule to a particular situation. But that broader rule must be based on the inductive method.

More importantly for the goal of this paper, the passage once again illustrates the fact that it is virtually impossible to make conclusions on the practice itself without analysing the way states-actors interpreted that practice. There is a practical and theoretical inseparability of two elements. Despite the conclusion of the ILC Special Rapporteur that evidence of the two elements of CIL must be sought independently, it is impossible to conclude that the practice was general, constant or uniform without the analysis of the way the actors have interpreted it.

This conclusion was confirmed also in the *Nuclear Advisory Opinion*.<sup>69</sup> In his dissenting opinion in this case, Judge Weeramantry argued that between 180 and 185 states support the prohibition of the use of nuclear weapons.<sup>70</sup> Even though this claim seems exaggerated, there is no doubt that the (great) majority of states did believe that the use of nuclear weapons is prohibited by international law. However, in the Advisory Opinion, the ICJ decided that there was no customary rule on the prohibition of the use of nuclear weapons in 1996. It is worth noting in this regard that the Court first stated that some states argued that the prohibition of the use of nuclear weapons could be based on the “*consistent practice* of non-utilisation of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons”.<sup>71</sup> It, then, stated that, in the view of states that claimed that the use of nuclear weapons could be legal, the lack of use of this weapon in armed conflicts since 1945 “is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen”.<sup>72</sup> The Court went on to conclude that these arguments are proof of the lack of *opinio juris* with regard to the prohibition of the use of nuclear weapons. Does this mean

68 *Ibid.*, pp. 422–423.

69 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996, p. 226, para. 65.

70 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Dissenting Opinion of Judge Weeramantry, *ICJ Reports*, 1996, p. 226, p. 304.

71 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 65.

72 *Ibid.*, para 66.

that it is the *opinio juris*, and not the practice, that needs to be uniform? It seems that it is definitely impossible to ascertain the substance of practice as an element of CIL without its interpretation – especially, but not only, when agents are refraining from some form of practice.

#### 4. THE CONCEPT OF DISCURSIVE NORMATIVE PRACTICE AND THE FORMATION OF CIL

##### 4.1. POSTEMA'S CONCEPT OF DISCURSIVE NORMATIVE PRACTICE AND CIL

As previously mentioned, despite the fact that the theory of the two elements of CIL has various weak points, it remains dominant among the international law scholars, states and international judicial institutions.<sup>73</sup> Gerald Postema believes that one of the reasons for this has been the absence of any other plausible alternative.<sup>74</sup> Therefore, he offered that kind of alternative on several occasions.<sup>75</sup> Considering the so-called material element of CIL, Postema first noted that “there is no such thing as the custom’s rule—the regularity of behaviour—viewed on its own. It is a commonplace view of contemporary philosophy that the problem is not that no rule or pattern can be constructed from a collection of bits of behaviour, but rather that an indefinite number of such patterns are logically projectable from the same collection.”<sup>76</sup> Postema, therefore answers the dilemma surrounding the criterion that practice needs to be uniform in order to be an element of CIL – there is no such thing as uniform practice.

However, if that is correct, how is one to know what the rule of customary law is; if there is no single pattern of behaviour, there is no rule, right? Postema explains this by using the complex concept of normative practice. He claims that “custom following is never a matter of rote repetition of one’s past behaviour, disengaged imitation of observed behaviour of others, or simple application of a preconceived representation or rule. Rather, it involves the agent grasping the significance of some pattern and recognising its application in the given circumstances of the conduct,

---

73 For more details, see Section 2.

74 Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, p. 708.

75 Postema, G., J., Custom in International Law: A Normative Practice Account, in: 2007, *The Nature of Customary Law*; Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3.

76 Postema, G., J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, p. 715.

against the background of intermeshing anticipations and understandings of others.”<sup>77</sup> Hence, Postema claims that there is no custom if agents in the process do not understand the pattern and provide it with some meaning. He, however, adds that there are many different fields in which normative practice exists: a jazz music ensemble, the rules of international diplomacy, etc.<sup>78</sup> Since the rules of CIL represent the discursive normative practice, they are somewhat different:

*parties who engage in the in discursive normative practices are not only in the business of using and articulating concepts, but also they offer, explore, and assess reasons and arguments. The moves and countermoves they make are moves in argument—offering claims, counterclaims, challenges, and responses, offers of warrants for action and rejections of them [...] Identifying and fixing the requirements of norms of a discursive practice involves exploring the reasons and arguments for and against them and the conclusions that they support and those they do not support.*<sup>79</sup>

Therefore, Postema continues, in order to be certain whether a specific practice is legally significant (binding), just a matter of comity, or a mere convergence of interests, one needs to “look at the way the conduct is ‘read’ in the transnational public domain. In particular, it is determined by how the agents tend to characterise their actions, the terms in which they seek to vindicate them, how these attempts are taken up by other participants in the practice, how the actions are affirmed, resisted, criticised, and the like.”<sup>80</sup> Put differently, the issue of whether the action of agents is legally relevant does not depend on the mental state of the agents (their belief or acceptance) but on their proper articulation and defence based on the proprieties of the background normative practice.

By doing this, Postema refutes the additive theory on the formation of CIL. He claims that there is no material and subjective element of (international) customary norm. The use of concept of DNP enables him to make a systemic integration of deeds and words – “words and deeds are equally important elements of practice”<sup>81</sup> – and avoid the complex issue of the relationship between the two elements of customary norm. He adds that this does not mean that CIL could be understood as a mere process of argumentation, as believed by some scholars who insist on the importance of *opinio juris* in the process of formation of CIL, because arguments in the DNP are always arguments about, and drawn from, deeds.<sup>82</sup>

77 *Ibid.*, p. 726.

78 *Ibid.*, p. 729.

79 *Ibid.*

80 *Ibid.*, pp. 735–736.

81 *Ibid.*, p. 731.

82 *Ibid.*

#### 4.1.1. Critical assessment of Postema's conception of discursive normative practice and the formation of CIL

Postema's use of DNP in the explanation of the process of formation of CIL provides a more solid theoretical ground than additive theory. First of all, Postema rightly warns that there is an indefinite number of patterns in the same expressed behaviour. Therefore, one needs to refute the thesis that practice as an element of customary norm is self-evident, and that all one needs to do is to see whether the ascertained practice is general, uniform and constant. It is actually not possible to determine the substance and scope of the practice itself. Representatives of additive conception use *opinio juris* to differentiate between "ordinary" and legally relevant patterns of behaviour. Sometimes they describe this subjective element as belief, and sometimes as acceptance by the actors that a certain pattern of behaviour is legally relevant. However, both of these explanations have weaknesses.<sup>83</sup>

Postema rightly concludes that legal relevance of a pattern of behaviour depends on how the agents characterise their actions; however, this characterisation is not their belief or acceptance, but their (counter)claim on the substance and legal relevance of the practice. Of course, in some situations, their claim could be the acceptance of some other actor's claim that a particular behaviour is legally relevant.

By introducing the concept of DNP, Postema also resolves the issue of whether or not words constitute practice that is relevant for the formation of CIL. Put differently, he resolves the issue that concerns the relationship between words and deeds. As previously stated, the process of making claims and counterclaims is the crucial part of the process of formation of CIL. On the other hand, the formation of CIL should not be understood as a mere process of making claims and counterclaims in a vacuum, since these claims are always claims about the deeds of actors.

Now, it would be interesting to implement this theory of Postema on the normative discursive practice and formation of CIL on the already mentioned issue of the customary rule on the prohibition of torture. First of all, it is obvious that there is no single pattern of behaviour of states when it comes to the question of torture. It is possible to find both – torture and restraint from torture – in the practice of states. One solution to this situation is to state that there is no customary rule on the prohibition of torture since there is no uniform practice. Still, this conclusion seems counterintuitive, having in mind the general consensus that prohibition of torture is not only a customary rule, but also a *ius cogens* norm of international

---

83 See more on this issue: Hrnjaz, M., 2016.

law. Therefore, as already mentioned, the ICJ tried to find the solution in stating that, in such situations, practice as an element of CIL need not be perfectly, but generally consistent. However, it is not easy to grasp what it means that practice needs to be generally consistent in the case of the rule prohibiting torture. Even more importantly, the ICJ also concluded that, in such situations, it is important how actors interpret their behaviour. By doing this, the ICJ actually moved just one or two steps away from the concept of DNP. Namely, it did not formally deviate from the additive theory and the criterion according to which practice needs to be consistent (or at least generally consistent), but it did recognise the crucial role of the interpretation of that practice (regardless of the fact that it was mistakenly identified as *opinio juris*). A more solid explanation would be that even though there are many patterns of behaviour concerning the issue of torture or the use of force in international relations, actors' exchange of argumentation on these patterns (which is also part of the practice relevant for the formation of CIL) clearly shows that CIL exists regarding these issues.

To conclude, even though it is possible to identify more than one pattern of behaviour concerning prohibition of torture, the crucial thing is that actors (predominantly states) are offering the argument that using torture is, and should be, prohibited by the norms of international law. They mainly criticise other state actors that use torture. Similar to the conclusions of the ICJ regarding the prohibition on the use of force, when confronted with assessments that they are violating the rule on the prohibition of torture, actors do not deny the existence of the rule. It is possible to ascertain the basic contours of the substance of that rule through the analysis of the actors' argumentation.

This does not mean that Postema's theory on the normative discursive practice and the formation of CIL properly resolves all the contested issues that exist in the field. I will start with some of the problems, or weak spots of the theory. First of all, I have already mentioned that all theories of CIL are determined by their authors' position on the nature of international law. It is important to stress in this regard that I agree with the authors who claim that international law, including CIL, is not the product of a spontaneous process, but is stipulated through deliberate and agreed process and authorised by agents.<sup>84</sup> Therefore, the will of these actors is still crucial in the process of international law-making, even though the will of the actors should not be understood as their explicit acceptance of every single norm of international law. Postema's position on the will of law-makers and the formation of CIL is a complex one. He first notes that "although unwritten, custom has the nature and force of law. Its existence,

---

84 See Section 2 for arguments in this regard.

like that of all law, is a contingent matter, being a product of invention. However, custom is made not by individual human hands and wills, but *by life and time*.<sup>85</sup> He then criticises Francisco Suarez's conception on the formation of custom as the exercise of the will and intention, and connects this conception with the additive theory.

It seems that, by denying the will and the subjective attitude of actors in the process of formation of customary law, Postema insists above all on the individual will of actors. He underlines the inter-subjective character of discursive normative practice – commitments of actors made in this process “establish or presuppose a normative relation among participants in the practice, a kind of reciprocally recognized standings”.<sup>86</sup> I agree with Postema's conclusion that CIL is not made based on the will of one actor, but through the process of interdependent social interaction and the exchange of arguments, claims and counterclaims. I can also agree with his argument that the answer to the question whether some pattern of behaviour is obligatory or not is determined by how the agents tend to characterise their own actions.

However, I am not convinced that the will of the actors has nothing to do with the characterisation of their actions in the process of formation of CIL. There are, of course, various ways to create a concrete customary rule. But, if one was to look, for example, at the formation of the customary norm on the right of coastal states to use the continental shelf, they will arguably conclude that the decisive moment for the formation of this customary norm was the so-called Truman's Proclamation on the continental shelf from 1945.<sup>87</sup> It was by this Proclamation that the United States extended their jurisdiction to the submerged lands and subsoil of the outer continental shelf. Of course, the Proclamation, in and of itself, did not create the customary norm of the right of coastal states to extend their rights in this area, but there was a will of the United States to create this right. This customary norm was created by the (mostly positive) reactions (claims and counterclaims) of other states to the Proclamation, and by their will for this to become the norm of international law. There will be situations in which the first move of a state will be in violation of some already existing customary norm, but if, and only if, the reaction of other actors support that acclaimed legal right, one can make a convincing argument that a new norm of customary law has been created. Without said support, the described behaviour would continue to be treated as a violation of CIL.

---

85 Postema, G., J., 2012, p. 710.

86 *Ibid.*, p. 724.

87 Sharf, M. P., 2013, *Customary International Law in Times of Fundamental Change*, Cambridge, Cambridge University Press.

Therefore, the will of actors perceived through their argumentation on the behaviour is important for ascertaining which pattern of behaviour will become a part of CIL. It would be possible to conclude that a new CIL norm has been created by the collective will of law-making actors ascertained through their legal characterisation of concrete actions.<sup>88</sup>

Closely connected to this issue is Postema's claim that the substance of a concrete customary rule is always reinterpreted and in a constant flux: "Unlike legal systems with formally defined institutions for making and changing legal norms, customary regimes cannot admit a sharp distinction between the formation and the application of their norms... change typically comes through the same kind of actions that might as easily be seen by some participants as violations: *ex iniuria ius oritur*."<sup>89</sup> As stated above, I believe that it is completely possible for a violation to create a new rule, through later claims of the violator and the acceptance of those claims by other actors; however, strictly formally speaking, this violation would be the material source of that rule, which became a part of CIL through the above mentioned exchange of the actors' claims and counterclaims.<sup>90</sup>

The problem with Postema's position on the constant reinterpretation of the substance of the rule is that rules that are in constant flux cannot fulfil some of the main functions of legal rules. He is actually accepting the thesis that one of the main functions of (customary) legal rules is to enable cooperation and coordination of actors, since it could produce legitimate expectations. But, one might ask the following question: how is this possible if rules are in the process of constant reinterpretation? How could actors legitimately expect anything in the above described chaos? One way to try to avoid this problem would be to accept a pragmatic way of thinking: there are, of course, constant disputes on the substance of the rule, but in most situations actors will agree on its core. The other way would be to claim that the substance of the rule remains relatively stable (this is the question of degree) until the actors decide to change it. This, however, would go against Postema's main conclusions on the nature of CIL.

To conclude, even though Postema's argument on the formation of CIL in accordance with the notion of DNP is convincing, it still leaves us with the haunting question of the practical value of these conclusions if they were to be taken to the extreme. Namely, how could CIL, which is

88 Postema would arguably refused to accept this argumentation.

89 Postema, G. J., 2007, p. 291.

90 Of course, this actor will argue that change already happened since it does not want to admit the responsibility for the violation of the existing rule. Fortunately for this violator, systems of sanctions of international law is underdeveloped, so if the other actors accept its claim, the violator will usually avoid the sanctions.

undergoing constant change and whose substance cannot be ascertained “from the outside”, provide legal certainty? Put differently, is it possible to use the concept of DNP to explain the process of formation of CIL without the mentioned flaws?

I believe that this is possible even though it would mean more pragmatic than theoretically rigorous approach. As previously stated, this would mean that the process of formation of CIL would be understood as the process of exchange of arguments of authorized agents through which they collectively decide which customs will become the part of CIL.<sup>91</sup>

Nevertheless, some of the weaknesses of this formal source of law remain. Namely, in most of the situations it isn't possible to conclude with certainty the exact moment when the rule of CIL has been created. In addition, it is sometimes difficult to ascertain the precise substance of the rule. Usually, described situation provides the agents with huge discretion regarding their behaviour in global relations. Notwithstanding these weaknesses seen from the perspective of binding function of international law, the process of normative argumentation exchange and formation of CIL play very important functions of law in international legal order such as the functions of legitimating various interests of actors and communicating between them.<sup>92</sup>

In the end, one could possibly argue that the mentioned process of exchange of arguments of authorized agents through which they create CIL could be understood as part of *opinio juris*. Nevertheless, this argumentation is not persuasive. Most of the representatives of additive theory claim that there is a clear separation of two elements of CIL and that they must be ascertained separately. This has been confirmed in the work of International Law Commission. But, I have already demonstrated that this separation is not maintainable since it is not possible to understand the meaning of practice without its interpretation by authorized agents. This is especially obvious in the cases of application of criteria that practice needs to be uniform or/and in the case of prohibitive rules. Hence, it is not possible to determine whether general, constant and uniform practice exists and afterwards to conclude whether that practice is followed by the sense of legal obligation through the exchange of arguments of agents. The direct consequence of this conclusion is that exchange of argumentation, claims and counterclaims, is not addition to the practice of authorized agents –

---

91 Of course, this decision-making process is very different than the one of adopting international treaties for example.

92 Onuma, Y., 2003, International Law in and with International Politics: The Functions of International Law in International Community, *European Journal of International Law*, Vol. 14, Issue 1, February, pp. 105–139.

it is actually part of the special kind of practice, discursive normative practice in the process of formation of CIL. On the other hand, if one makes the argument that the existence of two elements could be determined simultaneously and that we use the same indicators for their existence then it would be impossible to make the difference between them.

## 5. CONCLUSION

Despite weak spots, the additive theory on the formation of CIL remains dominant among international law scholars, jurisprudence of ICJ and states. It seems that there is something very attractive in this theory – whether it is its alleged simplicity, reliance on the principle of voluntarism in international law, or something else.

Gerald Postema has argued that one of the possible explanations for the popularity of additive theory is the lack of plausible alternative so he offered one – the concept of DNP. There are convincing arguments that the concept of DNP provides more solid theoretical basis for the explanation of the formation of CIL than additive theory.

Nevertheless, the chances that the very complex and subtle concept of DNP with its own weaknesses will replace deeply rooted additive theory in the explanation of the formation of CIL look very slim. However, some of the conclusions made in this paper could still improve the contemporary understanding of the process of formation of CIL. Firstly, there are persuasive arguments that there is no such a thing as the uniform practice as an element of CIL – among many existing patterns of behavior actors choose the one to become the norm of CIL. This argument is in accordance with above mentioned Murphy's claim that customary law reflects deliberately stipulated order of law. Secondly, this deliberately stipulated order of international law is happening through the complex exchange of normatively relevant argumentation about the practice of authorized agents.

In the end, critics of CIL could still rightly warn that some of the weaknesses of this formal source of international law remain even after suggested modifications to the theoretical explanation of the process of its formation. The first one is that even with these modifications it is not easy to ascertain the precise substance of customary norms in international law. The second one is that it is hard to identify the exact moment of the norm formation having in mind constant attempts of norms reinterpretation by the authorized agents. These flaws taken together are seriously endangering the legal certainty in international legal order.

But, interestingly, states as primary agents do not highlight these deficiencies very often. One of the reasons could perhaps be that CIL still plays important role in some of the other functions of international law and not only the binding one – functions of legitimating and communicating between the actors in international community.

## BIBLIOGRAPHY

1. Besson, S., D'Aspremont, J. (eds.), 2018, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press.
2. Besson, S., Theorizing Sources of International Law, in: Besson S., Tasioulas J. (eds.), 2010, *The Philosophy of International Law*, Oxford University Press.
3. Brownlie, I., 1998, *Principles of International Law* (5<sup>th</sup> edition), Oxford, Oxford University Press.
4. Byers, M., 2003, *Custom, Power and the Power of the Rules: International Relations and Customary International Law*, Cambridge, Cambridge University Press.
5. D'Aspremont, J., 2011, *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press.
6. Dixon, M., 2003, *Textbook on International Law* (7<sup>th</sup> edition), Oxford, Oxford University Press.
7. Hart H. L. A., 1961, *The Concept of Law*, Oxford, Clarendon Press.
8. Henckaerts, J., Doswald-Beck, L. (eds.), 2005, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press.
9. Higgins, R., 1995, *Problems and Process: International Law and How We Use It*, Oxford, Oxford University Press.
10. Hrnjaz, M., 2016, *Nastanak i utvrđivanje postojanja međunarodne običajne norme: praksa Međunarodnog suda pravde, doktorska teza*, Univerzitet u Beogradu – Fakultet političkih nauka.
11. Jovanović, M., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press.
12. Kelsen, H., 2003, *Principles of International Law*, The Lawbook Exchange.
13. Kirgis, Jr F. L., 1987, Custom on a Sliding Scale, *American Society of International Law*, Vol. 81, pp. 146–151.
14. Klabbers, J., 2017, *International Law* (2<sup>nd</sup> edition), Cambridge, Cambridge University Press.
15. Kolb, R., 2018, Legal History as a Source of International Law: From Classical to Modern International Law, in: Besson, S., D'Aspremont, J. (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press.
16. Koskeniemi, M., 2006, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press.
17. Lukić, R., 2012, *Sistem filozofije prava*, Pravni fakultet Univerziteta u Beogradu.
18. Mendelson, M., 1999, *The Formation of Customary International Law*, Leiden, Martinus Nijhoff Publishers.

19. Murphy, J. B., Habit and Convention at the Heart of Custom, in: Perreau-Sassine, A., Murphy, J. B. (eds.), 2007, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press.
20. Onuma, Y., 2003, International Law in and With International Politics: The Functions of International Law in International Community, *European Journal of International Law*, Vol. 14, Issue 1, pp. 105–139.
21. Pellet, A., Article 38, in: Zimmermann, A., Oellers, K. F., Tomushat, C., Tams, C. J. (eds.), 2012, *A Statute of International Court of Justice, A Commentary*, Oxford, Oxford University Press.
22. Petersen, N., 2007, Customary Law Without Custom? Rules, Principles and the Role of State Practice in International Norm Creation, *American University International Law Review*, Vol. 23, Issue 2, pp. 275–310.
23. Postema, G. J., 2012, Custom, Normative Practice, and the Law, *Duke Law Journal*, Vol. 62, No. 3, pp. 707–738.
24. Postema, G. J., 2007, Custom in International Law: A Normative Practice Account, in: Perreau-Sassine, A., Murphy, J. B. (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, Cambridge, Cambridge University Press, pp. 279–306.
25. Roberts, A. E., 2001, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *The American Journal of International Law*, Vol. 95, pp. 757–791.
26. Ross, A., 2008, *A Textbook of International Law: General Part*, The Lawbook Exchange.
27. Scharf, M. P., 2010, Seizing the “Grotian moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change, *Cornell Journal of International Law*, Vol. 43, pp. 439–463.
28. Scharf, M. P., 2013, *Customary International Law in Times of Fundamental Change*, Cambridge, Cambridge University Press.
29. Schlütter, B., 2010, *Developments in the Customary International Theory and the Practice of International Court of Justice and the International ad hoc Tribunals for Rwanda and Yugoslavia*, Leiden, Martinus Nijhoff Publishers.
30. Shaw, M. N., 2017, *International Law* (8<sup>th</sup> edition), Cambridge, Cambridge University Press.
31. Talmon, S., 2015, Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion, *European Journal of International Law*, Vol. 26, No. 2, pp. 417–433.
32. Tasioulas J., 1996, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, *Oxford Journal of Legal Studies*, Vol. 16, pp. 85–128.
33. Thirlway, H., 1972, *International Customary Law and Codification*, Leiden, Sijthoff Leiden.
34. Thirlway, H., 2005, The Sources of International Law, in: Evans, M. (ed.), *International Law*, Oxford, Oxford University Press.
35. Thirlway, H., 2014, *The Sources of International Law*, Oxford, Oxford University Press.

## LEGAL ACTS

1. International Law Commission, 2018, Draft Conclusions on Identification of Customary International Law, A/73/10.
2. International Law Association, 2000, Committee on Formation of Customary (General) Law (Final report of the Commission), London.
3. International Law Commission, 2018, Identification of Customary International Law (comments and observations received from governments), A/CN.4/716.
4. International Law Commission, 2018, Fifth Report on the Identification of Customary International Law, A/CN.4/717.

## CASE LAW

1. ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment, *ICJ Reports*, 2002, p. 3.
2. ICJ, *Asylum*, (Colombia/Peru), Judgment of 20 November 1950, *ICJ Reports*, 1950, p. 266.
3. ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits 16 February 2001, *ICJ Reports*, 2001, p. 102.
4. ICJ, *Case concerning Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment of 12 April 1960, *ICJ Reports*, 1960.
5. ICJ, *Fisheries case*, (United Kingdom v. Norway), Judgment of 18 December 1951, *ICJ Reports*, 1951, p. 116.
6. ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *ICJ Reports*, 1974, p. 3.
7. ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, *ICJ Reports*, 2012, p. 99.
8. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996, p. 226.
9. ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14.
10. ICJ, *North Sea Continental Shelf Case*, Judgment of 20 February 1969, *ICJ Reports*, 1969, p. 3.

## INTERNET SOURCES

1. Statute of the Court | International Court of Justice ([icj-cij.org](http://icj-cij.org))

## FILOZOFIJA MEĐUNARODNOG OBIČAJNOG PRAVA: DOVOLJNA JE PRAKSA

Miloš Hrnjaz

APSTRAKT

Osnovni cilj ovog rada je da kritički preispita dominantnu „dodavajuću” teoriju o nastanku međunarodnog običajnog prava koristeći koncept diskurzivne normativne prakse i rad Džeralda Posteme. Moj osnovni zaključak je da upotreba ovog koncepta pruža bolje objašnjenje procesa nastanka međunarodnog običajnog prava od „dodavajuće” teorije koja se sastoji od dva elementa – prakse i *opinio juris*-a. S druge strane, i Postemina teorija ima određene slabosti na koje u ovom radu pokušavam da ukažem i čiji značaj pokušavam da umanjim.

**Ključne reči:** međunarodno pravo, međunarodno običajno pravo, Međunarodni sud pravde, izvori međunarodnog prava, diskurzivna normativna praksa.

Article History:

Received: 15 October 2021

Accepted: 6 December 2021

Ana Zdravković\*

## OBLIGATIONS *ERGA OMNES* – *JUS COGENS* IN *STATU NASCENDI*? A THEORY INSPIRED BY THE NATURE OF INTERNATIONAL LAW

**Abstract:** *This paper is a follow-up to a debate on the book “The Nature of International Law” by Miodrag A. Jovanović. First, the approach towards erga omnes obligations adopted in the book is analyzed, after which a different perspective towards the concept is offered. The curious case of erga omnes obligations can be summed up by stating that there has hardly been more elucidated concept in international law but with so little clarification achieved. With the aim of shedding more light on this conundrum, the concept is compared to others of a similar nature, primarily jus cogens norms, only to identify that erga omnes obligations could be defined as jus cogens in statu nascendi. Respectively, it is argued that according to the current state of affairs in the international community, the International Court of Justice is an instance of last resort when distinguishing between jus cogens norms and obligations erga omnes. Finally, the view concerning the three-layered nature of the international legal hierarchy is accepted, with jus cogens norms having the highest rank, followed by erga omnes obligations and with the jus dispositivum of international law in third place.*

**Key words:** *erga omnes obligations, jus cogens, peremptory norms of international law, International Court of Justice, International Law Commission.*

### 1. ON *THE NATURE OF INTERNATIONAL LAW* – A BOOK BY MIODRAG A. JOVANOVIĆ

It is high time that discussions about *The Nature of International Law* started. The book was published by Cambridge University Press in 2019, but due to the extraordinary circumstances of 2020, a symposium on the publication was organized at the Faculty of Law University of Belgrade only in June 2021. This predominantly gathered scholars specialized in international law, which indicates that the author succeeded in attaining the

---

\* PhD candidate, University of Belgrade Faculty of Law; e-mail: ana.zdravkovic@ius.bg.ac.rs

attention of an audience outside the realm of pure jurisprudence. This paper is one of the follow-ups to the debate that took place at the symposium.

*The Nature of International Law* is, in a nutshell, a treatise on the typical features of what is called the international legal order, namely normativity, institutionalization, coercive guaranteeing and justice-aptness. Written in a comprehensible and appealing style, which is arguably not always typical for pieces by legal philosophers, in a masterly way the book tackles the issues of the development of the theory of international law, a hierarchy of formal sources of international legal norms, institutionalization, fragmentation and the judicialization of international legal order, to name just a few. An especially compelling point is made at the very end, regarding the (ir)relevance of legal uncertainty and it is particularly worth mentioning that there is a graspable and conclusive comparison between two branches of public law: constitutional and international law. The book will most certainly serve multiple functions. Not only does it have the substantial capacity to spark academic debate on the various matters it elucidates, but as a rather compendious and interdisciplinary work, it should also be beneficial to every young scholar specializing in either legal theory or international law.

Naturally, taking into account the enormous width and reach of the book's subject, together with the restraints imposed by the limited number of pages which are inherent in every monograph of this kind, it can be expected that there are certain aspects of the subject that were not sufficiently regarded by the author, and which certainly deserved more in-depth analysis. One of these issues, upon which the book only briefly touches, is the concept of *erga omnes* obligations, a concept that has been with us for over half a century and that almost any lawyer would recognize to a certain extent but hardly know how exactly to define. The aim of this paper is to contribute to the demystification of this blurred concept of international legal norms and, by offering an unconventional explanation of the notion in hand, to serve as a prompter for achieving clarity and sharper distinction between different categories of international legal norms. After all, it is in the *Nature of International Law* that admittedly "a special sort of uncertainty concerns determining which normative content has the formal quality of a *jus cogens* norm and/or an *erga omnes* obligation".<sup>1</sup> Before any normative content can be filled into these categories, they must somehow receive even the contours of defined concepts. Even more, if the author's own remark on achieving "the highest possible level of uncertainty absorption"<sup>2</sup> should be followed.

---

1 Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, p. 230.

2 *Ibid.*

## 2. *ERGA OMNES* OBLIGATIONS IN *THE NATURE OF INTERNATIONAL LAW*

A brief exposé in the book dedicated to *erga omnes* obligations is placed within the chapter “International Law as a Normative Order” in the section that epistemologically analyzes how to ascertain valid international legal norms, as well as how to ascertain norms stemming from different classes of general international legal rules, such as *jus cogens* or *erga omnes* obligations. Firstly, it is reminded that the concept of *erga omnes* obligations is the invention of the International Court of Justice (hereinafter: ICJ), as pronounced in the well-known *obiter dictum* of the *Barcelona Traction* case, where the Court stated that “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State [...] By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”<sup>3</sup> In addition, the Court provided examples of such obligations in contemporary international law, namely the prohibition of aggression, the prohibition of genocide, obligations correlative to the basic human rights, including protection from slavery and racial discrimination.<sup>4</sup> After more than two decades, the Court added the right to self-determination to the list of *erga omnes* norms, explaining that it is not only an integral part of the UN Charter, but also recognized in the jurisprudence of the Court, and emphasizing that it is among fundamental principles of contemporary international law.<sup>5</sup>

Following the introductory part regarding ICJ’s development of the concept, an important finding is stated in the book. That is, “all the mentioned obligations derive from norms of *jus cogens*”, hence the remainder

---

3 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment of 5 February 1970, *ICJ Reports 1970*, p. 33, para. 33.

4 *Ibid*, para. 34. Apparently, this concept differs from obligations stemming from treaties that produce *erga omnes* effect because of their nature, such as those regulating international boundaries, freedom of navigation in international straits or those establishing neutralized or demilitarized zones, see more in Linderfalk, U., 2011, *International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes*, *Nordic Journal of International Law*, Vol. 23, p. 5. Also, both the doctrine and the ICJ recognize the concept of obligations “*erga omnes partes*”, which are obligations stemming from multilateral treaties and which are owed only to other State parties of that treaty, hence any State party may demand the responsibility of another, ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, *ICJ Reports 2012 (II)*, p. 450, para. 69.

5 ICJ, *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, *ICJ Reports 1995*, p. 102, para. 29.

of the author's attention is concentrated on "the analysis of the relationship between the two concepts".<sup>6</sup> This statement will also serve as the starting thesis for the analysis that will follow in the second part of this paper. Before that, let us skim over the author's main points.

To start with, it is accepted that any inquiry into the matter must be two-folded; the first stage revolves around identification of norms designated with some higher legal rank, while the second stage is based on clarification of the special legal consequences arising out of breaches of such "superior" norms.<sup>7</sup> With regard to the first stage, it is emphasized that there is no universal agreement about whether *erga omnes* obligations have any kind of superior status at all, in the same manner as *jus cogens* norms obviously have.<sup>8</sup> Even though the doctrine widely attributes them with this higher normative power,<sup>9</sup> the International Law Commission (hereinafter: ILC) took the opposite view, stating that *erga omnes* obligations imply no superiority over other international legal norms, but only determine the scope of application of the relevant law as well as the ensuing procedural consequences.<sup>10</sup> When it comes to the legal consequences, it is accurately noted that *jus cogens* norms make conflicting treaties void, while *erga omnes* obligations entitle States that are not directly affected by an international wrongful act (that is, a breach of such a norm) to invoke the responsibility of the violator, since those obligations are owed to all members of the international community.<sup>11</sup> Then, several common elements of *erga omnes* obligations are determined, although it is admitted that they are all merely descriptive. Thus, they may only provide a useful framework for the inquest of prospective candidates for such international legal status, but cannot be considered to be decisive criteria themselves.<sup>12</sup> Specifically, *erga omnes* norms are all narrowly defined obligations, negative obligations (prohibitions), strict obligations (duties), they all stem

6 Jovanović, M. A., 2019, p. 120.

7 *Ibid.* See also, Tomuschat, C., Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* – Concluding Observations, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers, pp. 429–430.

8 *Ibid.*

9 Author refers to Tomuschat (note 7) and Kadelbach, see Kadelbach, S., *Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers, p. 26.

10 Jovanović, M. A., 2019, p. 121, citing International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (13 April 2006), p. 193, para. 380.

11 Jovanović, M. A., 2019, p. 120. See also, Kadelbach, S., 2006, p. 26.

12 *Ibid.*, p. 122.

from *jus cogens* norms and they are all instrumental for the current international community which is committed to safeguarding world peace as well as human rights.<sup>13</sup> This last feature is characterized as a substantial one, since it indicates that these obligations protect basic moral values and represent, to quote the ICJ, “the concern of all States”, so this element could be pivotal in the process of identification of *erga omnes* obligations.<sup>14</sup>

Finally, to the inevitable question of who should ascertain whether a particular norm has such a status, the book recalls the view of Cassese on the same question regarding *jus cogens* norms, according to whom the task should be entrusted to international judicial courts and tribunals.<sup>15</sup> In conclusion, a general point is made, namely that it is ultimately upon law-applying institutions to determine whether a content-specific rule passes the threshold criteria of the given order so as to count as a valid legal rule.<sup>16</sup>

### 3. ERGA OMNES OBLIGATIONS – THE SPITTING IMAGE OF JUS COGENS?

At the outset of the analysis, it is important to elaborate the book’s finding that “all the mentioned obligations derive from norms of *jus cogens*”. To do that, the last report of the ILC regarding peremptory (*jus cogens*) norms of international law must be referred to.<sup>17</sup> In the pages of the report, an illustrative list of norms that have acquired the *jus cogens* status is provided; it contains: “the prohibition of aggression, the prohibition of genocide, the prohibition of slavery, the prohibition of apartheid and racial discrimination, the prohibition of crimes against humanity, the prohibition of torture, the right to self-determination and the basic rules of international humanitarian law”.<sup>18</sup> Clearly, enumerated norms almost completely overlap with the *erga omnes* obligations catalogue that the ICJ established in the abovementioned judgment.<sup>19</sup> Moreover, it is rather

---

13 *Ibid.*, pp. 121–122. Author relies on the findings of Ragazzi, M., 1997, *The Concept of International Obligations Erga Omnes*, Oxford, Oxford Clarendon Press, pp. 132–134.

14 *Ibid.*, p. 122.

15 *Ibid.*, p. 123, citing Cassese, A., For an Enhanced Role of Jus Cogens, in: Cassese, A., (ed.), 2012, *Realizing Utopia – The Future of International Law*, Oxford, Oxford University Press, p. 164.

16 *Ibid.*

17 International Law Commission, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur*, A/CN.4/727 (31 January 2019).

18 *Ibid.*, p. 26, para. 60.

19 According to the ILC, “examples provided by the Court (of *erga omnes* obligations, A. Z.) are all part of the Commission’s list of examples of norms of *jus cogens*”, *ibid.*, p. 42, para. 93.

interesting to examine the ILC's argumentation for including these particular norms in the exemplifying *jus cogens* list. When it comes to the status of the prohibition of aggression, the prohibition of torture and the prohibition of genocide, it is emphasized that the ICJ unambiguously recognized them as norms of *jus cogens*.<sup>20</sup> Although further reference is made to the case-law of other international courts, quasi-judicial bodies and national courts, the previous work of the ILC, commentaries and stands of various States and the doctrine, one might gain the impression that all of this was somehow needless, after the thronal reference to the ICJ. Things are just slightly different in relation to the rest of the identified norms. For instance, it is stated that even though the ICJ has not expressly proclaimed the prohibition of apartheid and racial discrimination to be *jus cogens*, it did qualify them as *erga omnes* obligations.<sup>21</sup> Concerning *jus cogens* status of the prohibition of slavery, it is similarly concluded that it was indirectly recognized, once the Court acknowledged *erga omnes* character of the norm.<sup>22</sup> In like manner, primary evidence of peremptory status of the right to self-determination was found in its inclusion into the list of norms with *erga omnes* quality;<sup>23</sup> and finally, the same was emphasized in regard to the rules of international humanitarian law<sup>24</sup>. So, it is safe to conclude that, at least as long as the ILC is concerned, the *jus cogens* status emanates primarily from the *erga omnes* nature of the norm.

Yet, the stance of the ILC was not always in line with this conclusion. Back in 2006, the ILC took the view that, albeit the norms that the ICJ had described as obligations *erga omnes* may also be related to the *jus cogens*, the aim of the Court was neither to highlight their non-derogable nor substantial nature, but rather to indicate the existence of rules that once violated induce general standing to make claims.<sup>25</sup> Therefore, *erga omnes* norms were characterized as obligations that concern secondary, not primary rules and as norms with certain procedural features, amounting to the right of any State to appeal against their breach.<sup>26</sup>

This kind of reasoning is motivated by the same argumentation underlying the doctrinal consideration that *erga omnes* obligations are the concept of State responsibility.<sup>27</sup> By way of explanation, in the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter:

20 *Ibid.*, pp. 27–38.

21 *Ibid.*, p. 42, para. 92.

22 *Ibid.*, p. 46, para. 102.

23 *Ibid.*, p. 49, para. 109.

24 *Ibid.*, p. 53, para. 117.

25 International Law Commission, 2006, p. 197, para. 389.

26 *Ibid.*

27 This view can be found in Kadelbach, S., 2006, p. 26.

ARSIWA) a distinction was drawn between breaches of obligations which are owed to the international community as a whole, breaches of obligations arising under a peremptory norm, and serious breaches of obligations under peremptory norms.<sup>28</sup> Obviously, ARSIWA does not mention the term *erga omnes* and it further complicates and confuses these insufficiently clear normative relations.<sup>29</sup> Be that as it may, every infringement of obligations *vis-à-vis* the international community empowers third States to claim responsibility of the violator and request cessation of the breach, as well as assurances and guarantees of non-repetition and reparations for the injury caused to the respective beneficiaries of such obligation.<sup>30</sup>

On the other hand, legal effects of breaching peremptory norms are more complex. In that case, circumstances precluding wrongfulness, *i.e.*, “consent, self-defence, countermeasures, force majeure, distress, and necessity” cannot serve as an excuse for violations,<sup>31</sup> which is probably the result of their inalienable character and the commonly accepted view that they must be respected at all times.

Finally, when it comes to serious breaches of obligations under peremptory norms, apart from the legal implications already stipulated by ARSIWA with regard to other “non-serious” breaches and those entailed under international law, additional outcomes are determined. To be specific, “states should cooperate to bring to an end, through lawful means, any serious breach, they must not recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining *that* situation.”<sup>32</sup>

Therefore, it is obvious that *jus cogens* is not a notion concerning only the quality of the normative content, whereas *erga omnes* obligations target the scope of the *cogens* rule and represents its consequence.<sup>33</sup> From

28 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, A/56/10 (November 2001), Art. 40, 42 and 48. Serious breach replaced the disputed notion of international crime, and it is defined as a gross or systematic failure by the responsible State to fulfil its obligation.

29 Similar opinion can be found in Kadelbach, S., 2006, pp. 36–37.

30 International Law Commission, 2001, Arts. 48 and 54, referring to the general principles laid down in the Chapter 1, see also Arts. 28–31. Article 54 is described as a saving clause, since it passes on the question of legality of countermeasures undertaken by third States as a response to the breach of obligations towards international community, to the subsequent development of international law, see International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 139.

31 *Ibid.*, Art. 26.

32 *Ibid.*, Art. 41.

33 Pellet, A., Conclusions, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers, p.

the ARSIWA point of view, *jus cogens* norms seem to be an independent category, whose breach is followed by a spate of various consequences, depending on the severity of a particular violation.

Then again, one additional reference needs to be made at this point. In one of its advisory opinions, the ICJ qualified construction of the wall in the occupied Palestinian territory as a violation of *erga omnes* obligations.<sup>34</sup> Furthermore, the Court considered that, due to the nature and significance of the rights and obligations in hand, all States were obliged not to recognize the illegal situation which is a result of the breach of relevant obligation, but also to refrain from providing aid or assistance in maintaining the created situation, as well as to make sure that any illegal consequence arising from the such activity would be terminated.<sup>35</sup> To rephrase it, the ICJ applied the consequences of serious breaches of *jus cogens* norms to the breach of duties, it had previously described as *erga omnes* obligations, thus merged the two concepts together. As if things were not perplexing enough, the ILC has used this confusing reasoning of the ICJ as an additional argument for justifying its qualification of the right to self-determination as a *jus cogens* norm.<sup>36</sup> Plainly, all of these inconsistent deductions and sometimes vicious circles are a result of insufficiently defined and elucidated concepts.

Lastly, the manner in which the ICJ had explained the *erga omnes* obligations, in particular their effect of giving rise to the legal interest of all States to claim compliance with them, may lead to the assumption that any State will have the right to seise the Court when such obligations are violated. Given that the ICJ is the main adjudicative organ of the UN, together with the fact that peaceful settlement of international disputes is one of the pillars of public international law, it would arguably be expected that this organ would find an appropriate way to react in case of infringement of rules it itself had characterized as most fundamental and that it would allow third States, that are not directly affected by the unlawful act, to bring disputes in these exceptional situations. Additional argument for following this line of reasoning is the perspective of the victims of such violations, who oftentimes amount to either politically fragile and incapacitated States or even the population of the responsible State itself. With that in mind, it can hardly be envisaged that those imperiled

418. See also, Bassiouni, M. C., 1996, *International Crimes, International crimes: jus cogens and obligatio erga omnes, Law and Contemporary Problems*, Vol. 59, p. 63.

34 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports 2004*, para. 155.

35 *Ibid.*, para. 159.

36 International Law Commission, 2019, p. 49, para. 109.

by the breaches of *erga omnes* norms would be capable of referring to the Court, which is the decisive point that led to the idea of allowing third States to bring these types of disputes before the Court. However, a major impediment here is the consensual jurisdiction of the Court. When confronted with this matter, the ICJ adopted a rather restrictive attitude, the same one it took regarding almost identical question of its jurisdiction in the event of *jus cogens* breaches. In respect of peremptory norms, the Court insisted that the concept cannot modify or displace the application of rules regulating the scope of its jurisdiction.<sup>37</sup> The ICJ has adjudicative authority exclusively towards those States that have voluntarily agreed upon its jurisdiction and only to the extent that their consent allows.<sup>38</sup> In the absence of the prescribed jurisdictional basis, such as the special agreement to submit the particular dispute to the Court, compromissory clause, declaration recognizing as compulsory the jurisdiction of the Court or *forum prorogatum*, this organ cannot assess the matter in hand, even if possible violation of *erga omnes* obligations is at stake.<sup>39</sup> Apparently, additional common feature of both *jus cogens* norms and *erga omnes* obligations is that the ICJ may not respond to their infringement, since its hands are tied by rigid and outdated legal rules, which were laid down long before these normative categories were developed and accepted. The pressing need for amending these procedural rules will become apparent over time, if it already has not been the case. Nevertheless, it must be noted that certain progress regarding this matter can be identified in recent years. While ruling on the admissibility of certain claims, in cases where its jurisdiction was firmly based on relevant conventional provisions, the Court actually granted legal standing to States that had no traditionally understood „special interest” in the particular matter, but rather broader legal interest stemming from *erga omnes* (*partes*) character of the obligations in hand.<sup>40</sup> By doing so, the Court ultimately departed from its highly criticized and disputable stance adopted in *South West Africa* decisions<sup>41</sup> and showed willing for progressive development and alternation of old

37 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), Judgment of 3 February 2012, *ICJ Reports* 2012, p. 46, para. 95. For a more broader study on peremptory norms and international judicial jurisdiction, see Orakhelashvili, A., 2006, *Peremptory Norms in International Law*, New York, Oxford University Press, pp. 490–508.

38 United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 36.

39 ICJ, *East Timor* (Portugal v. Australia), p. 102, para. 29.

40 ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), paras. 68–70; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Gambia v. Myanmar), Order of 23 January 2020, paras. 41–42.

41 ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, *ICJ Reports* 1966, para. 15.

concepts. Although these occurrences may be promising, the consensual nature of the ICJ's jurisdiction remains a considerable obstacle for full practical implementation of the *erga omnes* concept.

#### 4. *ERGA OMNES* OBLIGATIONS AND *JUS COGENS* – IF THERE IS A DIFFERENCE, WHAT IS THE DIFFERENCE?

To become a *jus cogens* norm of general international law a norm must be accepted and recognized by the entire international community as a non-derogable one.<sup>42</sup> Once it acquired that status, it cannot be modified unless a subsequent norm having the same character is introduced.<sup>43</sup> Having regard to the fact that the concept was formally established via the international law of treaties, its primary function in public international law was to make conflicting treaties null and void.<sup>44</sup> In the meantime, the term not only introduced the hierarchization of international legal order, but also became a common denominator for rules encompassing issues of the utmost priority for the international community.<sup>45</sup> As already illustrated in the previous section, international community is bound by special legal implications as well as unique set of obligations in the event of infringement of *jus cogens* norms. This is particularly true regarding serious breaches but let us also examine the consequences of “ordinary” breaches of *jus cogens* norms.

With that goal in mind, it must be clarified that these norms, as understood nowadays, are necessarily norms established under general international law; that is, norms that have a general scope of application, arising from either multilateral treaties or international customary law.<sup>46</sup> This logically follows from their definition, which explicitly requires that such norms must be accepted and recognized by the whole international com-

42 United Nations, Vienna Convention on the Law of Treaties, *Treaty Series*, Vol. 1155, p. 331, (23 May 1969), Art. 53.

43 *Ibid.*

44 If the treaty conflicts with a peremptory norm of general international law at the time of its conclusion, it is void, *ibid.*

45 For more detailed analysis of the concept, see Jovanović, M. A., 2020, *Jus Cogens: A Complex Case of Constitutional Reasoning in International Law*, *RphZ Rechtsphilosophie*, Vol. 6, No. 3, pp. 249–262.

46 For more about groundlessness of regional *jus cogens*, see Zdravković, A., 2019, *Finding the Core of International Law – Jus Cogens in the Work of International Law Commission, South Eastern Europe and the European Union – Legal Issues*, Vol. 5, pp. 156–157.

munity as legal rules that cannot be derogated, which concurrently implies that they must have previously been accepted and recognized as international legal rules. Accordingly, the effect of *jus cogens* norms is not bilateral in its nature, but rather *erga omnes* – meaning towards all. All the more so, because once the norm reaches the non-derogable status due to its vital importance, such a norm must be universally binding on all subjects of international law as they all have legitimate interest in its preservation and protection.<sup>47</sup> As a result, an “ordinary” breach of a *jus cogens* norm can be understood as a breach of obligations *vis-à-vis* the international community, consequently entitling every other State to request that the wrongdoer accepts responsibility and to demand cessation, assurances, guarantees of non-recurrence, and reparation for the injured State. Put differently, the consequences of breaching *jus cogens* norms completely cover consequences commonly ascribed to breaches of *erga omnes* obligations.

Following this finding, it becomes apparent that the two-stage analysis that Jovanović accepts in the book is not so useful, since the second stage referring to the special legal consequences following from violations cannot reveal whether the norm in hand is *jus cogens* or an obligation *erga omnes*.

Both peremptory norms and *erga omnes* obligations designate special types of legal commands which are hierarchically ranked above “ordinary” rules of international law. Although it was already mentioned that there were some doubts as to whether *erga omnes* obligations were indeed of a higher status than others, not much support can be found for that sort of skepticism in either doctrine or case-law. While scholars describe them as obligations of a higher normative value,<sup>48</sup> a subcategory of international constitutional law,<sup>49</sup> or as protecting values of heightened importance,<sup>50</sup> the ICJ associated *erga omnes* character of obligations with fundamental and intransgressible nature of certain principles, that were even described as basic considerations of humanity.<sup>51</sup> It emphasized that all States must

47 Wet, E. de, 2006, The International Constitutional Order, *International and Comparative Law Quarterly*, Vol. 55, No. 1, p. 61. See also, Wet, E. de, Jus Cogens and Erga Omnes, in: Shelton, D., (ed.), 2013, *Oxford Handbook on Human Rights*, Oxford, Oxford University Press, p. 15.

48 Hoogh, A. J. J. de, 1991, The Relationship Between Jus Cogens, Obligations Erga Omnes, and International Crimes: Peremptory Norms in Perspective, *Austrian Journal of Public International Law*, Vol. 41, p. 192. See also, Wet, E. de, 2006, p. 62.

49 Fassbender, B., 1998, The United Nations Charter as Constitution of the International Community, *Columbia Journal of Transnational Law*, Vol. 36, No. 3, p. 591.

50 Tams, C., 2005, *Enforcing Obligations Erga Omnes in International Law*, New York, Cambridge University Press, p. 310.

51 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory opinion of 8 July 1996, *ICJ Reports 1996*, p. 257, para. 79.

adhere to those obligations, regardless of whether they are parties to the relevant international treaties that contain them.<sup>52</sup>

Therefore, the only difference between these two normative categories is the unique non-derogability trait of *jus cogens*. This is the *rationale* for defining *erga omnes* obligations as *jus cogens in statu nascendi*. They truly represent narrowly defined negative duties, but they do not “stem from *jus cogens*”. On the contrary, they aspire to reach the highest normative status of *jus cogens*; for that they have already fulfilled the requirement to be universally applicable norms, hence can be regarded as part of general international law, they seek to protect the common interests of all human beings, but they are simply not yet acknowledged as norms from which no derogation is permitted. In accordance with this proposition is the belief of some scholars that the international legal hierarchy has a layered nature, comprising *jus cogens* as the superior category, *erga omnes* obligations that have developed into norms of customary law, but still not *jus cogens* norms, and lastly, other dispositive (non-peremptory) norms of international law.<sup>53</sup>

Finally, it is necessary to untangle the mystery of who will identify whether a particular norm is the obligation *erga omnes* or *jus cogens*. This can also be rephrased as to who should identify whether the norm is non-derogable one. Although in principle the answer should be straightforward and should be the international community, *i.e.*, the totality of subjects of public international law, serving in the capacity of its main legislator, at this stage of the development of the international legal order that does not seem to be a feasible solution. On the one end of the spectrum are States which are reluctant to utilize these concepts in their relations and argumentations due to political considerations, lack of knowledge, or simple disinterest, while on the other there are those prone to the misinterpretation of various legal instruments with the aim of promoting their own interests.<sup>54</sup> Thus, Jovanović’s statement that this determination task should be entrusted to the law-applying institutions must be accepted. With respect to the facts presented so far, along with the present circumstances in the international community, it seems reasonable to concretize that statement by indicating that the ICJ is actually the one ascertaining

52 *Ibid.*

53 Linderfalk, U., 2011, p. 19. Similar statement that norms expressing obligations *erga omnes* form a second layer of the international value system, which is positioned under peremptory norms, in Wet, E. de, 2006, p. 62.

54 Most obvious example would be the misuse of the peremptory right of armed self-defence, for more see Green, J. A., 2009, *The International Court of Justice and Self-Defence in International Law*, Oxford, Hart Publishing, pp. 111–147.

the non-derogable character of norms.<sup>55</sup> Not only has the Court come forward with a new normative category in the first place, but it also provided itself as an instance of last resort when distinguishing between *jus cogens* norms and obligations *erga omnes*. Hence, this finding should be understood as one merely stemming from the reality, rather than any kind of suggestion or rave.

## 5. FROM *THE NATURE OF INTERNATIONAL LAW* TO THE NATURE OF *ERGA OMNES* OBLIGATIONS

Notwithstanding the fact that most of the considerations regarding the *erga omnes* obligations from *The Nature of International Law* were found to be untenable throughout the analysis, this paper was mainly inspired by the aforementioned book. Furthermore, it can hardly be denied that the concept of *erga omnes* obligations is not illuminated enough, which is apparent from countless different theories about it and its usage in various contexts and connotations. As an illustration, the *Barcelona Traction* judgment was even cited as a reference to *jus cogens*,<sup>56</sup> indicating that terms are sometimes used interchangeably as synonyms. This view, although it may seem appealing, cannot be accepted, because if the Court had in mind *jus cogens*, it would have resorted to that concept.

The inquiry started from scrutinizing the statement that all determined obligations *erga omnes* derive from norms of *jus cogens*, bearing in mind that the distinction between these normative concepts is not as clear-cut as it may appear on the face of it. It was shown that all obligations which the ICJ has qualified as *erga omnes* found their place in the illustrative list of *jus cogens* norms, while the ILC used their *erga omnes* character as a first argument for justifying the assigned preemptory status. Furthermore, it was revealed that both concepts encompass core ethical values of the international community, both produce *erga omnes* effects, and their breaches lead to rather similar legal consequences, hence that they cannot be differentiated based on these criteria. Another detected similarity amounts to the inability of third States to bring disputes before the ICJ in

---

55 For the opinion that the confirmation of the ICJ is the final requirement for the norm to become *jus cogens*, see Zdravković, A., *Međunarodni sud pravde – vladalac ili mislilac?*, in: Jovanović, M. A., Zdravković, A., (eds.), 2020, *Sudstvo kao vlast*, Beograd, Centar za pravosudna istraživanja, p. 169.

56 Elias, T. O., 1974, *The Modern Law of Treaties*, New York, Oceana Publications, p. 185. Truth be told, the ICJ has a tradition of avoiding the phrase *jus cogens*, which only further provokes speculations on the clash between the two concepts, Kadelbach, S., p. 36.

case of infringement of either *jus cogens* or *erga omnes* obligations, due to restrictive and inappropriate procedural rules regarding its consensual jurisdiction. These concepts, thus, widely coincide with each other but are not identical. The distinctive trait of *jus cogens* norms is their non-derogable nature, which *erga omnes* obligations do not possess. For this reason, all *jus cogens* norms are *erga omnes* at the same time, but not the other way around, or in other words, not all *erga omnes* obligations have attained the *cogens* status.<sup>57</sup> The proposed explication following from these findings is that *erga omnes* obligations are *jus cogens in statu nascendi*. Should certain *erga omnes* obligations once become worthy of entering *jus cogens* realm, it is the ICJ that will ultimately ascertain the matter. Accordingly, three-layered nature of the international legal hierarchy is accepted, with *jus cogens* norms having the highest rank, followed by *erga omnes* obligations and with the *jus dispositivum* of international law in third place.

After all, it must be appreciated that since the *Barcelona Traction* case, the Court has, in its own peculiar manner, outgrown the rigid positivistic and consent-based approach to the international law and paved the way for further development of a more coherent system of norms which will be regarded as a guardian of the common goods of the world. One of the pivotal features of the process of hierarchization and constitutionalization of international legal order is reaffirmation of the role of international law in protecting and preserving core ethical values of the international community.

On a final note, the objective of *The Nature of International Law* was not and could not be to solve each and every controversy of international law. Hence, this paper is an attempt not only to complement the wider debate of the issues tackled in the book, but also to serve as an incentive for the author to further contemplate various unresolved international legal matters and to continue with his unique contribution to the philosophy of international law. *The Nature of International Law* is certainly a much-needed call for the revival of the discipline.

## BIBLIOGRAPHY

1. Bassiouni, M. C., 1996, *International crimes: jus cogens and obligatio erga omnes, Law and Contemporary Problems*, Vol. 59.
2. Elias, T. O., 1974, *The Modern Law of Treaties*, New York, Oceana Publications.
3. Fassbender, B., 1998, *The United Nations Charter as Constitution of the International Community, Columbia Journal of Transnational Law*, Vol. 36, No. 3.
4. Green, J. A., 2009, *The International Court of Justice and Self-Defence in International Law*, Oxford, Hart Publishing.

<sup>57</sup> Wet, E. de, 2013, p. 15.

5. Hoogh, A. J. J. de, 1991, The Relationship Between Jus Cogens, Obligations Erga Omnes, and International Crimes: Peremptory Norms in Perspective, *Austrian Journal of Public International Law*, Vol. 41.
6. Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press.
7. Jovanović, M. A., 2020, Jus Cogens: A Complex Case of Constitutional Reasoning in International Law, *RphZ Rechtsphilosophie*, Vol. 6, No. 3.
8. Kadelbach, S., Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers.
9. Linderfalk, U., 2011, International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes, *Nordic Journal of International Law*, Vol. 23.
10. Orakhelashvili, A., 2006, *Peremptory Norms in International Law*, New York, Oxford University Press.
11. Pellet, A., Conclusions, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers.
12. Tams, C., 2005, *Enforcing Obligations Erga Omnes in International Law*, New York, Cambridge University Press
13. Tomuschat, C., Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes – Concluding Observations, in: Tomuschat, C., Thouvenin, J., (eds.), 2006, *The Fundamental Rules of the International Legal Order*, Leiden, Martinus Nijhoff Publishers.
14. Wet, E. de, 2006, The International Constitutional Order, *International and Comparative Law Quarterly*, Vol. 55, No. 1.
15. Wet, E. de, Jus Cogens and Erga Omnes, in: Shelton D., (ed.), 2013, *Oxford Handbook on Human Rights*, Oxford, Oxford University Press.
16. Zdravković, A., 2019, Finding the Core of International Law – Jus Cogens in the Work of International Law Commission, *South Eastern Europe and the European Union – Legal Issues*, Vol. 5, pp. 156–157.
17. Zdravković, A., Međunarodni sud pravde – vladalac ili mislilac?, in: Jovanović, M. A., Zdravković, A., (eds.), 2020, *Sudstvo kao vlast*, Beograd, Centar za pravodna istraživanja.

## LEGAL ACTS

1. United Nations, Vienna Convention on the Law of Treaties, *Treaty Series*, Vol. 1155, p. 331 (23 May 1969).

## CASE LAW

1. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, Order of 23 January 2020.
2. ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, *ICJ Reports 1970*.

3. ICJ, *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, *ICJ Reports* 1995.
4. ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), Judgment of 3 February 2012, *ICJ Reports* 2012.
5. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004.
6. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, *ICJ Reports* 1996.
7. ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, *ICJ Reports* 2012 (II).
8. ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, *ICJ Reports* 1966.

## OTHER SOURCES

1. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, A/56/10 (November 2001).
2. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, 2001, *Yearbook of the International Law Commission*, Vol. II, Part Two.
3. International Law Commission, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur*, A/CN.4/727 (31 January 2019).
4. International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (13 April 2006).

## OBAVEZE ERGA OMNES – JUS COGENS U NASTAJANJU? ANALIZA INSPIRISANA KNJIGOM THE NATURE OF INTERNATIONAL LAW

Ana Zdravković

### APSTRAKT

Rad predstavlja nastavak diskusije o knjizi Miodraga A. Jovanovića *The Nature of International Law*, sa akcentom na koncept *erga omnes* obaveza. U tekstu je najpre predstavljen pristup obavezama *erga omnes* prihvaćen od strane autora knjige, a nakon toga je ponuđen nešto drugačiji pogled na ovaj koncept. *Erga omnes* obaveze u međunarodnom pravu su karakteristične po tome što pripadaju malobrojnim temama o kojima se puno pisalo, a malo razjasnilo. Shodno tome, cilj rada nije da odgovori na svako sporno pitanje u vezi sa ovim konceptom, već da pokuša da ga

dodatno rasvetli, pre svega kroz upoređivanje sa sličnim konceptima, a na prvom mestu *jus cogens* normama. Nakon prikaza i analize različitih relevantnih okolnosti i argumenata, utvrđeno je da se *erga omnes* obaveze mogu definisati kao *jus cogens* norme u nastajanju. U kontekstu pitanja ko je ovlašćen da odlučuje o tome da li bi konkretnu normu trebalo uvrstiti u jednu ili drugu kategoriju, u radu je zauzet stav da ta uloga trenutno pripada Međunarodnom sudu pravde, imajući u vidu aktuelne odnose i stanje unutar međunarodne zajednice. Naposljetku, u radu je prihvaćena teza da se normativna hijerarhija međunarodnopravnog poretka sastoji od tri nivoa, pri čemu *jus cogens* norme zauzimaju najviše mesto, dok se ispod njih nalaze *erga omnes* obaveze, a potom sve ostale dispozitivne norme međunarodnog prava.

**Ključne reči:** *erga omnes* obaveze, *jus cogens*, peremptorne norme međunarodnog prava, Međunarodni sud pravde, Komisija za međunarodno pravo.

Article History:

Received: 15 October 2021

Accepted: 6 December 2021

REVIEW ARTICLE

Jernej Letnar Čerňič\*

## INSTITUTIONAL ACTORS AS INTERNATIONAL LAW-MAKERS IN BUSINESS AND HUMAN RIGHTS: THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND BEYOND

**Abstract:** *Business and human rights is an interdisciplinary field, which advocates that both state and businesses are duty-holders of human rights obligations. The area of business and human rights aims to regulate and prevent negative impact of business operations at all levels of global supply chains. The approach of international law in this regard has so far been piecemeal. States have been traditionally a principal participant in the international community. Nonetheless, this article aims to test arguments submitted by Jovanović in his 2019 book “The Nature of International Law” that institutional non-state actors are capable of creating international legal rules. Equipped with this knowledge, this article argues that the UN Human Rights Council has through adoption of the UN Guiding Principles on Business and Human Rights restated human rights obligations of states and indirectly of corporations in international law in order to protect the dignity of rights-holders in local and global environments.*

**Key words:** philosophy of international law, institutional actors, business and human rights, human rights, state obligations, corporate obligations, UNGPs on Business and Human Rights.

### 1. INTRODUCTION

Companies have been in the last decades on only daily levels affecting the rights of the ordinary rights holders who are often left unprotected in the case of business-related human rights abuses.<sup>1</sup> Business and human

\* Professor of Constitutional and Human Rights Law, Faculty of Government and European Studies, New University, Ljubljana and Kranj, Slovenia; e-mail: jernej.letnar@gmail.com

This piece was prepared within the framework of a research project co-financed by the Slovenian Research Agency: ‘A Holistic Approach to Business and Human Rights’ (no. JP-1790).

1 See, for example, Clapham, A., 2006, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press; Deva, S., 2012, *Regulating Corporate Human Rights*

rights have been over the last decades a growing field attempting to promote awareness about human rights protection in business.<sup>2</sup> States are often not able nor willing to bring justice to victims in the case of business-related human rights abuses. As such, rights-holders often do not have any recourse to enforce accountability for business-related human rights abuses. International law has in the past only indirectly regulated business and human rights. Domestic regulation of business and human rights have been, on one hand, progressing in the last decades, particularly within the ambit of the European Union and its Member States. On the other hand, states have so far not adopted international convention that would formally create obligations of state in business and human rights. One of the reasons for such lack of regulation is that the majority of states as primary participants in international law have been reluctant to regulate business and human rights at the international level. Nonetheless, recent years have illustrated a global effort to advance accountability for business-related human rights violations.<sup>3</sup>

Institutional non-state actors are a core part of non-state actors in international law. Nonetheless, a few international organisations have in the last decades in international law attempt to fill the gap in business and human rights. They have adopted guidelines that have thereafter been employed as a point of departure by majority if not all stakeholders in business and human rights ranging from states to businesses and civil society.

---

*Violations: Humanizing Business*, London, New York, Routledge; Deva, S., Bilchitz, D. (eds.), 2013, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, Cambridge, Cambridge University Press; Jägers, N., 2002, *Corporate Human Rights Obligations: In Search of Accountability*, Antwerp, Intersentia; Letnar Čerňič, J., 2010, *Human Rights Law and Business*, Groningen, Europa Law Publishing; Letnar Čerňič, J., Ho, T. van (eds.), 2015, *Human Rights and Business: Direct Corporate Accountability for Human Rights*, Wolf Publishing; Letnar Čerňič, J., 2020, *Corporate Accountability under Socio-Economic Rights, (Transnational Law and Governance)*, Oxon, New York, Routledge.

- 2 Wettstein, F., The History of “Business and Human Rights” and Its Relationship with Corporate Social Responsibility, in: Deva, S., Birchall, D. (eds.), 2020, *Research Handbook on Human Rights and Business*, Cheltenham, Edward Elgar; Ramasastry, R., 2015, Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability, *Journal of Human Rights*, 14, p. 237.
- 3 Deva, S., Bilchitz, D. (eds.), 2013; Clapham, A., 2006; Ruggie, J. G., 2013, Just Business: Multinational Corporations and Human Rights, New York, W. W. Norton & Co.; Deva, S., 2012; McCorquodale, R., Smit, L., Neely, S., Brooks, R., 2017, Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises, *Business and Human Rights Journal*, Vol. 2, Issue 2, pp. 195–224; Carrillo Santarelli, N., 2013, *Necessity and Possibilities of the International Protection of Human Dignity from Non-State Violations*, PhD Thesis, Universidad Autónoma de Madrid.

Those soft law or quasi legal documents have through state and business practice attained binding status in the international community in various forms either through further legislative efforts or by judicial decisions of domestic and international courts. As such, Jovanović in his book on *The Nature of International Law* rightly pinpoints at one of the points of contention in international law, namely whether institutional non-state actors can participate in the international community and whether they can create international legal norms. Accordingly, he aptly asks “[...]whether some of their acts, which are not intended by founding treaties to be of a legal nature, do produce legal effects and whether those effects amount to law-making;”<sup>4</sup> As a result, Jovanović’s pinpoints at one of the challenges in business and human rights. Commentators have often posed similar questions as to the nature and scope of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs on Business and Human Rights or UNGPs) and OECD Guidelines for Multinational Enterprises. To this end, this article aims to examine the role of non-state actors as international law-makers in Business and Human Rights.

More specifically, this article therefore analyses the role of institutional non-state actors in international law-making in the field of business and human rights. It attempts to answer whether Jovanović’s approach to non-state actor is persuasive from the perspective of human rights protection in business operations. As such, it explores whether the UN Human Rights Council as one of the organs of the United Nations is competent to adopt binding international legal acts and norms. The UN Human Rights Council had in 2011 unanimously adopted United Nations Guiding Principles on Business and Human Rights (UNGP’s on Business and Human Rights), which quickly turned into the main authoritative document in the global framework of business and human rights, often cited by domestic and regional human rights bodies and implemented in domestic systems.<sup>5</sup> Its main proponent has often submitted that they were adopted consensually and they represent repetition of the already existing international legal obligations in international human rights. Accordingly, this article addresses challenges in placing human rights obligations on state and corporate actors from the point of view of the functions of institutional non-state actors in international law-making in the field of business and human rights.

---

4 Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, p. 168.

5 Ruggie, J., 2008; Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5.

This article includes four main sections. Section 2 studies the theoretical framework and underpinnings of business and human rights. Thereafter, section 3 analyses the legal nature and scope of UNGPs on Business and Human Rights. Finally, Section 4 explores whether UNGPs on Business and Human Rights could be considered as material and binding sources of international law? Equipped with this knowledge, this article argues that the UN Human Rights Council has through UNGPs on Business and Human Rights reinforced state human rights obligations in order to protect the dignity of rights-holders.<sup>6</sup> All in all, it argues that UNGPs are a textbook example that at times institutional non-state actors are capable of producing binding law even though states formally did not intend to grant them legislative powers. It is a contribution to the debate that public or private institutional actors are capable of contributing to international-law making.

## 2. THE THEORETICAL FRAMEWORK OF BUSINESS AND HUMAN RIGHTS

Ordinary people have been in the contemporary world exposed to the positive as well as negative impacts of business, which can also indirectly or directly violate human rights. Such abuses include violations of civil and political rights as well as economic and social rights, including the most severe violations such as participation in genocides, crimes against humanity and war crimes. Corporations themselves or, even more commonly, jointly with state actors interfere with individual's absolute rights, such as the right to life, a prohibition of torture, as well as rights such as rights to water, food and decent housing. The nature and extent of corporate violations varies according to geographical areas as well as to differences between corporations themselves. The bulk of violations are still committed in the Americas, Africa, Asia and Central and Eastern Europe. States have been traditionally the principal duty-bearer in human rights law. Nonetheless, also other actors may have obligations under human rights law in the business context. Business and human rights is an interdisciplinary area that states that states have primary obligations to protect individuals against business-related human rights abuses, but that also businesses have obligations to respect, protect and fulfil human rights in their business operations and throughout their global supply chains.<sup>7</sup>

---

6 See, for instance, Vasquez, C. M., 2005, Direct vs. Indirect Obligations of Corporations under International Law, *Columbia Journal of Transnational Law*, 43, p. 927.

7 See, for instance, Letnar Černič, J., 2020.

It has spread over many layers and levels. Some regional and domestic legal systems, particularly in the Global North, have in the past years developed specialized sources of law in different sub-fields of business and human rights, mostly in the areas of non-financial reporting and mandatory due diligence.<sup>8</sup> The European Union has particularly in the last decade introduced binding legislation in the field of business and human rights.<sup>9</sup> Some domestic courts have in the past delivered judgements that established some forms of accountability for corporate human rights violations.<sup>10</sup> The developments have been somewhat outstanding in international law. The access to remedy of rights-holders has been particularly lacking in business and human rights. Most domestic legal systems do not allow or only partially allow for the enforcement of corporate accountability for human rights violations in domestic systems as well as in third countries, which requires victims to resort to often ineffective and reluctant domestic courts of Asian, African and South American countries. In recent years, progress has been made only in Anglo-Saxon jurisdictions, especially in the English legal system. Victims can only in rare cases

- 8 Lorenzo, F. di, Levin-Nally, E., 2021, The “Conflict Minerals Regulation” or the “Regulation on Responsible Sourcing of Minerals”: Evolving Purpose and Terminology, *Business and Human Rights Journal Blog*, 22 February, (<https://www.cambridge.org/core/blog/2021/02/22/the-conflict-minerals-regulation-or-the-regulation-on-responsible-sourcing-of-minerals-evolving-purpose-and-terminology/>), 10. 11. 2021); Modern Slavery Act (UK, 2015); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, 2010); Modern Slavery Act 2018, Australia (No. 153, 2018). Loi 2017–399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, *Official Gazette of the Republic of France*, March 27, 2017; The Dutch Child Labour Due Diligence Law, Eerste Kamer, vergaderjaar 2016–2017, 34 506, A.
- 9 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Text with EEA relevance; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *OJ L* 130, 19. 5. 2017, p. 1–20.
- 10 *Vedanta Resources PLC and another v. Lungowe and others*; [2019] UKSC 20. Judgment, (<https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>), 10. 11. 2021). UK Supreme Court, 10 April 2019, at para. 61. See generally Yilmaz-Vastardis, A., Leader, S., 2017, *Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains*, Essex Business and Human Rights Project, (<https://www1.essex.ac.uk/ebhr/documents/Improving-Paths-to-Accountability-for-Human%20Rights-Abuses-in-the-Global-Supply-chains-A-Legal-Guide.pdf>), 10. 11. 2021); *Connelly v. R.T.Z. Corporation*, [1998] A.C. 854 at 868–69; *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854 (House of Lords) (citing *Sim v. Robinow*, 1892 Sess. Cas. (R.) 668 and *Spliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 474.

enforce corporate accountability within the jurisdictions of the countries where they are registered. The right to effective remedy is one of the basic tenets of human rights justice. The UN High Commissioner for Human Rights noted some years ago that “[...] accountability and remedy in such cases is often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions.”<sup>11</sup> Challenges “[...] include fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement.”<sup>12</sup> As a result, civil society organisations have been pressuring the governments to pay attention to the plight of individuals suffering due to the negative impact of business activities.

Some international organisations have developed quasi-legal business and human rights documents in the field of human rights, investment and labour rights. The global civil society has therefore over the past two decades advocated for the adoption of the UN Treaty on Business and Human Rights. The UNGPs have not fully satisfied global civil society, who have argued that binding convention at international level is indispensable for the advancement of business and human rights. As a result, the United Nations Human Rights Council on 26 June 2014 adopted resolution A/HRC/RES/26/9 “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>13</sup> The Treaty Alliance, a group of international NGOs noted that the potential international convention is to ensure that human rights have a precedence of the interest and rights of corporations in order to provide rights-holders with access to supervisory mechanisms, which would be able to hear their claims.<sup>14</sup> Victims have often encountered insurmountable

---

11 United Nations High Commissioner for Human Rights, Report on “Improving accountability and access to remedy for victims of business-related human rights abuse”, United Nations General Assembly, A/HRC/32/19, (10 May 2016), para. 2.

12 *Ibid.*, para. 4.

13 UN Human Rights Council Resolution A/HRC/RES/26/9, adopted 14 July 2014, (<https://undocs.org/A/HRC/RES/26/9>, 20. 11. 2021), p. 2.

14 Treaty Alliance, We call on states to participate actively in upcoming negotiations of the international treaty to ensure protection of human rights from the activities of transnational corporations and other business enterprises, 29 May 2015, (<https://www.business-humanrights.org/en/treaty-alliance-joint-statement-calls-for-signa>

obstacles to enforce accountability for alleged corporate human rights violations. As such, the Treaty would grant rights-holders with the access to fair, impartial and independent judicial, quasi-judicial or non-judicial proceedings where their allegations about business-related human rights abuses would be heard and addressed. The Elements for the Draft Legally Binding Instrument in 2017 envisaged that the potential UN Treaty on Business and human rights would create binding corporate obligations to comply with human rights throughout their global chains that are recognized by the international community in the form of the already existing international human rights treaties.<sup>15</sup> To this end, it noted that corporations are to identify potential actual human rights challenges at all levels of their business operations, including in their relationship with suppliers and other business partners.<sup>16</sup> As such, corporations would be also asked to provide access to justice and reparations to victims of business-related human rights abuses.<sup>17</sup> As a result, corporations are to take preventive steps and adopt preventive measures to avoid human rights violations and comply with domestic and international human rights. They are to develop effective, fair and independent international supervisory that would monitor on daily levels the business compliance with human rights.<sup>18</sup> The Intergovernmental Working Group has so far held seven rounds of negotiations, however there is still no final agreement on the wording of the draft text. The countries of the Global North appear particularly reluctant to support the idea of binding obligations of states to protect individuals against corporate human rights violations. On the other hand, the Member States of the European Union and other countries of the Global North appear to be open to supporting the potential

---

tures-in-favour-of-proposed-binding-treaty-to-enhance-corporate-legal-accountability-for-rights-abuses, 10. 11. 2021). See for instance, Lopes, R., Kwesiga, A., 2018, *What the Zero Draft and Protocol Lack: Meaningful Access to Justice – A Global South Perspective*, Business and Human Rights Resource Centre, 8 October, (<https://www.business-humanrights.org/en/blog/what-the-zero-draft-and-protocol-lack-meaningful-access-to-justice-a-global-south-perspective/>, 20. 11. 2021); Lappin, K., Pedersen, H., Khan, T., 2016, *Influence of corporations in treaty process would undermine affected communities' interests*, Business & Human Rights Resource Centre, March 28, (<http://business-humanrights.org/en/influence-of-corporations-in-treaty-process-would-undermine-affected-communities%E2%80%99-interests>, 20. 11. 2021). See also Jägers, N., 2011, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?, *Netherlands Quarterly of Human Rights*, 29, p. 159.

15 Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, 29 September 2017, para. 3.3.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

draft of the Business and Human Rights Treaty that would be based on the UNGPs on Business and Human Rights.

### 3. THE LEGAL NATURE AND SCOPE OF UNGPs ON BUSINESS AND HUMAN RIGHTS

John Ruggie conceived UNGPs as a tool that would assist businesses in identifying and responding to human rights risks in their operations. He refrained from developing other legal documents that would include complex legal languages as most businesses would not be able to grasp and internalize in their business operations.<sup>19</sup> UNGPs were drafted as a practical document ready to be employed by business managers in the already existing risk management procedures.<sup>20</sup> They are to assist businesses to avoid negative human rights impact throughout the global supply chains of their business operations.<sup>21</sup> The idea for such business-oriented activities derived from John Ruggie's previous work with the voluntary Global Compact initiative.<sup>22</sup> As such, many traits of his previous work have been translated also in the consultations and drafting of the UNGPs. As such, the UNGPs were not primarily designed as a human rights document but as a tool box to be employed by businesses. Catá Backer argues that Ruggie's "framework seeks inter-systemic harmonization that is socially sustainable, and thus stable. The framework recognizes and operationalizes emerging governance regimes by combining the traditional focus on the legal systems of and between states with the social systems of non-state actors and the governance effects of policy[...]"<sup>23</sup> Such an approach has been criticised by human rights scholars, who have expressed concern that the UNGPs do not provide added value. De Schutter noted that "[...] substantive choices may hide behind terminological matters. For instance, mentioning 'impacts' rather than 'violations' reveals a shift from a legal to a managerial conception of the responsibility of business."<sup>24</sup> Nonetheless,

---

19 Ruggie, J. G., 2014, Global Governance and "New Governance Theory": Lessons from Business and Human Rights, *Global Governance*, Vol. 20, Issue 1, pp. 5, 14.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 Cata Backer, L., 2012, From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance, *Pacific McGeorge Global Business & Development Law Journal*, Vol. 25, Issue 1, pp. 69–172.

24 Schutter de, O., Foreword: Beyond the Guiding Principles, in: Deva, S., Bilchitz, D. (eds.), 2013, pp. xv–xxii.

the process of drafting of the UNGPs has been to some extent open and included stakeholders from different arenas. Deva recognizes that the drafter of the UNGPs attempted to obtain the view of various stakeholders in different regions, professions and industries in order to increase the credibility and acceptance of the principles.<sup>25</sup> Similarly, Hamm notes that Ruggie attempted to include all stakeholders in the consultation during the drafting process of the UNGPs.<sup>26</sup> He particularly aimed to pay attention to the views of the business community, which was previously excluded from, for instance, drafting of the UN Norms.<sup>27</sup> Such an approach has been reflected in the Pillar 2 of the UNGPs, where corporate responsibility for human rights is defined as social and as legal norm.<sup>28</sup> Corporations advocated for voluntary, not binding approaches in business and human rights. Nonetheless, it seems that John Ruggie has not paid appropriate attention to civil society and victims' organisations who have throughout the process argued for a greater place of rights-holders in the UNGPs. The author of the UNGPs on Business and Human Rights wished to move beyond the UN Norms on Business and Human Rights<sup>29</sup>, which employed a rights-based approach to business and human rights. However, states and business communities have not expressed full support for their adoption and opted to support the new project.

As far their contents go, the UNGPs on Business and Human Rights include foundational and operational principles. It created three sets of obligations of stakeholders in business and human rights, namely: "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; the need for rights and

25 Deva, S., *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, in: Deva, S., Bilchitz, D. (eds.), 2013, pp. 78–104.

26 Hamm, B., 2021, *The Struggle for Legitimacy in Business and Human Rights Regulation – A Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty*, *Human Rights Review*, (<https://doi.org/10.1007/s12142-020-00612-y>), p. 19.

27 *Ibid.*

28 *Ibid.*

29 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003). See also Kinley, D., Nolan, J., Zerial, N., 2007, *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, *Company and Securities Law Journal*, Vol. 25, Issue 1, pp. 30–42; Weissbrodt, D., Kruger, M., 2003, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *American Journal of International Law*, 97, p. 901.

obligations to be matched to appropriate and effective remedies when breached.”<sup>30</sup> The UNGPs first establishes obligations of states to ensure that individuals are protected for business-related human rights abuses. Principle 1 provides that states are the primary responsible to protect individuals against corporate human rights violations in their territory.<sup>31</sup> They do not, however, recognize that states have human rights obligations beyond their borders to regulate businesses and not violate human rights of individuals, for instance, in the Global South. The UNGPs ask states in Principle to provide businesses registered in their domestic legal system with clear rules that they are to observe human rights.<sup>32</sup> States therefore have obligations to make sure that businesses in their territory observe human rights. To this end, they are to adopt normative but also policy mechanisms to control businesses in their territory. Their obligations are broader and more extensive in relation to the state-owned companies, where states are asked to lead by example. States have negative and positive obligations to observe human rights in their business environments.

Human rights obligations of businesses derive from Pillar 2 of the UNGPs on Business and Human Rights. UNGPs provide in Principle 11 that “Business enterprises should respect human rights”.<sup>33</sup> They explain corporate obligations in terms of negative nature obligations. More specifically, they require that corporations do not infringe human rights of individuals and groups. Negative obligations are obligations of result. As for the content of such obligations, the UNGPs explain in principle 12 that “the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work”.<sup>34</sup> The UNGPs constructed corporate obligations to observe human rights in terms of social expectations, not legal norms. Nonetheless, the UNGPs have not limited themselves only to the negative obligations of businesses.<sup>35</sup> They also provide for positive obligations, which derive from

---

30 UNGPs on Business and Human Rights, General Principles, p. 1.

31 UNGPs on Business and Human Rights, Principle 1.

32 *Ibid.*, Principle 2.

33 *Ibid.*, Principle 11.

34 *Ibid.*, Principle 12.

35 Kinley, D., Tadaki, J., 2004, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, *Virginia Journal of International Law*, 44, p. 931; Ramio Marles, C., Alsina Burgues, V., 2016, The Role of the Ombudsman in Protecting the Rights of Consumers of Services of General Interest Provided by Private Companies, *US-China Law Review*, 13, p. 181; McCorquodale, R.

Principle 15 and further UNGPs principles. They stipulate in Principle 15 that businesses are to take active measures to prevent business-related human rights violations. In this way, they ask corporations to introduce internal human rights policies, human rights due procedures and provide rights holders with access to non-judicial, quasi-judicial and judicial procedures.<sup>36</sup> Those obligations are arguably the essential part of the UNGPs as they impose due diligence and remedial obligations on businesses. They are positive in nature and impose an obligation of conduct on businesses. Of particular importance is Principle 17 which sets out requirements of human rights due diligence that businesses are asked to follow when they identify risks and potential and actual negative consequences of their business operations.<sup>37</sup> They are obliged to adapt their business operations on the basis of the findings in order to eliminate future risks.<sup>38</sup> As a result, many businesses have, upon the adoption of the UNGPs, introduced human rights due diligence in their internal processes. Several states, mostly in the global North have introduced mandatory due diligence laws, which require corporations to not only to report on non-financial indicators, but also to include due diligence processes in their business operations.

As such, the UNGPs's due diligence concept has also provided incentive for adoption of due diligence legislation in several domestic systems, which provide for mandatory non-financial reporting and mandatory due diligence.<sup>39</sup> As for access to remedy, the UNGPs provide in the principle 25, the main principle of its Pillar III, that "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."<sup>40</sup> The obligations to provide the access to remedy therefore rest with states, which traditionally through the judicial branch of government enforce different forms of responsibility for human rights abuses. For those reasons, what is required is a reform of the domestic and international legal orders concerning corporate

---

*et al.*, 2017, Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises, *Business and Human Rights Journal*, Vol. 2, Issue 2, pp. 195–224; Michalowski, S., 2012, No Complicity Liability for Funding Gross Human Rights Violations, *Berkeley Journal of International Law*, 30, p. 451.

36 UNGPs on Business and Human Rights, Principle 15.

37 *Ibid.*, Principle 17.

38 *Ibid.*

39 Nolan, J., 2017, Business and human rights: The challenge of putting principles into practice and regulating global supply chains, *Alternative Law Journal*, Vol. 42, Issue 1, pp. 42–46.

40 Ruggie, J., 2008, Principle 25.

responsibility and accountability for human rights. The UNGPs on Business and Human Rights therefore established clear obligations that states and corporations are obligated to follow in the area of human rights.

#### 4. UNGPs ON BUSINESS AND HUMAN RIGHTS AS MATERIAL AND BINDING SOURCE OF INTERNATIONAL LAW?

Commentators have over the last decade heavily debated the legal nature, value and impacts of the UNGPs on Business and Human Rights.<sup>41</sup> Undoubtedly, the UNGPs on Business and Human Rights have not been adopted as an international human rights treaty. On the contrary, they were adopted by the UN Human Rights Council, which although being a principal human rights organ of the UN, is formally structured under the UN General Assembly. As such, they do not formally create direct human rights obligations as any other guidelines and resolutions.<sup>42</sup> The legal nature of the UNGPs on Business and Human Rights is therefore formally in the realm of soft law.<sup>43</sup> It is of non-legal or quasi-judicial nature. Lagoutte argues that “Guiding principles and guidelines adopted by the UN General Assembly or the Committee of Ministers of the Council of Europe are negotiated and debated among the member states of the organization. Hence UN guiding principles such as the UNGPs only represent an

---

41 Ruggie, J. G., 2013, *Just Business: Multinational Corporations and Human Rights*, New York, W. W. Norton & Co.; Ruggie, J. G., 2004, Business and Human Rights: The Evolving Agenda, *American Journal of International Law*, 101, p. 819; Martin Amereson, J., 2012, The End of the Beginning? A Comprehensive Look at the Business and Human Rights Agenda from a Bystander Perspective, *Fordham Journal of Corporate and Finance Law*, 17, p. 871; Aaronson, S. A., Higham I., 2013, “Re-righting Business”: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms, *Human Rights Quarterly*, 35, p. 333; Jägers, N., 2011, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability? *Netherlands Quarterly of Human Rights*, 29, p. 159; Felice D. de, Graf, A., 2015, The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights, *Journal of Human Rights Practice*, 7, p. 40.

42 Chinkin, C., 2000, Normative Development in the International Legal System, in: Shelton, D. (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford, Oxford University Press, pp. 21–42.

43 See, for example, Catá Backer, L., 2015, Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All, *Fordham International Law Journal*, 38, pp. 457–542.

initial crystallization of the states' goodwill."<sup>44</sup> Nonetheless, such views are not shared by some of the leading scholars in business and human rights. Deva argues that one should not question the legal power of the UNGPs as a tool to advance the position of rights-holders.<sup>45</sup> However, the UNGPs have in the international arena restated obligations to states and corporations in business and human rights. To this end, they have strengthened the protection of rights-holders in business and human rights. As a result, what is the nature of the UNGPs from the viewpoint of distinction between formal and material sources of international law?

Commentators have argued that formal sources include those that fall within one defined category of sources of international law.<sup>46</sup> On the other hand, material sources of international law refer to the practice of participants in international law.<sup>47</sup> From a point of view of formal sources of international law, the UNGPs do not formally create binding obligations. Nonetheless, its principal author, the late professor John Ruggie, has always maintained that the UNGPs on Business and Human Rights are a reflection of the existing international human rights law. Even though he recognized that the UNGPs are soft law documents, he advocated that their power arises from the practice of states. Soft law documents are generally not considered as formal sources of international law.<sup>48</sup> Nonetheless, Dupuy concedes that legal norms included in the soft law could eventually create binding obligations depending on the context and state practice.<sup>49</sup> Accordingly, Ruggie, Rees and David argued that "Guiding

44 Lagoutte, S., 2016, The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law, in: Lagoutte, S., Gammeltoft-Hansen, T., Cerone, J. (eds.), *Tracing the Roles of Soft Law in Human Rights*, Oxford, Oxford University Press, pp. 235–253, 243.

45 Deva, S., 2021, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, *Business and Human Rights Journal*, Vol. 6, Issue 2, pp. 336–351, 350.

46 Besson, S., Aspremont, J. d', The Sources of International Law: An Introduction, in: Besson, S., Aspremont, J. d' (eds.), 2014, *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, pp. 25–26.

47 *Ibid.*, p. 6. See also Aspremont, J. d', 2011, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, Oxford: Oxford University Press.

48 See, for instance, Pauwelyn, J., Wessel, R. A., Wouters, J. (eds.), 2012, *Informal International Lawmaking*, Oxford, Oxford University Press; Cf. Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights, 21 October 2011; Schutter, O. de *et al.*, 2012, Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights, *Human Rights Quarterly*, Vol. 34, Issue 4, pp. 1084–1169.

49 Dupuy, P.-M., 1991, Soft Law and the International Law of the Environment, *Michigan Journal of International Law*, 12, p. 431.

principles authoritatively define a universe of discourse and establish its basic parameters and perimeters. Their constitutive elements achieve uptake to the extent that they have intrinsic persuasive power, inspire or justify prescribed conduct, engender shared expectations of ends and means, as well as other such normative and epistemic factors.”<sup>50</sup> They appear to claim that UNGPs are considered a material source of international law.

Other scholars have emphasized that they have been adopted unanimously, which reflects state commitment and recognition of UNGPs as material sources of international regulation of business and human rights.<sup>51</sup> Nonetheless, such conclusions have not been followed in practice, where less than thirty states have adopted National Action Plans on Business and Human Rights. In spite of the low number of adoption of National Action Plans, the impact and legitimacy of the UNGPs cannot be underestimated. It is submitted that the adoption of the UNGPs on Business and Human Rights has three-fold added value for creating international legal obligations in the field of business and human rights, perhaps not in the formal understanding of the sources of public international law, but surely from the perspective of material sources of international law.

First, the content of the majority of the principles included UNGPs on Business and Human Rights have been reflections of the customary and treaty international human rights obligations that states carry in international human rights law concerning supervision of private actors. Undoubtedly, the UNGPs illustrate the growing consensus among domestic systems that states and corporations are obliged to respect human rights. It has been generally accepted by several international and regional human rights bodies that states have positive obligations of binding nature to protect human rights of private actors in their horizontal relationships.<sup>52</sup> State obligations to strive to prevent human rights violation in the horizontal relationship are widely recognized, for instance, in the European regional system of human rights protection.<sup>53</sup> Moreover, domestic and regional legal systems have increasingly recognized that corporations have human rights obligations and are to ensure that in their business activities

---

50 Ruggie, J., Rees, C., Davis, R., 2021, Years After: From UN Guiding Principles to Multi-Fiduciary Obligations, *Business and Human Rights Journal*, Vol. 6, Issue 2, pp. 179–197.

51 Addo, M., 2014, The Reality of the United Nations Guiding Principles on Business and Human Rights, *Human Rights Law Review*, Vol. 14, pp. 133–47.

52 Letnar Čeranič, J., 2020.

53 See, for instance, Lavrysen, L., 2017, *Human Rights in a Positive State, Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge, Intersentia.

do not infringe human rights. The UN Human Rights Council, as an institutional non-state stakeholder, has by adopting the UNGPs participated in international law making through restating existing state human rights obligations. They have adopted a perhaps formally declarative legal document of soft law legal nature, which nonetheless includes binding international legal obligations that derive from other formally binding sources of international law. As a result, the substance of the UNGPs could be considered as part of material sources of international law.

Second, the domestic and regional courts have over the past decade judicialized the UNGPs. Courts have included them in their judgements and decisions as an authoritative source of international law thereby recognizing that the nature of UNGPs stretches beyond soft law.<sup>54</sup> Courts have employed the tripartite framework of UNGPs to deliver reasoned judgement in business and human rights. Further, the UN Human Rights bodies have also not only referred to, but also relied on the normative power of the UN human rights bodies.<sup>55</sup> Additionally, 26 states have so far adopted National Action Plans and translated the UNGPs in domestic legal systems, even though much ground remains to be covered for them to be fully translated in domestic fora.<sup>56</sup> National human rights institutions have started to include UNGPs into their promotional and restorative human rights activities.<sup>57</sup> Several states have adopted national legislation in

54 García Muñoz, S., 2019, *Special Rapporteur on Economic, Social, Cultural and Environmental Rights, Business and Human Rights: Inter-American Standards*, IDH, ([http://www.oas.org/en/iachr/reports/pdfs/Business\\_Human\\_Rights\\_Inte\\_American\\_Standards.pdf](http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf)); Márquez Carrasco, C., Vivas Tesón, I., (eds.), 2017, *La implementación de los Principios Rectores de las Naciones Unidas sobre empresas y los derechos humanos por la Unión Europea y sus Estados miembros*, Aranzadi Thomson Reuters: Ministerio de Economía, Industria y Competitividad, Madrid, 2017. See also Sanders, A., *The Impact of the “Ruggie Framework” and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation*, in: Martin, J., Bravo, K., (eds.), 2016, *The Business and Human Rights Landscape: Moving Forward, Looking Back*, Cambridge, Cambridge University Press, pp. 288–315.

55 See, for instance, United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017).

56 UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *State National Action Plans*, (<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>, 20. 11. 2021); Bauer, J., 2016, *What Good is a NAP for Developing Countries? A Preliminary Assessment of Achievements and Prospects for National Action Plans on Business and Human Rights in the Global South*, SSRN, (<https://ssrn.com/abstract=3221052>).

57 Haász, V., 2013, *The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles*, *Human Rights Review*, 14, pp. 165–187.

business and human rights inspired by the UNGPs.<sup>58</sup> As a result, the evidence suggests that UNGPs have been at least partially domesticated in the national legal systems.<sup>59</sup> In this way, domestic systems provide evidence that the UNGPs have at least to some extent converted into (material) sources of international law.<sup>60</sup>

Third, the normative power of the UNGPs has propelled the calls for binding normative documents at international level. The main proposal for the potential UN Treaty has been built on complementarity with the UNGPs.<sup>61</sup> It is based on binding state obligations to respect, protect and fulfil human rights against potential corporate human rights violations. If adopted, States would be able to require businesses to conduct human rights due diligence through their supply chains. Equally important, the potential UN Treaty would also establish a legal basis for criminal, civil and administrative liability of corporations in their domestic systems. As a result, it would provide rights-holders with the access to remedy in business-related human rights abuses through domestic different modes of legal liability and provide them with reparations. On the contrary, another, competing, proposal has advocated for the direct translation of UNGPs in the UN Treaty, which would make the UNGPs formally binding in public international law.<sup>62</sup> Such a proposal would formally recognize the binding nature of the UNGPs and make them already formally binding. The UNGPs have, as a result, provided a springboard for further development of the regulation in the field, which has been so under-regulated in the past.

58 Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt im Zusammenhang mit Auslandaktivitäten von Unternehmen: Kein Schweizer Alleingang in der Gesetzgebung (2019), Bern, ([https://static.woz.ch/sites/woz.ch/files/text/download/lobby-schreiben\\_von\\_8august2019.pdf](https://static.woz.ch/sites/woz.ch/files/text/download/lobby-schreiben_von_8august2019.pdf), 20. 7. 2021); Loi 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017, Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten. Bundesgesetzblatt Jahrgang 2021, Nr. 46, 22. 7. 2021, 2959, ([https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBL#\\_bgbl\\_\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_\\_1627115664209,15.11.2021](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBL#_bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1627115664209,15.11.2021)).

59 Wettstein, F., 2021, Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights, *Business and Human Rights Journal*, Vol. 6, Issue 2, pp. 312–325.

60 Choudhury, B., Hardening Soft Law Initiatives in Business and Human Rights, in: Plessis, J. J. du, Keong Low, C. (eds.), 2017, *Corporate Governance Codes for the 21<sup>st</sup> Century*, Cham, Switzerland, Springer.

61 Blackwell, S., Vander Meulen, N., 2016, Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights, *Notre Dame Journal of International and Comparative Law*, 6, p. 51.

62 O'Brien, C., 2020, Transcending the Binary: Linking Hard and Soft Law Through a UNGPs-Based Framework Convention, *AJIL Unbound*, 114, pp. 186–191.

All in all, institutional non-state participants have a role to play as international law-makers in the field of business and human rights. As such, one can answer the initial question posed by Jovanović in his book. It submitted that one can confirm that the UNGPs, even though they were not meant to be of binding nature, under certain conditions produce binding legal obligations of corporations and states.<sup>63</sup> UNGPs are a material source of international law. Those conditions include the content of soft law international legal documents. If institutional actors adopt a soft law document that includes already existing international legal obligations, its nature will be at least materially binding. The UNGPs can already at this moment produce binding obligations as their content to the large extent derives from the already existing obligations that states and corporations have in customary and treaty international law. As such, one can persuasively argue that the UN Human Rights Council and its Member states have by adopting UNGPs participated in international law making as self-standing participants. The UNGPs on Business and Human Rights are now an authoritative and legitimate legal source of binding obligations of states and corporations in businesses and human rights. To this end, one should not turn a blind eye to the capacity and ability of institutional non-state actors in international law. As a result, the UNGPs are textbook examples that institutional non-state actors are capable of producing binding law even though states did not intend to grant them with legislative powers.

## 5. CONCLUSION

This article studied institutional actors as international law-makers in drafting and adopting binding documents in the area of human rights protection in business. More specifically, it analysed whether the UN Human Rights Council as a subsidiary organ of the United Nations has through the adoption and impact of United Guiding principles on Business and Human Rights been participating in the creation of international relations even though traditional sources of international relations would not allow for such participation. To be clear, international institutional actors traditionally do not belong among those stakeholders in international law that are free to create and amend rules of international law. To the contrary, the creation of the rules in public international law traditionally rests on the willingness and ability of states as primary participants or subjects of international law. Nonetheless, the last decades has shown that scholars of international law should not dismiss the persuasive ability and normative capacity of participants in international law beyond state to develop binding rules of international law. Such interpretation concurs with Jovanović's

---

63 Jovanović, M. A., 2019, p. 168.

observations as to the ability of institutional non-state actors to have equal legal standing in international law-making, but it also substitutes the traditional function of the state in business and human rights, which has been often captured by the private actors.<sup>64</sup> In spite of states still being the primary participants in international law, the credibility and legitimacy does not only hinge on their ability and willingness to accept new legal rules, but also on the content of soft law documents such as UNGPs. Such arguments are perhaps even more persuasive in a legal system such as international law, which does not have a very clear hierarchy of legal norms nor there exists a permanent judicial institution with compulsory jurisdiction which would be competent to resolve norm-conflicts. Most of the international legal rules arise from the consent reached among its participants. If one takes consent as a determining factor, one can easily accept that UNGPs, which are adopted unanimously, include binding obligations.

The UNGPs are an example of a formally soft law UN document that has through wide-spread, general and systematic practice of states, international organisations, businesses and domestic and regional judicial institutions acquired the status of authoritative document that reflects binding obligations of states. Surely, they are not formal sources of international law. However, those stakeholders have agreed that the content of the UNGPs arises to at least substantive legality if formal legality was not possible due to their legal form. Therefore, UNGPs should be considered as a material source of international law. Accordingly, the UNGPs have been over past decades domesticated by domestic and international legal systems thereby raising to the status of material sources of international law. All in all, participants in domestic and international environments have in the past decades recognized that the UNGPs on Business and Human Rights are not only soft law international document, but a material source of state obligations in business and human rights. The ability and capacity of international institutional actors therefore should not be underestimated. The example of the UNGPs illustrates that they under certain conditions contribute to international law-making.

## BIBLIOGRAPHY

1. Aaronson, S. A., Higham I., 2013, "Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' *Human Rights Quarterly*, 35.
2. Addo, M., 2014, The Reality of the United Nations Guiding Principles on Business and Human Rights, *Human Rights Law Review*, Vol. 14.

---

64 Augenstein, D., 2012, The Crisis of International Human Rights Law in the Global Market Economy, *Netherlands Yearbook of International Law*, 44, p. 41.

3. Aspremont, J. d', 2011, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press.
4. Augenstein, D., 2012, The Crisis of International Human Rights Law in the Global Market Economy, *Netherlands Yearbook of International Law*, 44.
5. Besson, S., Aspremont, J. d', The Sources of International Law: An Introduction, in: Besson, S., Aspremont, J. d' (eds.), 2014, *The Oxford Handbook of the Sources of International Law*, Oxford University Press.
6. Blackwell, S., Vander Meulen, N., 2016, Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights, *Notre Dame Journal of International and Comparative Law*, 6.
7. Carrillo Santarelli, N., 2013, *Necessity and Possibilities of the International Protection of Human Dignity from Non-State Violations*, PhD Thesis, Universidad Autónoma de Madrid.
8. Clapham, A., 2006, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press.
9. Catá Backer, L., 2012, From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance, *Pacific McGeorge Global Business & Development Law Journal*, Vol. 25, Issue 1.
10. Catá Backer, L., 2015, Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All, *Fordham International Law Journal*, 38.
11. Chinkin, C., 2000, Normative Development in the International Legal System, in: Shelton, D., (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford, Oxford University Press.
12. Choudhury, B., Hardening Soft Law Initiatives in Business and Human Rights, in: Plessis, J. J. du, Keong Low, C. (eds.), 2017, *Corporate Governance Codes for the 21<sup>st</sup> Century*, Cham, Switzerland, Springer.
13. Deva, S., 2012, *Regulating Corporate Human Rights Violations: Humanizing Business*, London, New York, Routledge.
14. Deva, S., Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles. In: Deva, S., Bilchitz, D. (eds.), 2013, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press.
15. Deva, S., 2021, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, *Business and Human Rights Journal*, Vol. 6, Issue 2.
16. Deva, S., Bilchitz, D. (eds.), 2013, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, Cambridge, Cambridge University Press.
17. Dupuy, P.-M., 1991, Soft Law and the International Law of the Environment, *Michigan Journal of International Law*, 12.

18. Felice, D. de, Graf, A., 2015. The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights, *Journal of Human Rights Practice*, 7.
19. Kinley, D., Nolan, J., Zerial, N., 2007, The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations, *Company and Securities Law Journal*, Vol. 25, Issue 1.
20. Kinley, D., Tadaki, J., 2004, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, *Virginia Journal of International Law*, 44.
21. Haász, V., 2013, The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles, *Human Rights Review*, 14.
22. Jägers, N., 2011, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability? *Netherlands Quarterly of Human Rights*, 29.
23. Jägers, N., 2002, *Corporate Human Rights Obligations: In Search of Accountability*, Antwerp, Intersentia.
24. Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press.
25. Lagoutte, S., The UN Guiding Principles on Business and Human Rights: A Confusing 'Smart Mix' of Soft and Hard International Human Rights Law, in: Lagoutte, S., Gammeltoft-Hansen, T., Cerone, J. (eds.), 2016, *Tracing the Roles of Soft Law in Human Rights*, Oxford, Oxford University Press.
26. Lavrysen, L., 2017, *Human Rights in a Positive State, Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge, Intersentia.
27. Letnar Černič, J., 2010, *Human Rights Law and Business*, Groningen, Europa Law Publishing.
28. Letnar Černič, J., 2020, *Corporate Accountability under Socio-Economic Rights, (Transnational Law and Governance)*, Oxon, New York, Routledge.
29. Letnar Černič, J., Ho, T. van (eds.), 2015, *Human Rights and Business: Direct Corporate Accountability for Human Rights*, Wolf Publishing.
30. O'Brien, C., 2020, Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention, *AJIL Unbound*, 114.
31. Márquez Carrasco, C., Vivas Tesón, I., (eds.), 2017, *La implementación de los Principios Rectores de las Naciones Unidas sobre empresas y los derechos humanos por la Unión Europea y sus Estados miembros*, Madrid, Aranzadi Thomson Reuters, Ministerio de Economía, Industria y Competitividad..
32. Martin Amerson, J., 2012, The End of the Beginning? A Comprehensive Look at the Business and Human Rights Agenda from a Bystander Perspective, *Fordham Journal of Corporate and Finance Law*, 17.
33. McCorquodale *et al.*, 2017, Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises, *Business and Human Rights Journal*, Vol. 2, Issue 2.
34. Michalowski, S., 2012, No Complicity Liability for Funding Gross Human Rights Violations, *Berkeley Journal of International Law*, 30.

35. Nolan, J., 2017, Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains, *Alternative Law Journal*, Vol. 42, Issue 1.
36. Pauwelyn, J., Wessel, R. A., Wouters, J. (eds.), 2012, *Informal International Law-making*, Oxford, Oxford University Press.
37. Ramasastry, R., 2015, Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability, *Journal of Human Rights*, 14.
38. Ramio Marles, C., Alsina Burgues, V., 2016, The Role of the Ombudsman in Protecting the Rights of Consumers of Services of General Interest Provided by Private Companies, *US-China Law Review*, 13.
39. Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *OJ L* 130, 19. 5. 2017.
40. Ruggie, J. G., 2004, Business and Human Rights: The Evolving Agenda, *American Journal of International Law*, 101.
41. Ruggie, J., 2008, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5.
42. Ruggie, J. G., 2013, *Just Business: Multinational Corporations and Human Rights*, New York, W. W. Norton & Co.
43. Ruggie, J. G., 2014, Global Governance and “New Governance Theory”: Lessons from Business and Human Rights, *Global Governance*, Vol. 20, Issue 1.
44. Ruggie, J., Rees, C., Davis, R., 2021, Years After: From UN Guiding Principles to Multi-Fiduciary Obligations, *Business and Human Rights Journal*, Vol. 6, Issue 2.
45. Sanders, A., The Impact of the “Ruggie Framework” and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation, in: Martin, J., Bravo, K. (eds.), 2016, *The Business and Human Rights Landscape: Moving Forward, Looking Back*, Cambridge, Cambridge University Press.
46. Schutter, O. de, Foreword: Beyond the Guiding Principles, in: Deva, S., Bilchitz, D. (eds.), 2013, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge, Cambridge University Press.
47. Schutter, O. de *et al.*, 2012, Commentary to the Maastricht principles on extra-territorial obligations of states in the area of economic, social and cultural rights, *Human Rights Quarterly*, Vol. 34, Issue 4.
48. Vasquez, C. M., 2005, Direct vs. Indirect Obligations of Corporations under International Law, *Columbia Journal of Transnational Law*, 43.
49. Weissbrodt, D., Kruger, M., 2003, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, *American Journal of International Law*, 97.

50. Wettstein, F., The History of “Business and Human Rights” and Its Relationship with Corporate Social Responsibility, in: Deva. S., Birchall, D., (eds.), 2020, *Research Handbook on Human Rights and Business*, Cheltenham, Edward Elgar.
51. Wettstein, F., 2021, Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights, *Business and Human Rights Journal*, Vol. 6, Issue 2.

## LEGAL ACTS

1. California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, 2010).
2. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Text with EEA relevance.
3. Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, 29 September 2017.
4. Loi 2017–399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, Official Gazette of the Republic of France, 27 March 2017.
5. Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights, 21 October 2011.
6. Modern Slavery Act (UK, 2015).
7. Modern Slavery Act 2018, Australia (No. 153, 2018).
8. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003).
9. The Dutch Child Labour Due Diligence Law, Eerste Kamer, vergaderjaar 2016–2017, 34 506, A.
10. United Nations High Commissioner for Human Rights, Report on “Improving accountability and access to remedy for victims of business-related human rights abuse, United Nations General Assembly, A/HRC/32/19, 10 May 2016.
11. United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017.

## CASE LAW

1. *Connelly v. R.T.Z. Corporation*, [1998] A.C. 854 at 868–69.
2. *Connelly v. R.T.Z. Corp. Plc.*, [1998] A.C. 854 (House of Lords) (citing *Sim v. Robinow*, 1892 Sess. Cas. (R.) 668.
3. *Spiilada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 474.

## INTERNET SOURCES

1. Bauer, J., What Good is a NAP for Developing Countries? A Preliminary Assessment of Achievements and Prospects for National Action Plans on Business and Human Rights in the Global South, SSRN, (<https://ssrn.com/abstract=3221052>).
2. García Muñoz, S., 2019, *Special Rapporteur on Economic, Social, Cultural and Environmental Rights, Business and Human Rights: Inter-American Standards, IDH*, ([http://www.oas.org/en/iachr/reports/pdfs/Business\\_Human\\_Rights\\_Inte\\_American\\_Standards.pdf](http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf)).
3. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten. Bundesgesetzblatt Jahrgang 2021, Nr. 46, 22. 7. 2021, 2959, ([https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl#\\_\\_bgbl\\_%2F%2F%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_\\_1627115664209](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl#__bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1627115664209), 15. 11. 2021).
4. Hamm, B., 2021, The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty, *Human Rights Review*, (<https://doi.org/10.1007/s12142-020-00612-y>).
5. Lappin, K., Pedersen, H., Khan, T., 2016, Influence of corporations in treaty process would undermine affected communities’ interests, Business & Human Rights Resource Centre, March 28, (<http://business-humanrights.org/en/influence-of-corporations-in-treaty-process-would-undermine-affected-communities%E2%80%99-interests>, 20. 11. 2021).
6. Lopes, R., Kwesiga, A., 2018, *What the Zero Draft and Protocol Lack: Meaningful Access to Justice – a Global South Perspective*, Business and Human Rights Resource Centre, 8 October, (<https://www.business-humanrights.org/en/blog/what-the-zero-draft-and-protocol-lack-meaningful-access-to-justice-a-global-south-perspective/> 20. 11. 2021).
7. Lorenzo, F. di, Levin-Nally, E., 2021, The “Conflict Minerals Regulation” or the “Regulation on Responsible Sourcing of Minerals”: Evolving Purpose and Terminology, *Business and Human Rights Journal Blog*, 22 February, (<https://www.cambridge.org/core/blog/2021/02/22/the-conflict-minerals-regulation-or-the-regulation-on-responsible-sourcing-of-minerals-evolving-purpose-and-terminology/> 10. 11. 2021).
8. Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt im Zusammenhang mit Auslandaktivitäten von Unternehmen: Kein Schweizer Alleingang in der Gesetzgebung (2019). Bern. URL: ([https://static.woz.ch/sites/woz.ch/files/text/download/lobbyschreiben\\_von\\_8august2019.pdf](https://static.woz.ch/sites/woz.ch/files/text/download/lobbyschreiben_von_8august2019.pdf), 15. 11. 2021).
9. Treaty Alliance, We call on states to participate actively in upcoming negotiations of the international treaty to ensure protection of human rights from the activities of transnational corporations and other business enterprises, 29 May 2015, (<https://www.business-humanrights.org/en/treaty-alliance-joint-statement-calls-for-signatures-in-favour-of-proposed-binding-treaty-to-enhance-corporate-legal-accountability-for-rights-abuses>, 10. 11. 2021).
10. UN Human Rights Council Resolution A/HRC/RES/26/9, 14 July 2014, (<https://undocs.org/A/HRC/RES/26/9>, 20. 11. 2021).

11. UN Working Group on the issue of human rights and transnational corporations and other business enterprises, State National Action Plans, (<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>, 20. 11. 2021).
12. Vedanta Resources PLC and another v. Lungowe and others; [2019] UKSC 20. Judgment, (<https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>, 10. 11. 2021), UK Supreme Court, 10 April 2019.
13. Yilmaz-Vastardis, A., Leader, S., 2017, *Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains, Essex Business and Human Rights Project*, (<https://www1.essex.ac.uk/ebhr/documents/Improving-Paths-to-Accountability-for-Human%20Rights-Abuses-in-the-Global-Supply-chains-A-Legal-Guide.pdf>, 10. 11. 2021).

## INSTITUCIONALNI AKTERI KAO MEĐUNARODNI ZAKONODAVCI U OBLASTI BIZNISA I LJUDSKIH PRAVA: RUKOVODEĆA NAČELA UJEDINJENIH NACIJA O BIZNISU I LJUDSKIM PRAVIMA I ŠIRE

Jernej Letnar Čerňič

### APSTRAKT

Biznis i ljudska prava predstavljaju interdisciplinarnu oblast, koja se zalaže za to da i država i poslovni subjekti budu nosioci obaveza koje se tiču ljudskih prava. Oblast biznisa i ljudskih prava ima za cilj da reguliše i spreči negativne uticaje poslovanja na svim nivoima globalnih lanaca snabdevanja. Pristup međunarodnog prava u ovom pogledu je do sada bio ograničen. Države su tradicionalno bile glavni učesnik u međunarodnoj zajednici. Ipak, ovaj članak ima za cilj da testira argumente koje je Jovanović izneo u svojoj knjizi *Priroda međunarodnog prava* iz 2019. godine, a to je da su institucionalni nedržavni akteri sposobni da kreiraju pravila međunarodnog prava. Opremljen ovim saznanjima, ovaj članak tvrdi da je Savet UN za ljudska prava usvajanjem Rukovodećih načela o biznisu i ljudskim pravima ponovio obaveze država i indirektno korporacija u pogledu ljudskih prava u međunarodnom pravu kako bi zaštitio dostojanstvo nosilaca prava u lokalnom i globalnom okruženju.

**Ključne reči:** filozofija međunarodnog prava, institucionalni akteri, biznis i ljudska prava, ljudska prava, državne obaveze, korporativne obaveze, Rukovodeća načela Ujedinjenih nacija o biznisu i ljudskim pravima.

Article History:

Received: 22 November 2021

Accepted: 6 December 2021

*Miodrag Jovanović\**

## THE NATURE OF INTERNATIONAL LAW AND BEYOND: A REPLY TO COMMENTATORS

### 1. INTRODUCTION

A book symposium often resembles a simultaneous chess exhibition (a.k.a. 'simul'), in which one player plays multiple games at a time with a number of other players. Unlike in a typical simul, in which a grandmaster plays with lower ranked players or even amateurs, the book author is in the exchange of argumentative moves usually faced with academic players of the similar, if not even higher, scholarly ranking and prestige. And yet, the organized book symposium is, akin the simul, "an excellent opportunity to flatter a master's vanity". In words of Dutch grandmaster Jan Hein Donner, "[l]ike a surgeon, he strides along the boards, where terminally ill positions are spread out for his inspection."<sup>1</sup>

Although I was deeply and truly flattered by the joint initiative of my colleagues and friends – Bojan Spaić, President of the IVR Serbia, and Violeta Beširević, Editor in Chief of *Pravni zapisi* journal – to organize a symposium for my last book *The Nature of International Law* (hereinafter *NoIL*), I did not think for a minute that in having the chance to respond to the raised comments and criticisms I will eventually assume the status of an inspecting surgeon, dealing with terminally ill (argumentative) positions. To the contrary, knowing the academic credentials of the invited Symposium's discussants – Goran Dajović, Tatjana Papić, Jernej Letnar Černič, Miloš Hrnjaz and Ana Zdravković – I knew that what I was about to encounter were very alive and kicking arguments, coming from both international legal theory and general jurisprudence. In fact, all the participants approached their task as if they were inspired by Donner's advices to the simul-giver's challengers – to "play something [they] know

\* Full Professor, Faculty of Law, University of Belgrade; e-mail: miodrag@ius.bg.ac.rs

1 Donner, J. H., 2006, *The King: Chess Pieces*, Alkmaar, New In Chess, p. 250.

well” and to play it “aggressively” that is, self-confidently.<sup>2</sup> As a result, their commentaries at times go well beyond what I said or intended to say in *NoIL*. While the author’s vanity is fed whenever his book becomes the source of inspiration for other scholars to further develop some ideas and concepts, I will, nonetheless, refrain from commenting such novel argumentative positions. Sticking to the traditional idea of book symposium, in the remainder of the paper I will tackle only those criticisms that are directly or indirectly related to my very own positions from *NoIL*. Although they are all concerned with different issues, the connecting, overarching theme is that of normativity of international law. Therefore, I will integrate my observations in a single response to all the reviewers.

## 2. MANY FACES OF INTERNATIONAL LAW’S NORMATIVITY

I will proceed from Dajović’s contribution,<sup>3</sup> which entirely focuses on the concept of international law’s normativity. In generally holding that I “erred less in what I said, and more in what I missed to say”<sup>4</sup>, he is trying to offer a more suitable conceptual framework within which international law’s normativity can be better comprehended.<sup>5</sup> More precisely, Dajović argues that the steps I undertook in *NoIL* in elucidating normativity of international law is misplaced and, to a large extent, wrong and that the alternative he proposes would better fit my own methodological approach – prototype theory of concepts.<sup>6</sup> To begin with, my insistence on criticizing Raz’s influential theory of legal norms as exclusionary reasons for action was, according to Dajović, mostly unnecessary. This is so due to the fact “international law’s specificities are such that they cannot be satisfactorily incorporated into the Razian conceptual framework.” Namely, since Raz’s starting point is that law necessarily claims legitimate authority, justificatory reasons with which law provides its subjects are profoundly moral in nature. Dajović suggests that I share this idea that only moral reasons are right reasons for action. But the problem is this – unlike the municipal

---

2 *Ibid.*, p. 251.

3 Dajović, G., 2021, Normativnost međunarodnog prava (Normativity of International Law), *Pravni zapisi*, 2, str. 488–522.

4 *Ibid.*, str. 519.

5 *Ibid.*, str. 491.

6 This theory and its relevance for the conceptualization of (international) law is elaborated in Ch. 2 of *NoIL*, and is further developed in Jovanović, M., 2021, On *The Nature of International Law*: Rejoinder, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, pp. 193–215 and On *The Nature of International Law*: Rejoinder (openedition.org), Jovanović, M., 2021, On Law and Coercion – Once Again, *Jurisprudence*, Vol. 12, No. 3, pp. 417–425.

level, at which authority implies relations of hierarchy and subordination, the international level is largely horizontal in nature, and, hence, not apt for Razian conception.<sup>7</sup> This has, in Dajović's opinion, led me to a second erroneous move of "diluting" and "gradating" Razian normativity of municipal law in order to adapt it to the empirical reality of international law."<sup>8</sup>

Dajović's alternative proposal concerns the employment of Hart's conceptual framework of "internal point of view", which refers to the practical attitude of rule acceptance. In Hart's own words, "it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view.'"<sup>9</sup> Dajović provides a brief survey of several theoretical attempts which try to show that "internal point of view towards certain standard of behavior can turn it into a normative standard, that is, a reason for the justification of our behavior."<sup>10</sup> In the last step, Dajović argues that, having acceptance at its core, Hart's framework is well equipped to highlight normativity of various international legal rules, such as customary rules or *jus cogens* norms.<sup>11</sup>

Let me start my response by reminding of what Dajović noticed as well, that this discussion is taken within the second 'how' question of normativity, which endorses the perspective of practical rationality. It asks how (legal) norms provide us with reasons for action.<sup>12</sup> In that respect, it is important to emphasize that all prescriptive statements, be they favors, advices, requests or any type of rules (of morality, religion, etiquette, fashion, custom or law) are normative in nature. That is, in prescribing what ought to be, these statements purport to guide our behavior, by providing us with specific reasons for action. In light of this insight, it is not clear how to understand Dajović's claim that "the primary question" in our discussion about international law's normativity is "how at all and under what conditions would be possible for international legal norms to be reasons for action".<sup>13</sup> Irrespective of whether international rules of conduct are classified as 'legal' or not, they are indisputably normative in the aforementioned sense, insofar as they purport to regulate behavior of actors at

7 Dajović, G., 2021, str. 502.

8 *Ibid.*, str. 501.

9 Hart, H., 2012, *The Concept of Law (with an Introduction by Leslie Green, 3rd ed.)*, Oxford, Clarendon Press, p. 91.

10 Dajović, G., 2021, str. 508.

11 *Ibid.*, str. 515.

12 The first 'how' question calls for the epistemological perspective. It is concerned with finding out how to ascertain a norm, and more specifically a legal norm.

13 Dajović, G., 2021, str. 500.

the international plane. Whether they succeed in that or not is completely different question. What, thus, emerges as a potentially relevant issue is: what type of reasons is provided by international rules of conduct? The answer to this question might be of crucial importance for solving the puzzle of legality of international rules of conduct, particularly if one concedes to a widespread thesis that legal rules provide us with some special type of reasons for action.

However, this was not my intention. In fact, I take the belief that the domain of legal is successfully elucidated once its, allegedly exceptional, normativity is clarified as one of the most common jurisprudential errors, which I wanted to expose in *NoIL*.<sup>14</sup> Since Raz developed the most influential theory of that sort, claiming that what distinguishes legal from other rules (and prescriptive statements) is that it provides its subjects with “exclusionary reasons for action”, this theory seemed to be the natural target of my critique. Now, Dajović’s disapproval might be justified if a) Raz is clear that his theory is deliberately devised to elucidate only the nature of municipal law; and/or b) specific legal raw data at the municipal and international level are so different that they warrant distinctive conceptualizations of normativity of relevant rules of conduct.

Neither of the two is defensible. True, in the early stage of his career, Raz argued that what mattered was that “the theory will successfully illuminate the nature of municipal systems.”<sup>15</sup> Some four decades later, the global legal landscape, shaped by the relation between municipal and international law, has changed so dramatically that Raz was forced to admit that “exclusive concentration on state law was, it now turns out, never justified, and is even less justified today.”<sup>16</sup> Moreover, in discussing some

---

14 The other four most common mistakes are the following: the normativity of law is exhausted in the discussion about the nature of legal obligation; there is a direct link between the concepts of ‘normativity’, ‘validity’ and ‘bindingness’; normativity *qua* bindingness of law is taken for granted; *How* questions of normativity and the *why* question, *i.e.* the problem of source(s) of law’s normativity, are not clearly distinguished.

15 He adds that it may turn out that they “are not unique, that all their essential features are shared by, say, international law [...] If this is indeed so, well and good.” Raz, J., *The Identity of Legal Systems*, in: Raz, J., 1979, *The Authority of Law – Essays on Law and Morality*, Oxford, Oxford University Press, p. 105.

16 In particular, “we need to rethink the relations of state-law to other legal systems, as the scope both of the authority and of the sovereignty of states has diminished and is likely to diminish still further, and the ways states integrate within the emerging international law is going to confront us with practical and theoretical problems.” Raz, J., *Why the State?*, in: Roughan, N., Halpin, A. (eds.), 2017, *In Pursuit of Pluralist Jurisprudence*, Cambridge, Cambridge University Press, p. 161. Some of these ideas are further developed in, Raz, J., *The Future of State Sovereignty*, in: Sadurski, W.,

of the aspects of the aforementioned relation, Raz explicitly states that his theory of authority, and concomitantly of legal rules as exclusionary reasons for action, applies to international bodies as well.<sup>17</sup>

He may arguably be wrong about that. Specificities of the *international* realm may indeed be of such a nature that they warrant different approach towards the problem of normativity of international rules of conduct, as argued by Dajović. While the premise of this reasoning is correct, the concluding inference is, however, not. And for the reasons I already mentioned – normativity is one and the same across the entire normative world. As put by Spaak: “[T]here is only one sense of normativity, only one sense of ‘ought,’ so that although we may with good sense speak of the normativity of law or the normativity of morality, etc., there is no specifically moral or legal or prudential type of normativity, but only normativity plain and simple.”<sup>18</sup> Therefore, while one may try to argue, along with Austin, that international rules of conduct should be classified as “positive morality” rather than “positive law,”<sup>19</sup> one may not challenge the normativity of those rules.

This, furthermore, implies that my idea in *NoIL* was not to somehow dilute the normativity of municipal law in order to apply it at the international level, as claimed by Dajović. By criticizing Raz’s conception of legal rules as exclusionary reasons for action, I tried to show that, when primarily understood as the capacity to give rise to obligations,<sup>20</sup> legal normativity can clearly be endowed with relative weight. In that respect, there is nothing special about the normativity of law. Law’s normative force competes with the normative force of other normative orders (and at times, with the normative force of certain prescriptive statements). What, then, might appear puzzling is law’s overall capacity to be authoritative for its norm-subjects, that is, to generate the sense of obligation. My argument is that the authoritativeness (*i.e.* bindingness) of law cannot be attributed

---

Sevel, M., Walton, K. (eds.), 2019, *Legitimacy: The State and Beyond*, Oxford, Oxford University Press, pp. 69–81.

- 17 Raz, J., 2017, p. 161. Finally, taking Raz’s theory to the international level was by no means my invention. For an attempt to adapt Raz’s theory for the international sphere, see, Besson, S., 2009, *The Authority of International Law – Lifting the State Veil*, *Sydney Law Review*, Vol. 3, No. 3, pp. 343–380. For a critical appraisal of Raz’s theory in light of international law’s specificities, see, Çali, B., 2015, *The Authority of International Law – Obedience, Respect, and Rebuttal*, Oxford, Oxford University Press.
- 18 Spaak, T., 2018, *Legal Positivism, Conventionalism, and the Normativity of Law*, *Jurisprudence*, Vol. 9, No. 2, p. 323.
- 19 Austin, J., 1995, *The Province of Jurisprudence Determined* (edited by Wilfrid E. Rumble), Cambridge: Cambridge University Press, p. 219.
- 20 This is a morally more problematic aspect of law’s normativity than the one that refers to the law’s capacity to guide norm-subjects’ behavior by granting them rights.

to some special sort of normativity, but to combined effects of its typical features – institutionality, (coercive) guaranteeing, and justice-aptness.

To say this is to point out that in most legal orders, most of the time, norm-subjects treat legal norms as conclusive reasons for action, just as sometimes they disregard them altogether or give preference to the rules of other normative orders. Exactly at this point, Hart's "internal point of view" may be of critical assistance, particularly if it is, along with Shapiro, treated as "synonymous with the 'internalized,' rather than the 'insider's,' perspective". This view is "the practical attitude of rule acceptance", taken whenever one "accepts or endorses a convergent pattern of behavior as a standard of conduct".<sup>21</sup> Thus, if this concept in Hart's own words depicts "the way in which the rules function as rules in the lives of those who normally are the majority of society",<sup>22</sup> it is less an explanation of law's normativity,<sup>23</sup> at least understood in the aforementioned sense, and it is more an elucidation of what it means to say that law is authoritative, *i.e.* binding for its norm-subjects. For instance, when talking about the one who assumes the "external point of view", Hart notices that his description of rule-following behavior "cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty".<sup>24</sup>

Dajović notifies that, when explicating "internal point of view", Hart makes an analogy between legal rules and rules of games. Although Dajović is probably right in claiming that there are important differences between the two,<sup>25</sup> I would like to stress one conceptual feature of games that might be helpful in understanding the role of "internal point of view" in Hart's account of law. Bernard Suits, a philosopher of games, in his 1978 book *The Grasshopper* tried to provide a more comprehensive conceptualization of this human activity. In doing so, he introduced the additional element – the so-called lusory attitude (from the Latin *ludus*, game) of game players. It can be defined as "the acceptance of constitutive rules just so the activity made possible by such acceptance can occur".<sup>26</sup> Lusory attitude is exactly the practical attitude of rule acceptance that Hart has in mind when elucidating the authoritativeness of legal rules. Simply put, in order for 'legal game' to be playable, its players – particularly legal

---

21 Shapiro, S. J., 2006, What Is the Internal Point of View?, *Fordham Law Review*, Vol. 75, No. 3, p. 1159.

22 Hart, H., 2012, p. 90.

23 Dajović, G., 2021, str. 514.

24 Hart, H., 2012, p. 89. At yet another place, Hart employs the phrase "the internal aspect of obligatory rules". *Ibid.*, p. 91.

25 Dajović, G., 2021, str. 511.

26 Suits, B., 1978, *The Grasshopper: Games, Life and Utopia*, Toronto, University of Toronto Press, p. 40.

officials – need to accept its constitutive rules (most notably, “rule of recognition”).<sup>27</sup> There is not a uniform way for the requisite lusory attitude of ‘legal game’ to be developed. Schauer aptly points out that “patterns of internalization across numerous decision-makers may of course develop, or be inculcated by education, or be enforced by sanctions”.<sup>28</sup> While, for instance, individuals tend to develop patterns of internalization of legal rules through the continuous processes of political socialization, which start already in kindergarten, most of legal officials are exposed to those patterns in the course of a specialized legal education. This, furthermore, implies that motivating reasons for accepting rules from the internal point of view may sharply differ.<sup>29</sup> Dajović reminds us that this was Hart’s view.<sup>30</sup> But, this was also the view that I espoused in *NoIL*, when explicating why legal rules are commonly treated as “the signaler of last resort”.<sup>31</sup>

To conclude. While I reject Dajović’s argument that my debunking of Raz’s conception was unnecessary and somehow misleading, I do accept his criticism that I could have more credibly relied on Hart’s concept of “internal point of view” when discussing the nature of international law. However, not with the aim that Dajović has in mind – to demonstrate that “international law possesses ‘normativity’ and, in that respect, ‘deserves’ to

27 “[W]hilst Hart was keen to stress that we identify the rule of recognition by looking to the practices of officials he did not believe that the rule was *constituted* by their behaviour. The rule of recognition of a given society is the rule that its courts actually accept and take a ‘critical reflective attitude’ towards.” Adams, T., *Practice and Theory in the Concept of Law*, in: Gardner, J., Green, L., Leiter, B. (eds.), 2021, *Oxford Studies in Philosophy of Law Volume 4*, Oxford, Oxford University Press, p. 19.

28 Schauer, F., 1991, *Playing By the Rules – A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford, Clarendon Press, p. 128.

29 “But the way in which and the extent to which, if at all, rules become a part of a decisional process is ultimately determined by the decision-maker alone.” *Ibid.*

30 “[A]llegiance to the system may be based on many different considerations: calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.” Hart, H., 2012, p. 203.

31 Here is a longer quote, with omitted footnotes: “The treatment of law as ‘the signaler of last resort’ can be well explained with reference to the aforementioned ‘respect’ for law. This respect can be manifested differently and generated for various reasons. True, the overall belief in the legitimacy of political authorities has proven to be the strongest ground for treating legal rules as binding. However, legal rules might be at times treated by norm-subjects as ‘binding’ for prudential reasons associated with legal sanctions, just as ‘some legal norms might sometimes trigger [...] general moral reasons’ for action, even when they are issued by plainly illegitimate authorities. Finally, norm-subjects might find themselves with other members of the polity in different interconnected legal statuses (e.g., students, employees, companies) in which treating obligation-installing norms as binding is connected to reciprocal benefits stemming from the concomitant right-conferring norms.” Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, pp. 142–143.

be treated as law”,<sup>32</sup> but in order to explicate authoritativeness (*i.e.* bindingness) of international law. The overall conclusion, nonetheless, would be the same – bindingness of legal rules can be gradated, because their normative force is of relative weight. The concept of ‘relative normativity’ has been for quite some circulating in the international legal –normativity as such, and, thus, (international) legal normativity as well, that invites the talk of gradation and relativity. Hence, one should not take relative normativity *per se* as a badge of inferiority of a given normative order.

Relative normative force of a legal rule may come from two different sources. While its capacity to give rise to obligation may be the upshot of norm-addressee’s blatant disregard for the practical attitude of rule acceptance, it can also be the result of norm-giver’s failure to provide precise directive as to which behavior its subjects are to follow. Drawing from the concluding chapter of *NoIL*, which deals with (un)certainty in international law, Papić, in her contribution,<sup>33</sup> discusses exactly those “indeterminate rules [that] make difficult to see what they require of their addressees.”<sup>34</sup> She enlists other, accompanying features of these indeterminate rules of international law: a) that it “is hard to assess the extent of compliance with them”; b) that “some authors seem to cast doubt on the legal force of such rules”; c) that this type of indeterminacy, which comes in forms of vagueness and ambiguity,<sup>35</sup> “is usually not a result of the poor legal drafting, but a deliberate choice driven by either domestic or international considerations”;<sup>36</sup> and d) that, being contextual and fluid, they allow “broader discretion in its interpretation by the affected state.”<sup>37</sup> Finally, instead of merely repeating how indeterminacy of these instruments might endanger legitimacy and efficacy of international law, Papić argues that we should find value in them. The specific value in mind is that “indeterminate rules accommodate disagreement”,<sup>38</sup> thereby highlighting the fact that international law is first and foremost argumentative practice.<sup>39</sup>

Since I committed myself to commenting only those aspects of the contributions that somehow tackle my own arguments in *NoIL*, I would

---

32 Dajović, G., 2021, str. 503.

33 Papić, T., 2021, In *Defense of Uncertainty: Values behind Indeterminate Rules of International Law*, *Pravni zapisi*, 2, pp. 523–549.

34 *Ibid.*, p. 529.

35 According to her, “[a] rule is vague when there is no pre-established answer to the issue it regulates.” On the other hand, “a rule is ambiguous, if it has multiple meanings.” *Ibid.*, p. 530.

36 *Ibid.*, p. 529.

37 *Ibid.*, p. 533.

38 *Ibid.*, p. 537.

39 *Ibid.*, p. 539.

like to stress that the aforedescribed features of indeterminate international rules make them ideal candidates for the classification under the controversial concept of ‘soft law’. As explicated in *NoIL*, in order to count as “soft law”, an instrument has to pass the requisite test of legal validity, *i.e.* that it stems from some of the recognized formal sources of law. On such a reading, everything hinges upon the “softness” of a given legal instrument. In that respect, I largely follow d’Aspremont’s idea of “soft *negotium*,” which is present whenever instruments “do not lay down any precise directive as to conduct and [...] are not cast in normative terms”.<sup>40</sup> Both examples that Papić discusses – Art. VI of the Treaty on the Non-proliferation of Nuclear Weapons and the UN Security Council Resolution 2249 – clearly qualify for the status of legal instruments with soft *negotium*. One of the important jurisprudential findings of this analysis is that “[a]ccepting that there may be legal acts with a soft *negotium* means that the normative character of an act is not the prerequisite of its legal character.”<sup>41</sup> This is a further vindication of one of the more general insights of *NoIL*, that the oft assumed overlapping between the concepts of “normativity”, “validity”, and “bindingness” is actually unsubstantiated.

That this is so, becomes also apparent from yet another Symposium’s contribution, that by Letnar Černič.<sup>42</sup> In developing my argument that institutional non-state actors are capable of creating international legal rules, he focuses on the UN Human Rights Council’s document – UN Guiding Principles on Business and Human Rights (UNGPs). The author emphasizes three important features of it. First, that although “from a point of view of formal sources of international law, the UNGPs do not formally create binding obligations”, its principal author, the late professor John Ruggie, has always maintained that it a) reflects the existing international customary and treaty human rights law, and b) that it is an instance of soft law.<sup>43</sup> Second, “the domestic and regional courts have over the past decade judicialized the UNGPs”, insofar as they have referred to the Guidelines “in their judgements and decisions as an authoritative source of international law thereby recognizing that the nature of UNGPs stretches beyond soft law.”<sup>44</sup> And third, “the normative power of the UNGPs has propelled the calls for binding normative documents at international

40 Aspremont, J. d’, 2008, Softness in International Law: A Self-Serving Quest for New Legal Materials, () *European Journal of International Law*, Vol. 19, No. 5, p. 1084.

41 *Ibid.*, 1084–1085.

42 Černič, J. L., 2021, Institutional Actors as International Law-Makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and Beyond, *Pravni zapisi*, 2, pp. 594–617.

43 *Ibid.*, p. 607.

44 *Ibid.*, p. 608.

level. The main proposal for the potential UN Treaty has been built on complementarity with the UNGPs.”<sup>45</sup>

Although Letnar Černić approached the subject matter from the perspective of the role of non-state institutional actors in the process of international law-making, I would like to comment his analysis through the filter of international law’s relative normativity. In discussing this concept in *NoIL*, I mention Besson’s argument that international law-making processes can result in both “complete legal norms” and “intermediary legal products”. Although the latter “are not yet valid legal norms, [they] may be vested with a certain evidentiary value in the next stages of the law-making process.”<sup>46</sup> For instance, UN General Assembly resolutions were long ago recognized as some such products with “nascent legal force.”<sup>47</sup> As I stated in *NoIL*, in other areas of law one can hardly find references to “intermediary legal products” or “emerging legal norms”. A norm that is emerging is not yet existent, *i.e.*, valid, and, thus, Letnar Černić is right in claiming that, from a point of view of formal sources of international law, UNGPs is not a valid legal<sup>48</sup> instrument. However, once it is ascertained that it does not pass the recognized threshold of international legal validity, this instrument can no longer be classified as an instance of “soft law”, as implied by Letnar Černić. And yet, as with a number of “products” of this sort in international law, UNGPs proved to have important legal bearing, insofar as it became a legitimate point of reference in an ongoing argumentative international legal practice. From Letnar Černić’s contribution, it is obvious that this bearing is three-fold: a) UNGPs has an evidentiary role for the argument that certain international human rights obligations of states enjoy the status of customary rules; b) its “intermediary legal” character is particularly strengthened by the said process of judicialization; and finally c) the undergoing work on the relevant UN treaty is based on complementarity with UNGPs.

In his seminal paper on the rising phenomenon of “relative normativity” of international law, which he portrayed as highly negative phenomenon, Weil discussed as one prominent example *erga omnes* obligations. This is the topic of Zdravković’s contribution.<sup>49</sup> Although the subtitle of

---

45 *Ibid.*, p. 609.

46 Besson, S., *Theorizing the Sources of International Law*, in: Besson, S., Tasioulas, J. (eds.), 2010, *The Philosophy of International Law*, Oxford, Oxford University Press, p. 170.

47 Castaneda, for example, referred to them as “embryonic norms” and “quasilegal rules”. Castaneda, J., 1969, *Legal Effects of United Nations Resolutions*, New York, Columbia University Press, p. 176.

48 He mistakenly uses “binding,” thereby repeating the usual error of implying overlapping meanings of “validity” and “bindingness” of legal norms.

49 Zdravković, A., 2021, *Obligatory Erga Omnes – Jus Cogens in Statu Nascendi? A Theory Inspired by “The Nature of International Law”*, *Pravni zapisi*, 2, pp. 577–593.

her paper suggests that it is “a theory inspired by *NoIL*”, she concludes by saying “that most of [its] considerations regarding the *erga omnes* obligations were found to be untenable”.<sup>50</sup> Zdravković’s key argument is that these norms are hardly distinguishable from *jus cogens* rules, insofar as the list of candidates for both categories largely overlaps. The main distinction is that the letter norms are non-derogable, while the former norms do not possess that quality. Therefore, her conclusion is that “*erga omnes* obligations are *jus cogens in statu nascendi*.”<sup>51</sup>

Zdravković’s analysis is meticulous, and there is not much to be added. Two caveats, though. First is about the formal status of *erga omnes* obligations in the architectonics of the international legal world. At one point, she says: “Although it was already mentioned that there were some doubts as to whether *erga omnes* obligations were indeed of a higher status than others, not much support can be found for that sort of skepticism in either doctrine or case-law.”<sup>52</sup> In *NoIL*, I pay attention to this doctrinary squabble regarding their formal status, and in doing so, I refer to the position taken by the International Law Commission’s (ILC) in its *Fragmentation* report. ILC is clear on this point: “The *erga omnes* nature of an obligation [...] indicates no clear superiority of that obligation over other obligations.” This is so, because unlike the norms of *jus cogens*, which “are distinguished by their normative power – their ability to override a conflicting norm – obligations *erga omnes* designate the scope of application of the relevant law, and the procedural consequences that follow from this.”<sup>53</sup> The fact that, content-wise, *i.e.* substantively speaking, the candidate norms largely overlap can in no way affect their formal position within the gradually hierarchized international legal order.

This brings me to the second caveat. It concerns Zdravković’s ultimate conclusion regarding the nature of *erga omnes* obligation. According to her, these obligations do not stem from peremptory norms, quite the contrary, “they aspire to reach the highest normative status of *jus cogens*.”<sup>54</sup> Hence, they are properly understood as “*jus cogens in statu nascendi*”. If formulated this way, two types of norms would become permanently entangled, so that they would stand in one very precise temporal relation. That is, in the process formation of peremptory norms, *erga omnes*

50 *Ibid.*, p. 589.

51 *Ibid.*, p. 590.

52 *Ibid.*, p. 587.

53 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi)* A/CN.4/L.682 of 13 April 2006, (2006), para. 380.

54 Zdravković, A., 2021, p. 588.

obligations would assume some pupa-like phase before the adult butterfly (*jus cogens*) is developed. Not only would this further complicate already complex process of *jus cogens* formation and its distinction from international customary rules,<sup>55</sup> but it would also raise the question whether some such pupa-like phase is mandatory in the emergence of peremptory norms. I am unsure whether there is enough doctrinary support for such far-reaching conclusion.

Hrnjaz's contribution<sup>56</sup> focuses on the most controversial formal source of international law – customary rules. In arguing that both jurisprudence of the ICJ and most of the international law doctrine fail to provide an appropriate explanation of the process of formation of customary international law, he argues that “practice of international law-makers is the only element” of customary rules.<sup>57</sup> In doing so, he explores Postema's alternative proposal, according to which this is a specific type of practice, the so-called “discursive normative practice”. This proposal tries to integrate material and subjective element of customary rule,<sup>58</sup> albeit with a partial success.<sup>59</sup>

Since Hrnjaz does not directly debate with any of the points about customary international law that I raised in *NoIL*, I will just briefly comment why the suggested approach is implausible.<sup>60</sup> Simply put, with practice as the sole element no distinction would be possible between habitual behavior and customary rule. This was famously demonstrated by Hart.<sup>61</sup> He says that in order for a group “to have a habit it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism.” In contrast, in case of the existence of a customary rule, “not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it.”<sup>62</sup> Finally, coming into existence of a customary rule requires that “some at

---

55 See, Jovanović, M., 2020, *Jus Cogens: A Complex Case of Constitutional Reasoning in International Law*, *Rechtsphilosophie*, Vol. 6, No. 3, pp. 249–262.

56 Hrnjaz, M., 2021, *Nature of Customary International Law: All We Need Is Practice*, *Pravni zapisi*, 2, pp. 550–576.

57 *Ibid.*, p. 550.

58 *Ibid.*, p. 566.

59 *Ibid.*, p. 570.

60 There are diametrically opposing proposals to eliminate the element of practice. See, e.g., Lepard, B. D., 2010, *Customary International Law: A New Theory with Practical Applications*, Cambridge, Cambridge University Press. I criticize both of them in *NoIL*.

61 He is speaking of “social rule”, but it is clear that what he primarily has in mind in making this comparison is customary rule.

62 Hart, H., 2012, p. 55.

least must look upon the behaviour in question as a general standard to be followed by the group as a whole.”<sup>63</sup> To “look upon” is to assume the aforementioned “internal point of view”, that is, “a critical reflective attitude to certain patterns of behaviour as a common standard”.<sup>64</sup> Whether such attitude is taken by states is often not easy to ascertain and for this reason I stressed in *NoIL* importance of the ILC’s questionnaire for states regarding ways and means for making the evidence of customary international law more readily available.<sup>65</sup>

### 3. A CONCLUDING NOTE

In concluding her paper, Zdravković remarks that, among other things, it should “serve as an incentive for the author to further contemplate various unresolved international legal matters and to continue with his unique contribution to the philosophy of international law.”<sup>66</sup> I can only confirm that all the contributions in the Symposium fully succeeded in producing such result. Anyone who has ever managed to finalize the work on a manuscript and to turn it into a published book knows how aggravating might be returning to the same topics and reflecting on them, over and over again. And yet, this is the only path for progress of both science in general, and an individual researcher. The Symposium has aptly demonstrated that *NoIL* is not the end, but the very beginning of an exciting journey into the philosophy of international law.

Received: 1 December 2021

Accepted: 6 December 2021

---

63 *Ibid.*, p. 56.

64 “this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong.’” *Ibid.*, p. 57.

65 [https://legal.un.org/ilc/guide/1\\_13.shtml](https://legal.un.org/ilc/guide/1_13.shtml)

66 Zdravković, A., 2021, p. 590.

Marko Božić\*

## SEKULARIZAM I USTAVNA SEKULARNOST (Odgovor Srđanu Miloševiću)

U prethodnom broju *Pravnih zapisa* objavljen je odgovor Srđana Miloševića na moj kritički osvrt od pre godinu dana na njegov članak „Hod po žici: o ustavnosti ograničenja slobode veroispovesti u vanrednom stanju proglašenom u Srbiji usled epidemije bolesti Covid-19”. Po priznanju samog Miloševića, dupliku mi je uputio kako bi otklonio nesuglasice ili, ukoliko to već nije moguće, izoštrio naša suprotstavljena gledišta utvrđivanjem njihovog porekla. Moj je utisak pak da ako je omanuo u prvom, Milošević se približio drugom cilju. I ova triplika nadovezuje se na isti. Drugim rečima, ideja joj nije da dalje zaoštrava polemiku, već da kroz odgovor na Miloševićeve primedbe do kraja izvede skicu za jednu teoriju sekularizma.

Već u samom naslovu, Milošević sugerise kompromis kroz „podelu interesnih sfera”. Dok za sebe tvrdi da se bavio ustavnim sekularizmom kao egzaktnim predmetom pravne nauke, koji opisuje kroz rekonstrukciju konkretne ustavnosudske prakse, moja gledišta o sekularizmu smatra tek slobodnom teorijskom spekulacijom. Na prvi pogled ubedljiva, ova opservacija, međutim, nije tačna: mada je zadatak pravne nauke, kao i svake druge, da svoj predmet, tj. sudsku praksu, precizno opiše, takođe joj je zadatak da taj predmet i objasni, tj. da kritički sagleda društvene uzroke i posledice te prakse. Dakle, ako kao pravnik i naučnik mogu da prihvatim da je ustavna sekularnost „ono i samo ono što autoritet kompetentan da tumači ustav kaže da ona jeste” (str. 294), ne mogu a da se ne zapitam kako je kompetentni autoritet došao upravo do tog tumačenja i čemu to tumačenje služi? To otud što, za razliku od prirodnih zakona, društveni zakoni nisu izraz kauzalnih veza, već ideološkog uverenja svojih tvoraca i tumača. Nemoguće je izvesti naučni zaključak o ustavnom sekularizmu, a zanemariti ideološku podlogu iz koje je, kao tumačenje jednog normativnog teksta, on iznikao.

Iz istog razloga, i dalje smatram da ne stoji ponovljena Miloševićeva tvrdnja da „[...]”, zbog mnoštva značenja koje se u praksi sudova, shvatanji-

\* Vanredni profesor, Pravni fakultet Univerziteta Union u Beogradu; e-mail: marko.bozic@pravnofakultet.rs

ma vlada i u doktrini daje pojmu sekularno, nije moguće, imajući u vidu relevantne izvore, odrediti ni približno nedvosmisleno značenje ovog pojma” (str. 286). Teorija sekularizma, kako sam je izložio u svom kritičkom osvrtu, nije ništa drugo do zadato značenje, odnosno pretpostavljena ideološka podloga za tumačenje onih odredaba liberalno-demokratskog ustava koje se bave slobodom veroispovesti. Ono je zadato upravo zbog polazne Miloševićeve pretpostavke da je ustavni tekst koherentan skup normi koje se međusobno nadopunjuju i nikada ne protivreče. Ako je tako, a mora biti, onda se rešenje prividne antinomije dveju ustavnih normi – poput one koju je Milošević rešavao – mora sagledati najšire, odnosno tako da ne ugrozi jedinstvenu arhitektoniku Ustava koja je, makar deklarativno, liberalno-demokratska. Sekularizam, kako sam ga u replici izložio, logički proizlazi iz ideje o jednakosti u slobodama kao osnovnog ustavotvorčevog opredeljenja: samo religijski neutralna država omogućava jednakost građana pred zakonom, jer nikoga ne privileguje, niti diskriminiše. Naravno da su u praksi ustavnih sudova moguća i drugačija tumačenja „sekularnosti”, pa i ona koja su očigledno suprotna ideji religijski neutralne države, ali onda ona više nisu konsekvantno liberalno-demokratska. Da nije tako, kolega Milošević i ja se nikada ne bismo mogli složiti da ustavna sekularnost kakvu danas poznajemo u Republici Srbiji u stvari nije ništa drugo do izraz klerikalizma.

Sekularizam, kako ga ja shvatam, nije dakle vrednost *eo ipso*, već sredstvo ili mehanizam za postizanje jedne vrednosti – jednakosti građana pred zakonom. Prema Miloševiću, sekularnost kako je ja shvatam uzrok je njihove neravnopravnosti. Ova, čini se sad već nepremostiva razlika u našim gledištima u stvari je posledica različitog shvatanja slobode veroispovesti, pa čak i slobode same. Prema Miloševiću, sekularna liberalno-demokratska država je dužna da ljudima prizna slobodu da biraju da li će se u životu rukovoditi naučnim pogledom na svet ili bilo kojim drugim, pa i verskim uverenjima. Zato država ne može *a priori* da dà prednost nauci u odnosu na religiju. Ja, naprotiv, smatram da zakoni koje formuliše nauka objektivno važe i nisu stvar slobodnog izbora, već nužnosti: ma šta o tome mislili jogi letači i Srđan Milošević, zakoni gravitacije jednako važe za sve, pa i za državu. Da je rasa konstrukt, da homoseksualnost nije bolest, da su žene jednake s muškarcima, a vakcina lek u borbi protiv virusa nije stvar bilo čijeg slobodnog uverenja već naučnih uvida! Ovim sam se podrobno bavio u svom prethodnom kritičkom osvrtu i neću se ponavljati. Iskorišću priliku da ukratko ukažem na poreklo, ali i na svu pogubnost ovog, Miloševiću bliskog, naizgled tako benevolentnog i tolerantnog gledišta.

Mišljenja sam, naime, da je koncem prošlog i početkom našeg veka, trijumfujući neoliberalizam ukrstio puteve s postmodernom kao kritikom racionalizma i relativizacijom objektivne spoznaje. S aspekta postmoderne,

budući i samo aksiomatsko i aproksimativno, naučno saznanje je samo još jedno verovanje – ograničena i uslovljena istina čije iskaze možemo, ali i ne moramo da prihvatimo. Na ovaj način, iracionalna verovanja koja je moderna pre nekoliko vekova izbacila na vrata, postmoderna je pustila kroz prozor. Da su sva mišljenja jednako vredna, neoliberalizam s kraja XX veka učinio je ne samo legitimnim već i jedinim ispravnim uverenjem: do tada neprikosnoveni autoritet nauke zamenilo je slobodno tržište ideja na kojem su, avaj, popularna verovanja oduvek stajala bolje od naučnih formula. Konačni ishod ovog procesa jeste fenomen koji se naziva populizmom, a definiše kao iliberalna demokratija. Uzrok, a ne tek jedan od simptoma ove krize, jeste urušavanje sekularne države kako sam je opisao: kao neutralne i na objektivnom znanju, a ne subjektivnom verovanju okupljene zajednice jednakih građana.

Da bi se liberalna demokratija sačuvala, mora se obnoviti: ako sloboda verovanja, pa i šire, sloboda mišljenja jemči društveni pluralizam, ona ne podrazumeva i epistemološki relativizam. U demokratiji sloboda mišljenja garantuje pravo svakom pojedincu da slobodno gradi i iznosi svoje stavove, ali te stavove *a priori* ne izjednačava. Ako su jednako legitimna, sva mišljenja nisu i jednako epistemološki vredna. Da bi se vrednovalo, mišljenje mora biti slobodno izraženo. Da bi bilo vredno, mora biti kompetentno. U protivnom, rasistički, homofobični i seksistički stavovi belih i svakojakih drugih suprematista imaju jednaku snagu kao i naučna gledišta o tome da su ljudi različite boje kože, seksualne orijentacije i pola pripadnici i pripadnice iste ljudske vrste bez razlike.

Ozbiljan prigovor koji se može uputiti ovom konceptu „sekularne države” jeste to što on iz društvene debate isključuje sve one koji nisu, s obzirom na nivo kompetentnosti, kadri da se u nju uključe. Odsustvo šire javnosti iz debate, opet, vodi gubitku poverenja i otuđenju kompetentne elite. A upravo su to glavni aduti populističkog diskursa. Jedini konstruktivan način za otklanjanje ovog prigovora i strateški odgovor populizmu jeste stvaranje društva jednakih šansi visoke i očigledne društvene prohodnosti – društva u kojem obrazovanje ne predstavlja privilegiju bogatih, već pravo svakog da u cilju lične afirmacije, i na korist zajednice u celini, stiče znanja i veštine utemeljene na sumi postojećeg naučnog iskustva kao javnog dobra, a ne zaštićenog domena. Neoliberalizam to pravo uskraćuje. Postmoderna stvara privid da nigde ne greši. Populizam koristi. Jer, zatanom masom, najlakše se vlada....

Dostavljeno Uredništvu: 4. oktobra 2021. godine

Prihvaćeno za objavljivanje: 6. decembra 2021. godine

Tijana Kojović\*

## EPIC V. APPLE: AN ANTITRUST EXPERIMENT

### 1. INTRODUCTION

On 10 September, the United States District Court Northern District of California handed down the first-instance decision in a highly publicized case *Epic v. Apple*.<sup>1</sup>

Epic sued Apple for violation of Sections 1 (*inter alia*, for illegal maintenance of monopoly) and 2 (*inter alia*, unreasonable restraint on trade) of the Sherman Act, for corresponding violations of the Californian antitrust laws,<sup>2</sup> and for violation of the Californian Unfair Competition Act, in each case in relation to the way Apple operates its iOS App Store. The plaintiff did not claim any damages but requested the court to enjoin the defendant Apple from further violations. Apple countersued for damages stemming from the breach by EPIC of its Developer License Agreement (“DPLA”) with Apple and won. Epic, for the time being, lost on all antitrust counts. It won solely on the challenge to the anti-steering provisions of the DPLA and the App Store Review Guidelines (“App Store Guidelines”) on the basis of the California Unfair Competition Law.

At the time this case note is being written, both Epic’s and Apple’s appeals are pending.

The case involves complex facts and economics idiosyncratic to digital platforms. That elusive background made both the definition of the relevant market and the determination of anti-competitive effects of the challenged conduct particularly difficult.

---

\* S.J.D, Central European University, Senior Partner in BDK Advokati OAD, Belgrade; e-mail: tijana.kojovic@bdkadvokati.com

1 United States District Court Northern District of California, Case 4:20-cv-05640-YGR, Rule 52 Order After Trial on the Merits, available at <https://s3.documentcloud.org/documents/21060631/apple-epic-judgement.pdf> (“Epic Decision”).

2 California Cartwright Act. That aspect of the dispute is not reviewed here because it is not substantially different from the Sherman Act claims.

## 2. BACKGROUND OF THE DISPUTE

Plaintiff Epic is a large and successful video gaming company. Its most famous product is the video game *Fortnite*, specifically the *Battle Royale* play mode. EPIC does not charge consumers for downloading and playing *Battle Royale*. Instead, it pursues the so-called freemium business model whereby it earns money by offering players to purchase so-called V bucks and spend them on in-game digital content, such as costumes for a game character. *Battle Royale* and some other *Fortnite* game modes can be played, and V bucks can be purchased and spent, on various devices (including Sony PlayStation, Microsoft Xbox, Nintendo Switch, PCs, mobile devices). Players using different devices can simultaneously play with one another (cross-platform play). Moreover, an individual player can start the game on one device and continue it on another while keeping the game progress (cross-platform progression). Equally, with the exception of Sony PlayStation and Nintendo Switch, a player can purchase V bucks while playing on one platform and spend them while playing on another platform (cross-purchase or cross-wallet).

Apple is, if that needs mentioning, a manufacturer of, *inter alia*, iPhone and iPad devices which operate on Apple's proprietary operating system iOS. iOS is a closed system which means that Apple maintains full control over which apps an iOS device user can download and use on the device. The fence around an iOS gaming app is threefold. If a video game producer such as Epic wants to make its game available on iOS devices, it must develop a special iOS-compatible app. In order to do so, it must enter into a non-negotiable Developer Product Licensing Agreement (DPLA) with Apple and pay a minor annual fee for the membership in the developer's program. DPLA gives the developer access to necessary tools and information to write up an app that can function on iOS. Furthermore, a third-party app developer who signs the DPLA undertakes to distribute its iOS-compatible and Apple-approved apps to iOS devices exclusively through the App Store operated by Apple and pre-installed on each iOS device. Apple does not allow installation of any competing app store on its iOS devices. Finally, to the extent a third-party game app developer charges for in-app purchases of digital goods after the app download, the payment must be processed exclusively by Apple's in-app payment processing system (IAP), whereby Apple automatically retains 30% of the transaction value as a commission.

To fortify the exclusivity of its App Store, Apple inserted into its App Store Guidelines the so-called anti-steering provisions which, *inter alia*, prohibit app developers from including in their iOS apps "buttons, external links, or other calls to action that direct customers to purchasing

mechanisms other than in-app purchase”. Another disputable provision of the App Store Guidelines prohibits app developers more broadly from sending to the customers whose contact details they obtained through the App Store any communication designed to discourage them from using in-app purchase administered by Apple.

By its lawsuit, Epic essentially sought to force Apple to allow its billion-people-large iPhone consumer base install and access Epic’s own game store on their iPhones and purchase *Fortnite* content from the Epic’s store rather than from App Store if they so prefer.<sup>3</sup> It also sought to force Apple to allow Epic bypass IAP and process the payments for in-app purchases by using Epic’s own payment processing solution.

Curiously, the lawsuit was preceded by an intentional breach by Epic of its DPLA with Apple and the App Store Guidelines, although Apple’s expected retaliatory action was not a prerequisite for the dispute. On the day Epic filed its Complaint, it covertly installed and activated a button on its *Fortnite* iOS app that offered cheaper prices to players if they selected Epic’s own payment system over Apple’s IAP. The move forced Apple to remove *Fortnite* from the App Store and eventually terminate the DPLA and countersue for damages.

### 3. CASE REVIEW

#### 3.1. MONOPOLIZATION (SECTION 2 OF SHERMAN ACT)

Section 2 of the Sherman Act prohibits, *inter alia*, maintenance of monopoly through unlawful means.<sup>4</sup> Illegal monopoly exists when there is (i) monopoly power on the relevant market which is (ii) wilfully acquired or maintained through anti-competitive conduct rather through “growth or development as a consequence of a superior product, business acumen, or historic accident”.<sup>5</sup>

##### 3.1.1. Relevant market

Like in every antitrust case, the departing point and the crucial task for the court was to define the relevant market. Epic and Apple fiercely differed on the proposed definitions while the court, somewhat unusually, discarded both proposals and adopted its own definition.

---

3 Epic’s prayer for relief sought to enjoin Apple’s conduct not only vis-à-vis Epic but in general. Epic’s Complaint for Injunctive Relief (“Complaint”) is available at <https://cdn2.unrealengine.com/apple-complaint-734589783.pdf>.

4 15 U.S.C. para. 2.

5 *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

The plaintiff's definition of the relevant product market evolved throughout the case in pursuit of the strategy to have Apple declared a monopolist. Epic ultimately proposed that Apple operates, for the purpose of this case, on two relevant single-brand markets: (i) market for distribution of iOS apps (essentially the App Store), and (ii) market for iOS in-app payment processing. It construed both of these product markets as aftermarkets of the foremarket for smartphone operating systems.<sup>6</sup>

"A 'foremarket' is 'a market in which there is competition for a long-lasting product' from which 'demand for a second product' derives. An 'aftermarket' is the 'market for the second product.'"<sup>7</sup> Epic needed the foremarket-aftermarket construct to support its theory that Apple is a monopolist by definition. In *Eastman Kodak*,<sup>8</sup> the Supreme Court established that monopoly may exist on the aftermarket if the competition on the foremarket is not sufficient to discipline the undertaking on the aftermarket. This will be the case if the consumers were not able or reasonably chose not to inform themselves of the costs of transactions on the aftermarket in advance of making a purchase on the foremarket. Lock-in on the foremarket would also exist if the cost of switching to a competing primary product is prohibitory.<sup>9</sup>

Epic's strategy also informed its choice of the relevant foremarket. The decision to define the relevant product foremarket as the market for smartphone operating systems rather than market for smartphones, and to exclude tablets from the market definition, is conspicuous. It was motivated by the fact that Apple has only a 15% market share on the global, very competitive, market for smartphones. In contrast, the market for smartphone operating system has only two players, Apple with 40% global market share and Google with 60%. Accordingly, Epic argued that Apple has unconstrained market power on the market of smartphone operating systems that locks consumers into using iPhone and by extension iOS apps in spite of Apple's anti-competitive conduct on the derivative markets for distribution of those apps and administration of payments for in-app purchases.

Apple proposed that the relevant product market should be defined as a two-sided market for digital gaming transactions between game app

6 Findings of Fact and Conclusions of Law proposed by Epic games, Inc. ("EPIC's Proposed Findings and Conclusions"), para. 125 *et seq.*, available at <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epics-Games-20-cv-05640-YGR-Dkt-407-Epic-Games-Proposed-Findings-of-Facts-and-Conclusions-of-Law.pdf>.

7 Epic Decision, footnote 244.

8 *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992) (*Eastman Kodak*).

9 *Ibid.*, at pp. 473–477.

developers and consumers of game app content. According to Apple, different digital transaction platforms, accessible through various devices, compete for both app developers and consumers.<sup>10</sup>

Epic Decision adopts a relevant market definition that was not proposed by either of the parties to the dispute. It defines the relevant product market as a two-sided market for digital mobile gaming transactions. On the one side of the transaction platform are transactions with app developers, and on the other side are transactions with app consumers.

The judge restricted the relevant market to gaming transactions on smartphones and tablets, reducing the market to Apple and Google. She excluded transactions on Nintendo Switch and streaming services for lack of evidence as to their substitutability with the transactions effected by using smartphones and tablet.<sup>11</sup> However, she appears to have contradicted herself when she acknowledged at one point in the decision that Nintendo, Microsoft, and Nvidia are “recent entrants into the mobile gaming submarket”.<sup>12</sup>

The decision discards Epic’s relevant product market theory on the basis that there can be no market without a product. The judge held that there is no foremarket for smartphone operating systems in which Apple competes since Apple, unlike Google, does not sell its iOS as a separate product either for the use on iPhones and iPads or for the use on other devices. Instead, Apple competes on the market for mobile devices, especially smartphones. Mobile devices are, according to the judge, more than just the underlying operating systems. Consumers choose to buy iPhone because of its design, battery and camera more than because of the operating system inside it.<sup>13</sup> For the same reason for which there is no foremarket, App Store and IAP cannot be the relevant markets either on a stand-alone basis or as aftermarkets. The decision essentially concludes that iOS platform and the App Store are not stand-alone products but rather platforms regulated by Apple within which competition between various apps occurs.

Even though the judge dismissed the plaintiff’s foremarket-aftermarket theory, she nevertheless devotes significant effort to demonstrate that Epic’s foremarket-aftermarket theory would fail even if App Store and IAP

---

10 Defendant Apple Inc’s Proposed Findings of Fact and Conclusions of Law, Proposed Conclusions of Law, at p. 153, available at <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-Games-20-cv-05640-YGR-Dkt-410-Apple-Proposed-Findings-of-Facts-and-Conclusions-of-Law.pdf>.

11 Epic Decision, p. 85.

12 *Ibid.*, p. 132.

13 *Ibid.*, p. 45.

were stand-alone product markets deriving from the primary smartphone market. In that context, the decision notes that the plaintiff did not offer any evidence suggesting that consumers are not aware, when buying iPhone, that they are investing into a closed system incompatible with other platforms. Epic also failed to impress upon the judge that the cost of switching from iPhone to Android is prohibitory. In contrast, the judge took note of evidence, introduced by Apple, that low switching from iPhone to Android-based smartphones is primarily caused by consumer satisfaction with the product rather than lock-in.<sup>14</sup> The court may have decided to challenge the lock-in argument in order to sustain its own definition of the relevant market as the market for mobile gaming transactions. Namely, if iOS users were locked into their iPhones, the proposition that there is competition for the gaming transactions between iOS and Android mobile devices would be untenable.

The definition of the relevant market endorsed by the court landed close to the Apple's proposal but is obviously narrower because Apple argued for the market of digital gaming transactions irrespective of the platform. While the dismissal of the Epic's proposed definition of the relevant market seems reasonable, the decision to segregate mobile gaming apps from video games in general is more controversial. According to the judge, the transactions involving the downloading of gaming apps on mobile devices and purchases within those apps are sufficiently distinct from the same type of gaming transactions that take place on PCs, consoles or cloud-based streaming platforms. It appears that the court's conclusion was driven by its inability to discern whether the fact that a lot of players play games on multiple devices is evidence of complementary playing or evidence of substitution.<sup>15</sup>

The finding that mobile gaming apps are sufficiently distinct from other mobile apps (such as Netflix or Spotify) is easier to understand. The court opted to segregate gaming app transactions from the rest of the app market for nine reasons, including because the overwhelming majority of revenues generated through App Store comes from the gaming transactions.<sup>16</sup> Generally, a cluster of products which are not mutually substitutable may create a distinct relevant market if "the product package is

14 *Ibid.*, pp. 47–48.

15 Epic Decision, pp. 60–61. Even Apple's advocacy of substitution may be read as in fact an argument in favour of complementary playing ("While an iPhone user is waiting for the bus in the morning, for example, she might decide to play a session of Fortnite on her phone for a few minutes[...] That same iPhone user, arriving home at night, might choose to play Fortnite or Halo on a game console or PC...") Apple's Proposed Conclusions of Law, para. 40.

16 Epic Decision, pp. 122–123.

significantly different from, and appeals to buyers on a different basis from, the individual products considered separately” or if customers generally obtain all products/services from the package at one place (e.g. banking services).<sup>17</sup> Epic did not develop such argument with respect to mobile apps or even iOS apps.

The relevant geographic market was determined on the worldwide level.<sup>18</sup>

### 3.1.2. Monopoly power

Having defined the relevant market, the court was called upon to determine whether Apple has monopoly power on that market.

Monopoly power is “the power to control prices or exclude competition”.<sup>19</sup> It may be rebuttably presumed if the market share is sufficiently large, proven by direct evidence of supracompetitive pricing and restriction on output, or, more often, proven circumstantially, by showing that the undertaking has a dominant share on the relevant market that suffers from entry barriers and inability of existing competitors to increase their output in the short run.<sup>20</sup>

Once the judge dismissed Epic’s postulation of a single-brand relevant market and opted for the relevant market of mobile gaming transactions, proof of Apple’s monopoly power became more difficult given the presence of strong competitor Google.

Apple’s market share on the relevant market is, as determined by the court, in the neighborhood of 55%. This falls short of the point where presumption of monopoly power arises, even if, according to the court, it brings Apple “near the precipice” of monopoly power.<sup>21</sup>

Since it could not infer monopoly power solely from the market share, the court examined whether there is direct evidence thereof, such as supracompetitive pricing and restriction in the output. While the court noted that Apple’s 30% commission rate appears to be above the competitive

---

17 *Image Tech Services, Inc. v. Eastman Kodak*, 125 F.3d 1195 (1997), 1204–05; *United States v. Phillipsburg National Bank and Trust Company*, 399 U.S. 350, 360–61 & n. 4 (1970).

18 Epic Decision, p. 90. Apple unconvincingly argued for domestic market on the basis that consumers face country-specific storefronts and that competitive conditions significantly differ from country to country. Apple’s Proposed Findings of Facts, paras. 438–451. The court discarded this argument, noting that country-specific storefronts are imposed by Apple rather than by market forces.

19 *United States v. du Pont & Co.*, 351 U. S. 377, 391 (1956); *Grinnel*, at 571.

20 Epic Decision, pp. 135–136.

21 *Ibid.*, p. 139.

level, it refused to find monopoly power on that basis because, according to the prevailing precedents, supracompetitive prices must be accompanied by a decreased output in order to support a monopoly power conclusion.<sup>22</sup> Decrease in the output was not proven. The court noted that the record in fact shows increase in the number of gaming transactions.

Finally, indirect evidence, such as barriers to entry, did not support the monopoly power conclusion either. The court noted that the point was not even argued by Epic given that neither party proposed the market definition ultimately adopted by the court. It nevertheless concluded that limited evidence on the record does not point to insurmountable entry barriers.<sup>23</sup>

The court therefore concluded that Apple does not have monopoly power on the market for mobile gaming transactions. As far as Section 2 of the Sherman Act is concerned, this made further analysis of the alleged anti-competitive conduct moot.

### 3.2. UNREASONABLE RESTRAINT ON TRADE (SECTION 1 OF SHERMAN ACT)<sup>24</sup>

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>25</sup> The Supreme Court has clarified that only unreasonable restraint of trade is caught by Section 1.<sup>26</sup>

To address Section 1 claim, the court first had to evaluate whether the restrictive provisions of the DPLA are an agreement in the broadest sense of that concept as used in Section 1 of the Sherman Act. If so, the next step is to analyse whether the vertical restraints imposed by Apple on app developers in the DPLA and App Store Guidelines have anti-competitive effects, *i.e.* whether they harm the competitive process and thus consumers. Anti-competitive effects can be established directly, by showing actual adverse effects, such as price increase, reduction of output or reduction of innovation above a competitive threshold, or indirectly, by showing that the defendant has substantial market power (a threshold lighter than

---

22 *Ibid.*, pp. 137–138.

23 *Ibid.*, pp. 138–139.

24 EPIC also advanced Section 1 illegal tying claim, which failed at the threshold because the allegedly tied products (App Store and IAP) were not seen by the court as products. Epic Decision, p. 152 *et seq.*

25 15 U.S.C. para. 1.

26 *National Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 687 (1978).

monopoly power) and has imposed a restriction on competition. The logic of indirect proof avenue is that if there is market power and a restraint on competition, the probability of competitive harm is high, whereas without market power, a restraint is unlikely to have an anti-competitive effect. Under the so-called “rule of reason”, which almost always applies to vertical restraints cases, if the plaintiff makes a *prima facie* showing, directly or indirectly, of anti-competitive effects, the burden reverts to the defendant to demonstrate that there are pro-competition justifications of the anti-competitive restraint, while the plaintiff may then annul the relevance of pro-competition justifications by showing that they do not outweigh anti-competitive effects, *i.e.* that the alleged procompetitive efficiencies could be equally achieved via less restrictive means.<sup>27</sup> Section 1 “rule of reason” analysis therefore resembles effects-based analysis of restrictive agreements under Article 101 TFEU.

### 3.2.1. Agreement

The court did not consider DPLA to be an agreement within the meaning of Section 1 Sherman Act because it was unilaterally imposed on app developers. The App Store Guidelines are not an agreement for the same reason. On that basis, Section 1 analysis could have stopped at this point. However, the court took a cautious approach and proceeded to examine whether the restraints stemming from the DPLA and the Guidance have anti-competitive effects which are not offset by prevailing pro-competitive justifications.

### 3.2.2. Anti-competitive effects

Relying on *Amex*<sup>28</sup>, which also involved a two-sided relevant market, the judge set the test which requires plaintiff to demonstrate that Apple’s app distribution restrictions increased the cost of mobile gaming transactions above the competitive level, reduced the number of mobile gaming transactions, or otherwise stifled competition in the mobile gaming market.<sup>29</sup>

Regarding anti-competitive effect in the form of price increase, the *Amex* postulate is that on a two-sided market, the showing of supracompetitive pricing on the one side of the market is not sufficient for a conclusion that there is an anti-competitive price increase on the market as

---

27 *Ohio v. American Express.*, 138 S. Ct. 2274, at 2284 (*Amex*).

28 *Ibid.*, at 2287.

29 Epic Decision, p. 143.

a whole. There has to be net harm to the consumers.<sup>30</sup> This is because what appears to be supracompetitive pricing on the one side can be offset by the pricing on the other side of the market.<sup>31</sup> On the example of App Store, Apple charges app developers under the DPLA only a minor fee for the access to iOS app development tools. Many of those developers do not pay any commission to Apple because they do not sell digital content within their iOS apps, although they may be monetizing their apps in another manner. On the downstream side of the market, Apple charges 30% commission fee only to those developers who sell their digital content through the App Store.<sup>32</sup> Given the extreme complexities of the economics of digital transaction platforms, proving net harm may be in many cases impossible.<sup>33</sup>

Epic court lightly shrugged off these acknowledged difficulties and concluded that “Apple’s app distribution restrictions do have some anti-competitive effects”.<sup>34</sup> The court saw those anti-competitive effects in the form of foreclosed competition by large app developers who run their own stores, consumer app prices the court think would be lower in the absence of distribution restrictions, and decreased innovation compared to what would have been the case in the absence of restraints.<sup>35</sup> Perhaps the court took a casual approach to determining anti-competitive effects because it was convinced of their business justifications.

### 3.2.3. Pro-competitive business justifications

Having found that Apple’s restrictions have *some* anti-competitive effects, the judge ultimately concluded that those effects are offset by the benefits the consumers get in the form of cyber security and reliability of the service (which at the same time promotes interbrand competition) and respect for consumers’ privacy. She also agreed that contractual restrictions are necessary to protect Apple’s intellectual property invested in the App Store from freeriding, even though she noted that the 30% rate does not correlate to the value of such intellectual property.<sup>36</sup> Finally, with

30 Panner, A. M., 2020–2021, Market Definition and Anticompetitive Effects in *Ohio v. American Express*, *The Yale Law Journal*, Vol. 130, available at <https://www.yalelawjournal.org/forum/market-definition-and-anticompetitive-effects-in-ohio-v-american-express>.

31 Epic Decision, pp. 90–91 and 94–95.

32 See Section 2 above.

33 Panner, A. M., 2020–2021.

34 Epic Decision, p. 144.

35 *Ibid.* pp. 96–102.

36 *Ibid.* pp. 145–147.

respect to IAP, she recognized business justification of the restraint in Apple's entitlement to facilitate collection of commission that includes royalty for intellectual property, and the benefits for consumers in the form of payment safety and convenience of a centralized purchasing system.<sup>37</sup>

The 'rule of reason' analysis concludes that Epic failed on its burden of proof that Apple had at its disposal less restrictive but equally efficient means of achieving security, privacy and protection of its IP.<sup>38</sup> On balance, with the exception of anti-steering provisions, the restrictive provisions of Apple's DPLA and App Store Guidelines are closer to being potentially beneficial to consumers than anticompetitive.<sup>39</sup>

### 3.3. CALIFORNIA UNFAIR COMPETITION LAW

This state extension of antitrust laws broadly prohibits, *inter alia*, "any unlawful, unfair or fraudulent business act or practice".<sup>40</sup> Given that antitrust claims failed and Apple's conduct was thus not found to be unlawful, of relevance was the 'unfair' prong of the cited prohibition.

The notion of 'unfairness' assumes that conduct is, albeit not unlawful, objectively 'unfair'. According to the so-called 'tethering test', that would be the conduct that is an 'incipient' violation of antitrust laws and conduct that violates the 'policy or spirit' of those laws with 'comparable' effects.<sup>41</sup>

Anti-steering provision in the Guidelines prohibit apps from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase", and from "encourag[ing] users to use a purchasing method other than in-app purchase" either "within the app or through communications sent to points of contact obtained from account registrations within the app (like email or text)". Accordingly, app developers are prohibited from informing their iOS-generated customers base on the app prices on other platforms not only by inserting the relevant communication within the iOS app but also by sending pricing information to the customers' contact details obtained though their registration with the App Store. App developers are also more generally prohibited from disclosing to their customers that they are paying 30% to Apple. Anti-steering provisions do not prevent app developers from advertising their offering in a general manner on other platforms.

---

37 *Ibid.*, pp. 149–150.

38 *Ibid.*, p. 150.

39 *Ibid.*, p. 162.

40 Cal. Bus. & Prof. Code, para. 17200.

41 Epic Decision, p. 162.

The court condemned the challenged anti-steering provisions as amounting to unfair business practice because they prevent iOS app consumers from making a fully informed choice as to where to shop.<sup>42</sup> The decision makes a stark comment that “common threads run through Apple’s practices which unreasonably restrains competition and harm consumers, namely the lack of information and transparency about policies which effect consumers’ ability to find cheaper prices, increased customer service, and options regarding their purchases. Apple employs these policies so that it can extract supracompetitive commissions from this highly lucrative gaming industry.”<sup>43</sup>

The decision enjoins Apple from: (i) prohibiting developers “to include in their: Apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to IAP” and (ii) “communicating with customers through points of contact obtained voluntarily from customers through account registration within the app”.

This means that, while the app developers will still be prohibited from installing competing payment solutions into their iOS apps<sup>44</sup>, they should be able to direct purchasers to shop outside the app and to contact them using the details they left upon registration with the App Store. Importantly, this injunction on anti-steering provisions is not limited to gaming apps.<sup>45</sup> As far as Epic is concerned, the victory on the unfair competition claim will be of little value if its assertion from the Complaint that the purchases outside a gaming app cannot substitute for in-app purchases was not self-serving.<sup>46</sup>

#### 4. CONCLUSION

Although Epic Decision, rendered in the context of private enforcement, may not bear much relevance in Europe where public enforcement dominates<sup>47</sup>, it confirms the central role of the relevant market definition for any competition law analysis. It also illustrates the inherent difficulty that both regulators and judges face when they attempt to assess (anti) competitiveness of business practices in the digital world. The decision

42 *Ibid.*, p. 50.

43 *Ibid.*, p. 118.

44 <http://www.fosspatents.com/2021/09/no-epic-v-apple-injunction-absolutely.html>.

45 Decision, p. 167.

46 Epic’s Complaint, p. 29; Epic’s Proposed Findings and Conclusions, para. 276 *et seq.*

47 See concluding remarks of Damien Geradine on <https://theplatformlaw.blog/2021/09/13/the-epic-games-judgment-is-out-some-first-thoughts/>.

is also rich with factual insights into the gaming industry and the world of digital transactional platforms, although the reader is left with an impression that the trial judge did not always have enough patience when evaluating those facts against antitrust principles.

It is to be seen whether the US Court of Appeals for the Ninth Circuit, and potentially the US Supreme Court, will disturb the first-instance decision in *Epic v. Apple*.

Received: 18 October 2021

Accepted: 6 December 2021

Vladeta Janković\*

## OGLEDALO OBIČAJA, SLIKA ISTINE

Tibor Varadi, *Protivnarodni osmeh*,  
Akademska knjiga, prevod s mađarskog Arpad Vicko,  
Novi Sad, 2021, 288 str.

Prema jednoj davnoj definiciji, komedija je „podražavanje života, ogledalo običaja, slika istine”. Dok bi druga dva dela definicije (*speculum consuetudinis*, *imago veritatis*) u potpunosti mogla važiti za žanrovski sasvim drugačije delo Tibora Varadija, sa onim prvim (*imitatio vitae*) stvari su složenije. Jer Varadijeva „dokumentarna proza (skoro roman)”, kako sam pisac podnaslovom žanrovski određuje *Protivnarodni osmeh*, život ne podražava nego ga, u nedostatku boljeg izraza, *rekonstruiše*, tačnije – presnim životnim činjenicama dočarava duh minule epohe.

Pred nama je najnovija u nizu od nekoliko knjiga koje je Tibor Varadi objavio tokom proteklih šest godina, najvećim delom uzimajući kao izvor porodičnu advokatsku arhivu. Nezavisno od izvesnosti da će te knjige jednog dana poslužiti i kao dragocen izvor nekom budućem (i to ne samo pravnom) istoričaru, reč je o visokokvalitetnoj prozi u osnovi dokumentarnog karaktera, sa snažno prisutnim memoarskim elementom. Celina je uobličena kao amalgam istorijskih, socioloških, pravnih, kulturoloških pa i karakteroloških razmatranja, preliven ponešto setnim humorom i blagom nostalgijom. Pri tome, ljudi i događaji o kojima se govori na osnovu suvih dokumenata i prepiske pod osvetljenjem koje na njih baca autor na izvestan prirodan način dobijaju bez ikakve sumnje književno-umetničku dimenziju.

Varadijev *Protivnarodni osmeh* je promišljeno i vešto komponovana knjiga, a slučajevi kojima se bavi potiču delom iz ratnih, a delom iz prvih posleratnih godina, kada su se svuda, ali u multietničkom Banatu na poseban način, dešavale mnoge strašne, surove i drastično nepravedne, ali i mnoge apsurdne stvari i kada su, pod pritiskom istorijskih okolnosti, na

\* Redovni profesor u penziji, Univerzitet u Beogradu; e-mail: vladeta.jankovic@gmail.com

površinu izbijale strane ljudske prirode koje u normalnim prilikama ostaju skrivene. Povesti o ljudskim sudbinama koje kazuje Varadi bez izuzetka polaze od pravnih odnosno sudskih predmeta iz advokatske arhive, sa povodima koji variraju od istorijski značajnih do krajnje trivijalnih, ali po pravilu imaju poentu opšteg važenja i vrednosti. Tako će, samo primera radi, slučaj ukradenih gaća ili zloupotrebe prasadi „fašističkog porekla” u krajnjem ishodu doći u istu ravan sa posleratnim pravosudnim nasiljem i brutalnom državnom pljačkom pošteno zarađenog bogatstva jevrejske porodice Lederer, koja je „bila proganjana, zatim osuđena”, s tim što je na kraju „nisu osudili oni koji su je proganjali”. U ovakvom viđenju, ta ista ravan na koju izlaze tako i toliko različite pojave zapravo je pozornica istorije, sa svim njenim poigravanjem pojmovima pravde i nepravde, privida i istine, slučaja i zle namere, nepouzdanosti ljudske prirode i nepredvidljivosti sudbine. Tako pročitana, Varadijeva proza daleko nadilazi svoj polazni tematski osnov da bi se povremeno vinula možda čak do paradigme, gde – da parafraziramo jednu slavnu definiciju – pojedinačni događaj pre-rasta u „ono što je moguće po zakonima verovatnosti i nužnosti”.

Neka, kao ilustracija Varadijevog postupka uopštavanja, bude naveden primer spora Marije i Eržebet, koje, obraćajući se sudu, nisu branile samo svoju imovinu i čast već su to činile i zato što „tako možemo da se uzdignemo među relevantne ljude”. Jer, nastavlja pisac, „sud je pozornica na kojoj nastupaju i partijski sekretari, i provladini i antivladini intelektualci, istaknuti pojedinci iz sfere medija, i milioneri. Ova okretna pozornica pokazuje da se i mi računamo.” A dok smo još u zoni iste metafore, a u duhu šekspirovske istine da je „ceo svet glumište gde ljudi svi i sve žene glume”, pada u oči da Varadi na nekoliko mesta, neočekivano ali elegantno i umesno, pravne slučajeve iz banatske provincije dovodi u vezu upravo sa dramama apsurdna Joneska i Beketa.

Iako pisac za svoje delo kaže da je „skoro roman”, utisak je da, koliko god granice tog žanra danas bile rastegljive, ne bi bilo jednostavno naći carinski prelaz preko kojeg bi *Protivnarodni osmeh* mogao da se na tu teritoriju prokrijumčari. Varadijeva dokumentarna proza, međutim, umetnički kvalitet stiže dobrim delom zahvaljujući bogatim, neočekivanim, često briljantno opravdanim asocijativnim iskakanjima iz osnovnog toka naracije. Te asocijacije na početku mogu ostaviti utisak digresija, ali se njihova opravdanost redovno potvrđuje i to na dragocen način koji prošlost povezuje sa sadašnjošću, a vojvođanske naravi i običaje sa stvarnošću savremenog, pre svega zapadnog sveta, uvek sa humorom i osećanjem za paradoks. Istovremeno, čisto književni kvalitet donosi srebrnasta gama nostalgije i izvesne rezignacije, koje ne ugrožavaju autentičnost emocije, a drže je na zdravom odstojanju od sentimentalnosti. Na istom tragu je i

sveprisutna ironija, kojom se na gospodstven način senče i istinski, duboko tragične priče.

Neka, na kraju, ostane zabeleženo i zapažanje da je knjiga strogo i uzdržano ilustrovana crno-belim fotografijama dokumenata, prepiske, novinskih isečaka, ulica, zgrada i natpisa, ali bez ijednog ljudskog lika. To bi možda mogao biti autorov pokušaj da, pravnički ali i ljudski mudro, ukaže na efemernost pojedinačnih ljudskih doživljaja u odnosu na trajnost materijalnih dokaza, a posebno dokumenata koji, uprkos nastojanjima da budu zatrti, ne gore i ne zaboravljaju se – sasvim kao što je sa dobrim knjigama slučaj.

Dostavljeno Uredništvu: 19. novembra 2021. godine

Prihvaćeno za objavljivanje: 6. decembra 2021. godine

*Jelena Jerinić\**

## TWO HUNDRED YEARS OF SERBIAN CONSTITUTIONAL HISTORY

Dragoljub Popović, *Constitutional History of Serbia*,  
Brill, 2021, 249 pp.

Writing about the constitutional history of a country is a brave undertaking, regardless of the country's size or legal tradition. It takes both courage and knowledge, but also a narrative talent. The book *Constitutional History of Serbia* by Professor Dragoljub Popović is a demonstration of all of the above. Besides being a diplomat and a judge of the European Court of Human Rights, for most part of his professional carrier, Dragoljub Popović was a law professor, predominantly teaching legal history and comparative law. His bibliography shows a profound interest in Serbian constitutional history, particularly of the 19<sup>th</sup> century.

The task the author took upon himself was to present and explain two hundred years of constitutional history, with over twenty constitutional texts, written, adopted and implemented in many (consecutive) turbulent times. As he himself noticed, he did that almost eighty years after a comprehensive volume on the topic had been published in Serbian and forty years after the same endeavor in English. Since the latter, Serbia has been in three unsuccessful joint states, governed by five different constitutional texts. In other words, the update on the last four decades alone would have been a worthy contribution.

Albeit separate subject-matter records of constitutional development in particular periods have been published in the meantime (as recorded by the author in a brief literature review in the Foreword), this book itself presents a noteworthy monographic synthesis. The author dedicates most of his attention to the period between the beginning of 19<sup>th</sup> century and the beginning of World War I, but he also meticulously outlines all other relevant constitutional texts passed during the 20<sup>th</sup> century, ending with the current Serbian Constitution of 2006.

---

\* Professor, Union University Law School Belgrade; e-mail: jelena.jerinic@pravnofakultet.rs

Weighing between a chronological and a subject oriented approach, the author chooses to employ both and does so with a very good sense of balance. He presents the constitutional texts and important events in a chronological order (dominantly in parts one and three of the book), but also takes time to explore the main concepts of constitution building, namely human rights, sovereignty and the rule of law, from a scholarly perspective, as well as their practical aspects (mainly in the second part of the book).

Popović's *leitmotif* is referring to deficiencies of legal education in Serbia throughout its constitutional history. At the very beginning, he makes a point that constitutional history has never been an independent subject in university curricula in law schools of the former Yugoslavia, but was studied within the legal history course and, partly, within constitutional law courses. Being a scholar himself, this is an obviously important message for the author and he dedicates several chapters to analysis of constitutional history scholarship, mostly in the second part of the book, but also comes back to the topic in his closing remarks.

Part One (Developments) is dedicated to the period from the First Serbian Uprising against the Ottoman Empire until the beginning of World War I, during which Serbia passed the process of nation and constitution building, towards a constitutional monarchy and finally came to the doorway of parliamentary government. Three chapters within this part are dedicated to those particular phases. In this, in many ways text-book material, the author presents the main events and constitutional texts, and then analyses the main institutions, from the perspective of modern concepts (the head of state, assemblies, council, executive power and the judiciary). The background of these developments is subtly introduced, relying on sources from the very epoch (*e.g.* texts of Vuk Karadžić, a contemporary of Prince Miloš Obrenović and the first Serbian constitution drafters), but not without a personal point of view. Popović is obviously a passionate researcher of this period, not only from the perspective of a legal scholar; he adds interesting anecdotes, depicting the character and style of governing of Miloš Obrenović and his successors. He is extremely critical of the Prince's attitude towards learned men of the time, which we also read about in Part Two of the book.

In the first chapter, we see how the constitutional question came onto the agenda, interpreted within the notion of independent internal government in the vassal principality of Serbia; how nation and constitution building took place under conditions of Ottoman rule, in the period marked by lack of learned lawyers. Popović gives a concise and accurate description of political life – when he characterizes it as “relatively

turbulent, despite the pre-modern environment in which political struggles took place” or explains how it was possible to be a liberal and a Serbian nationalist at the same time, writing about young liberals educated in foreign universities participating in the 1858 St Andrew’s Day Assembly. During this period, which lasted until the end of the second reign of Miloš Obrenović, some efforts for modernization were successful, but a modern structure was not introduced, as separation of powers and people’s representation were still lacking. Confusion of powers prevailed as a concept at the beginning of the 19<sup>th</sup> century and remained dominant throughout the first fifty years.

Chapter 2 is dedicated to the period of constitutional monarchy, which developed in three stages: the first, under the 1861 constitutional settlement, in which monarch did not legislate, but appointed legislators; the second, under the 1869 Constitution, in which the monarch appointed one quarter of legislators; and the final under the 1888 Constitution, introducing elected legislators. The author sees the first period, under the reign of Prince Mihailo Obrenović, as modelled after German monarchies of the first half of the 19<sup>th</sup> century and provides a comparison of their institutions. The 1869 Constitution was the first Serbian constitution to introduce human rights and it was under it, during the 1870s when ministerial responsibility started emerging, heading towards parliamentary government, together with formation of political parties. The 1888 Constitution is described as a landmark, providing basis for a parliamentary government, as well as stronger guarantees of human rights. However, Popović shows that this constitution proved to be an unsuccessful attempt to introduce parliamentary government; continuing to Chapter 3 in which the period from 1903 to 1914 was marked by a pattern of King’s behavior which fulfilled minimum requirements of parliamentary government. He sees that this was a political system with dominant political parties, comparing it to Italy, Japan and India in the second half of the 20<sup>th</sup> century.

Part Two (The Evolution of Constitutionalism), the heart of the book, deals with evolution of constitutionalism and is focused on the progress of legal thought and legal scholarship in the underdeveloped, newly liberated Serbia. In the temporal context, it mostly refers to the period covered in Part One, but takes a different, subject-matter approach. Nevertheless, the author reminds us of the prominent events and historical actors, so this part can also be read as a standalone piece. The underlying themes of this part are human rights, sovereignty and the rule of law and they are analyzed from the perspective of works of prominent Serbian intellectuals. It is an *homage* to great legal minds and scholars, even beyond the legal field – from Dositej Obradović in the end of the 18<sup>th</sup> and beginning of the 19<sup>th</sup>

century to Slobodan Jovanović who retired in 1940. Popović takes time to present the work of each of them, adding biographical notes, which might be unknown even to the wider legal readership in Serbia.

Chapters Four and Five are dedicated to human rights and to sovereignty and the rule of law in Serbian nation building respectively, by exploring the ideas of several prominent figures. The concept of human rights was introduced by Dositej Obradović who connected it to the rule of law and individual rights, whereas “the masses”, whom Popović presents through the poetry of the blind epic poet Filip Višnjić, favored collective rights. For Božidar Grujović, Secretary of the Government Council, freedom was the idea which could be achieved only under a constitutional government. This view was shared by Vuk Karadžić, for whom individual rights were a foundation of a constitutional state. Even though Davidović and Radičević intended to introduce human rights in the text of the 1935 Constitution, they did not succeed, but human rights were eventually included in the texts from 1869 onwards. However, these remained proclamations and could not serve as “a functional Bill of Rights”. Popović sees three ideas regarding the relationship of the rule of law and sovereignty. The first was popular sovereignty, as a vague idea finding its place in popular poetry. Then there was the idea of the sovereign monarch or, according to Dositej Obradović, an absolute monarch enriched by some Enlightenment features. In similar vein, Lazar Vojnović, the first Serbian public law professor, represented the theory of state sovereignty. Finally, the idea of constitutional supremacy was advocated for by Grujović and Karadžić.

Chapter Six is dedicated to „two outstanding professors of law and their views on the Rule of Law and Human Rights” – Jovan Sterija Popović and Dimitrije Matić. The author finds them marking a milestone in development of ideas on the rule of law and human rights in mid-19<sup>th</sup> century. Moreover, the two learned professors educated in German, contributed to critical thinking in legal studies, while teaching at the Grand School in Belgrade and the Kragujevac Lycée. Although their views were somewhat different, both found protection of fundamental human rights to be an important feature of the rule of law.

Exploring practical aspects of the rule of law in Chapter Seven, Popović puts forward the concept of “peace and quietness” to explain how running of state affairs was only allegedly proper and to the satisfaction of the governed, based on the medieval notion of order, which was the acceptable model of social behavior. Even though this notion was gradually departed from, the competing idea of the rule of law was not fully introduced even in 1870s when Serbia came close to constitutionalism. Continuing into Chapter Eight dedicated to the rule of law doctrine, the author

explains how ideas of *Rechtstaat* and the rule of law emerged in Serbian legal thought, under foreign influence, and how they were understood and used through different periods. *Rechtstaat* was largely viewed through the lens of judicial review of administrative action, while the term rule of law gained precedence only after World War II (Popović explains this partly by Serbian lawyers' inclination to read more in English at that time).

He closes Part Two of the book with a chapter titled A Century of Teaching Constitutional Law, dedicated to written works of Dimitrije Matić, Milovan Milovanović and Slobodan Jovanović, presenting a "line of stability" in teaching and curricula, based on a common understanding of constitutional law.

In Part Three (*Serbia and Yugoslavia*), once again taking a dominantly chronological approach, the author swiftly takes us through the period during which Serbia was not an independent state, but part of the Kingdom of Serbs, Croats and Slovenes and of three Yugoslav states (Kingdom of Yugoslavia, SFRY and the Federal Republic of Yugoslavia). The reason for dedicating a comparatively smaller part of the book to these periods might be in the fact that the author wanted to focus on the constitutional history of Serbia as an independent state. Chapter 10 covers both the Kingdom of Serbs, Croats and Slovenes (later on Kingdom of Yugoslavia), which intermittently functioned as a parliamentary government, as well as an absolute monarchy (from 1928 to 1931) and the socialist Yugoslavia, followed by the so-called Rump-Yugoslavia, which was practically finally dismantled in 2006.

In similar vein, Chapter 11 deals with the "two constitutions of Serbia" – the 1990 Constitution adopted while Serbia was still a federal unit of SFRY, by a single-party parliament and the current 2006 Constitution, adopted after the final resolution of the joint state with Montenegro. The author, as he confesses, was among the authors of one of the initial drafts of the current constitution, but remains critical of its solutions, evaluating that it "does not properly meet the standards of modern constitutional settlements". He finds the reasons for its deficiencies in the deeply rooted authoritarian heritage, which *inter alia*, has been portrayed throughout this book.

The book is published in the eve of long awaited amendments of the Serbian Constitution, which once again, comes after a flawed consultative process, disregarding opinions of the academia and other legal experts, nevertheless, presented as a necessity forced from the outside – this time not by the Ottomans, Russians or the Habsburgs, as in the 19<sup>th</sup> century, but by the European Union. In that respect, we can only agree with Professor Popović when he proposes that some inspiration may be found in

history and the hope that the fate of Božidar Grujović – a learned lawyer whose voice was not heard in 1805 – will not befall Serbian legal professionals of today. It is also a message to future constitution writers, in the time of declining trust in academia and its ousting from the policy making process.

Considering all said above, this book is a noteworthy contribution to the study of constitutional history and constitutional law in Serbia. In less than 250 pages, the author succeeds in taking the reader from the time when Serbia was establishing home-rule within the Ottoman Empire and was governed by an illiterate autocrat to present-day Serbia, still struggling with its authoritarian heritage. It is bound to be an enjoyable and insightful reading also for scholars outside of Serbia, endeavoring in comparative research, particularly those in the wider Balkan region. As such, it will be a valuable contribution to any law library in Europe.

Received: 6 November 2021

Accepted: 6 December 2021

## HRONIKA PRAVNOG FAKULTETA UNIVERZITETA UNION U BEOGRADU (1. 10. 2020 – 30. 9. 2021)\*

### IZBORI NASTAVNIKA I SARADNIKA

1. Dr Marko Božić izabran je 15. oktobra 2020. godine u zvanje vanrednog profesora za užu Teorijskopravnu i Javnopravnu naučnu oblast.
2. Jovana Popović, MA, izabrana je 8. februara 2021. godine u zvanje asistenta za užu Građanskopravnu naučnu oblast.
3. Dr Jelena Jerinić izabrana je 11. februara 2021. godine u zvanje redovnog profesora za užu Javnopravnu naučnu oblast.
4. Dr Vanda Božić izabrana je 16. septembra 2021. godine u zvanje docenta za užu Krivičnopravnu naučnu oblast.

### ODBRANJENE DOKTORSKE DISERTACIJE

1. Andreja Mihailović, doktor nauka – pravne nauke, doktorirala je 27. oktobra 2020. godine odbranivši disertaciju pod nazivom „Derivativna tužba”;
2. Nebojša Jerinić, doktor nauka – pravne nauke, doktorirao je 10. februara 2021. godine odbranivši disertaciju pod nazivom „Zaštita uzbunjivača u cilju borbe protiv korupcije”;
3. Aleksandra Janković, doktor nauka – pravne nauke, doktorirala je 20. aprila 2021. godine odbranivši disertaciju pod nazivom „Održavanje ličnih kontakata roditelja i srodnika sa detetom”;
4. Lazar Đurović, doktor nauka – pravne nauke, doktorirao je 14. juna 2021. godine odbranivši disertaciju pod nazivom „Pravni i institucionalni okvir za delovanje organizacija civilnog društva u upravljanju javnim poslovima”.

### ODBRANJENI MASTER RADOVI

1. Jasna Božić, master pravnik iz oblasti HUMAN RIGHTS LAW, odbranila je 17. decembra 2020. godine master rad pod nazivom „Right of free access to information of public importance through perspective of the right to protection of personal data: restrictions and conflicting interests in the exercise of those rights through the work of the Commissioner for information of public importance and personal data protection”;
2. Katarina Šuvalija, master pravnik iz oblasti Korporativno pravo i pravo organizacija odbranila je 23. aprila 2021. godine master rad pod nazivom „Služba pravne pomoći u jedinicama lokalne samouprave u Republici Srbiji”.

---

\* Priredila Jovana Popović, asistent, Pravni fakultet Univerziteta Union u Beogradu

## USPESI NAŠIH NASTAVNIKA

- Asistent Nikola Kovačević izabran je u članstvo u Evropskom komitetu za sprečavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja. Pored toga, 29. septembra 2021. godine, kolega Kovačević je primio i prestižno priznanje – Nansenovu nagradu za Evropu, koja se dodeljuje pojedincima koji u svom radu sa izbeglicama pokazuju visok stepen posvećenosti i požrtvovanosti.

## STUDIJSKI BORAVCI I STRUČNA USAVRŠAVANJA

- Prof. dr Marko Božić je u svojstvu stipendiste CNL-a (Centre national du livre), francuske vlade od 15. juna do 15. avgusta 2021. godine bio na studijskom boravku po pozivu pri *Centre d'études turques, ottomanes, balkaniques et centrasiatiques* (CETOBAC), CNRS, Paris, France, u okviru kojeg je realizovao istraživanje o zakonskoj zabrani islamskog vela u socijalističkoj Jugoslaviji.

## IZDAVAČKA DELATNOST

### *Udžbenici*

- Mario Lukinović, Vojislav Jović, *Ekološko pravo*;
- Nevena Petrušić, Jelena Arsić, *Medijacija: teorija, pravo i praksa*;
- Srđan Šarkić, *Osnovi rimskog prava, IV izdanje*.

### *Monografije*

- Mario Lukinović, *Pravna informatika*.
- Mladen Nikolić, Nebojša Šarkić, *Komentar Zakona o izvršenju i obezbeđenju: sudska praksa i propisi s posebnim dodatkom o građanskom izvršnom postupku: prema stanju zakonodavstva od 1. januara 2021. godine, III izmenjeno i dopunjeno izdanje*.

### *Zbornici radova*

- Tamara Ilić i Marko Božić (ur.), *NOMOPHYLAX: zbornik radova u čast Srđana Šarkića*;
- Katarina Ivančević (ur.), *Zbornik radova / Međunarodna naučna konferencija Zaštita kolektivnih interesa potrošača održana 24. oktobra 2020. godine u Beogradu, 2021*;
- Nebojša Šarkić, Milan Počuča, Mario Lukinović (ur.), *Analiza zakona i podzakonskih akata Republike Srbije i propisa Evropske unije u oblasti upravljanja otpadom, sa posebnim osvrtom na obaveze lokalne samouprave, odnosno grada Novog Sada*.

### *Praktikumi, skripta i drugi nastavni materijali*

- Jelena Arsić, *Praktikum za Porodično pravo, I izdanje*;
- Violeta Beširević, *Izabrane lekcije iz predmeta Pravo Evropske unije: za školsku 2020/2021*;

- Jelena Jerinić, Ana Vladislavljević, Bojan Savković, *Praktikum za vežbe iz Ustavnog prava*;
- Aleksa Radonjić (prir.), *Reader on EU Private Law*;
- Slobodan Vukadinović, *Praktikum za Osnove građanskog i privrednog prava, I izdanje*.

### *Priručnici za pravosudni ispit*

- Bogoljub Milosavljević, *Ustavno pravo*;
- Bogoljub Milosavljević, Jelena Jerinić, *Upravno pravo*;
- Milena Trgovčević Prokić, *Nasledno pravo i postupak za raspravljanje zaostavštine*;
- Milena Trgovčević Prokić, *Vanparnični i javnobeležnički postupak*;
- Nataša Mrvić Petrović, *Krivično pravo: (opšti deo)*;
- Nebojša Šarkić, Zoran Vavan, *Radno pravo*;
- Nebojša Šarkić, Milan Počuča, *Porodično pravo*;
- Nebojša Šarkić, Milan Počuča, *Pravosudno organizaciono pravo*;
- Nebojša Šarkić, Mladen Nikolić, *Izvršni i stečajni postupak*;
- Slobodan Vukadinović, *Građansko pravo: opšti deo*;
- Srećko Kosanović, *Krivično procesno pravo*;
- Vida Petrović Škero, *Građansko procesno pravo*;
- Vladimir Crnjanski, *Stvarno pravo*;
- Vladimir Čolović, *Međunarodno privatno pravo*;
- Vladimir Čolović, *Privredno pravo: statusni deo (kompanijsko pravo): priručnik za pravosudni ispit*;
- Zdravko Petrović, Leposava Karamarković, Zoran Ivošević, *Obligaciono pravo*.

## PROJEKTNA DELATNOST

### Projekti koje finansira Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije

- Uticaj Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda na vladavinu prava u Sloveniji i Srbiji – Ovo je projekat koji se u okviru bilateralne saradnje PFUUB-a ostvaruje sa Evropskim pravnim fakultetom Univerziteta Nova univerza iz Ljubljane. U okviru projekta, doc. dr Aleksa Radonjić i doktorand Boris Topić boravili su na fakultetu Univerziteta Nova univerza u cilju sprovođenja istraživanja i prikupljanja literature.

### Međunarodni projekti

- COST projekat CA19143: Global Digital Human Rights Network / Globalna mreža za digitalna ljudska prava – Projekat se realizuje u periodu 2020–2024. Prof. dr Violeta Beširević učestvovala je na sastanku Upravnog odbora COST projekta CA19143 *Global Digital Human Rights Network*, u svojstvu članice Upravnog odbora. Sastanak je održan onlajn 20. septembra 2021. godine.

## KONFERENCIJE, OKRUGLI STOLOVI I SAVETOVANJA KOJE JE ORGANIZOVAO FAKULTET

- Property Law Conference – Challenges of the 21<sup>st</sup> Century – Pravni fakultet Univerziteta Union u Beogradu je 9. oktobra 2020. godine organizovao međunarodnu naučnu konferenciju „Property Law Conference – Challenges of the 21<sup>st</sup> Century”. Zbog okolnosti izazvanih pandemijom, konferencija je održana onlajn, korišćenjem Zoom internet platforme. Članovi Međunarodnog akademskog odbora konferencije bili su: Wian Erlank, PhD, North-West University, Law Faculty Potchefstroom (South Africa), Aleksandra Čavoški, PhD, University of Birmingham, Birmingham Law School (UK), Ana Vlahek, PhD, University of Ljubljana, Faculty of Law (Slovenia), Rafael Ibarra Garza, PhD, Universidad de Monterrey (Mexico), José Carlos de Medeiros Nóbrega, PhD, University of Osnabrück (Germany), Gabrijela Mihelčić, PhD, University of Rijeka, School of Law Rijeka (Croatia), Meliha Povlakić, PhD, University of Sarajevo, Faculty of Law (Bosnia and Herzegovina), Radenko Jotanović, PhD, University of Banja Luka, Faculty of Law (Bosnia and Herzegovina), Irina Sferdian, PhD, West University of Timisoara, Faculty of Law (Romania), Oliver M. Hübner, PhD, Frei Universität Berlin (Germany), Miloš Živković, PhD, University of Belgrade, Faculty of Law (Serbia), Dragoljub Popović, PhD, Union University, Faculty of Law (Serbia). Skup su organizovali prof. dr Jelena Simić i doc. dr Aleksa Radonjić. Na skupu su uzeli učešće nastavnici i saradnici PFUUB-a, i to na sledećim temama: Katarina Jovičić, Slobodan Vukadinović, Differences of Property Transfer Systems in Europe – The Challenge of Substantive Unification of Contract Law in the 21<sup>st</sup> Century; Dragoljub Popović, Dušanka Komnenić, Property of Frozen Assets in Ex-Yugoslav Banks in the Case-Law of the European Court of Human Rights; Jelena Jerinić, Who Should Be the Judge of the Common Good? Possibilities for Judicial Review of Public Interest Determination in Expropriation Cases – The Example of Serbia. PFUUB je u elektronskom formatu na engleskom jeziku izdao Knjigu sažetaka međunarodne naučne konferencije *Property Law Conference – Challenges of the 21<sup>st</sup> Century*.
- Međunarodna naučna konferencija „Zaštita kolektivnih interesa potrošača” – Pravni fakultet Univerziteta Union u Beogradu je 24. oktobra 2020. godine organizovao međunarodnu naučnu konferenciju „Zaštita kolektivnih interesa potrošača” u saradnji sa Institutom za uporedno pravo u okviru internog naučnog projekta „Zaštita kolektivnih interesa potrošača u srpskom i uporednom pravu” koji je realizovan u toku 2020. godine i kojim je rukovodila prof. dr Katarina Ivančević. Zbog okolnosti izazvanih pandemijom konferencija je održana u onlajn formatu, korišćenjem Zoom internet platforme. Pozdravne govore održali su prof. dr Katarina Ivančević, Pravni fakultet Univerziteta Union, prof. dr Jelena Jerinić, prodekan Pravnog fakulteta Univerziteta Union, prof. dr Nataša Mrvić Petrović, član Upravnog odbora, Institut za uporedno pravo i g-đa Tamara Samardžić u ime pomoćnice ministra u Ministarstvu trgovine, turizma i telekomunikacija. Organizacioni odbor konferencije je bio u sastavu: prof. dr Katarina Ivančević, doc. dr Slobodan Vukadinović, dr Katarina Jovičić. Naučni odbor je bio u sastavu: prof. dr Maja Bukovac Puvača, Faculty of Law, University of Rijeka, Croatia, prof. dr Aleš Galič, Faculty of Law, University of Ljubljana, Slovenia, prof. dr Tatjana Jovanić, Faculty of Law, University of Belgrade, Serbia, prof. dr Nataša Mrvić Petrović, Institute

of Comparative Law, Belgrade, Serbia, prof. dr Tibor Tajti, Central European University, Budapest, Vienna, Austria, prof. dr Meliha Powlakić, Faculty of Law, University of Sarajevo, Bosnia i Hercegovina, ass. prof. Nikola Dožić, Faculty of Law, University of Podgorica, Montenegro. Program konferencije je podeljen u pet panela koji su bili posvećeni sledećim tematikama: Uvodne teme; Upravni postupak, inspekcijiski nadzor i prekršajni postupak; Kolektivni zahtevi i kolektivne tužbe; Vansudski i sudski postupak; Finansijske usluge. Nakon izlaganja učesnika sledila je zanimljiva diskusija. U radu konferencije su učestvovali naučni radnici iz Srbije, Austrije, Hrvatske, Crne Gore, Bosne i Hercegovine, Velike Britanije, Danske, Indije, SAD i Rumunije. Radovi izloženi na ovoj konferenciji objavljeni su 2021. godine na srpskom i engleskom jeziku u okviru zbornika u izdanju Pravnog fakulteta Univerziteta Union u Beogradu. Na skupu su učešće uzeli nastavnici i saradnici PFUUB-a, i to na sledećim temama: Vukadinović Slobodan, Mehanizmi kolektivne zaštite potrošača od nepravilnih ugovornih odredaba; Ivančević Katarina, Zaštita potrošača korisnika usluge osiguranja od nepravilnih ugovornih odredaba; Jerinić Jelena, Posebnosti upravnog postupka za zaštitu kolektivnog interesa potrošača; Simić Jelena, Pacijenti kao potrošači – šta smo naučili iz slučaja Colin Gee and others v. Depuy International Limited; Jovičić Katarina, Afera Dieselgate i njen uticaj na kolektivnu zaštitu potrošača u Nemačkoj i Evropskoj uniji; Mrvić Petrović Nataša, Jovanović Slađana, Prekršajnoppravna zaštita potrošača; Radonjić Aleksa, Sudska zaštita kolektivnih interesa potrošača u Evropi, pouke za pravo Srbije.

- Naučni skup „Uporednopravna tradicija – granice recepcije” – Pravni fakultet Univerziteta Union u Beogradu je 20. novembra 2020. godine održao naučno savetovanje na temu „Uporednopravna tradicija – granice recepcije”. U drugom delu skupa bila je i promocija knjige *NOMOPHYLAX* posvećene prof. Srđanu Šarkiću. Ova knjiga predstavlja izvanredan doprinos pravnoj literaturi jer je 30 autora, iz različitih evropskih zemalja na 700 stranica obradilo različite teme iz oblasti Pravne tradicije. Za ovaj izvanredni događaj i za vrsnu knjigu koju su priredili zaslužni su doc. dr Tamara Ilić Matović i prof. dr Marko Božić. Njihov doprinos je izuzetan i zaslužuje najveće moguće profesionalne pohvale. Doc. dr Vladimir Crnjanski sa PFUUB-a bio je učesnik-izlagač na temu: „Opšti pregled pravnoistorijskog nasleđa notarijata”. S obzirom na specifične okolnosti, pohvale vredan trud uložili su i naši zaposleni oko realizacije onlajn skupa, prijema učesnika, distribucije knjiga i sl.
- Konferencija „Digitalna revolucija 4.0: kroz teoriju i praksu” – Na Pravnom fakultetu Univerziteta Union u Beogradu u saradnji sa Fondacijom Registar nacionalnog internet domena Srbije – RNIDS održana je 3. decembra 2020. godine druga po redu konferencija pod sloganom „Digitalna revolucija 4.0: kroz teoriju i praksu”. Nakon tri industrijske revolucije – parne, električne i digitalne – čovečanstvo se uzdiglo i do Četvrtе industrijske revolucije, koja se naziva i Industrija 4.0. Razumevanje ove revolucije i njenih istorijskih prethodnika ključno je za rešavanje izazova s kojima se suočava društvo. Ovaj naziv dugujemo svetskom ekonomskom forumu, koji je kao Četvrtu industrijsku revoluciju označio sistem koji spaja sposobnosti kako ljudi, tako i mašina. Živimo u doba veštačke inteligencije, genetičkog inženjeringa, biometrije, obnovljivih izvora energije, autonomnih vozila i drugih stvari koje iz osnova menjaju realnost koju poznajemo. Brisanje granica između fizičkog, digitalnog i biološkog predstavlja izazov za pravo. Svedoci smo sveobuhvatnih

promena koje donosi Četvrta industrijska revolucija, međutim tehnologije se razvijaju tolikom brzinom da je nemoguće predvideti njihov napredak. Društvene i socijalne okolnosti vekovima se menjaju i pravo zajedno sa njima. Pravo je od svog postanka vezano za informacije (od prvih normi koje su prvo zapisivane na papiru, a potom i štampane, do danas kada se one prenose digitalno). Proces digitalizacije i upotrebe veštačke inteligencije u pravu nije novina, on je tu prisutan već decenijama. I kako su se mnoge oblasti prava (krivično, građansko, upravno, obligaciono, radno, intelektualna svojina i dr.) prilagođavale upotrebi informaciono-komunikacionih tehnologija radi apsorbovanja novonastalih pojava, tako se i u administrativnom delu pravo sve više oslanjalo na blagodeti nastalih informatičkih promena. Od primene veštačke inteligencije u sastavljanju dokumenata, preko formiranja baza i datoteka, do pomoći u pronalaženju pravnih informacija i dokumenata, kao i pomoći u odlučivanju. Konceptija ovogodišnje Konferencije je povezivanje struke i nauke u cilju prezentovanja promena koje utiču na pravo i kako se pravo menja usled navedenih promena. Konferencija je otvorena uvodnim izlaganjem prof. dr. Nebojše Šarkića, dekana Pravnog fakulteta Univerziteta Union u Beogradu, a usledila su predavanja: prof. dr. Saše Gajina, profesora na Pravnom fakultetu Univerziteta Union u Beogradu, advokata Nenada Cvijetičanina iz Advokatske kancelarije Cvijetičanin, Dragana Milića iz Advokatske kancelarije Milić, Vladimira Marenovića iz Advokatske kancelarije Živko Mijatović and Partners, Dejana Đukića, v. d. direktora Registra nacionalnog internet domena Srbije, i prof. dr. Maria Lukinovića, profesora na Pravnom fakultetu Univerziteta Union u Beogradu. To je druga po redu konferencija koju zajednički organizuju Fondacija „Registar nacionalnog internet domena Srbije” (RNIDS) i Pravni fakultet Univerziteta Union u Beogradu. Zbog okolnosti izazvanih pandemijom, skup je održan u onlajn formatu, korišćenjem Zoom internet platforme.

- Seminar „Procesna ovlašćenja javnih izvršitelja prema novom Zakonu o izvršenju i obezbeđenju” – PFUUB je 4. decembra 2020. godine održao seminar pod nazivom „Procesna ovlašćenja javnih izvršitelja prema novom Zakonu o izvršenju i obezbeđenju”. Seminar je održan u prisustvu 56 prijavljenih učesnika koji su tematska izlaganja pratili onlajn, putem Zoom platforme, ili neposrednim prisustvom, u skladu s epidemiološkim merama, u prostorijama Fakulteta. U svojstvu predavača učestvovali su: prof. dr. Nebojša Šarkić, prof. dr. Milena Trgovčević Prokić, doc. dr. Vladimir Crnjanski, Mladen Nikolić, sudija Privrednog apelacionog suda, i Zoran Rogić, sudija Višeg suda u Beogradu.
- Stručni skup – Antidiskriminacioni propisi – Na Pravnom fakultetu Univerziteta Union u Beogradu 23. marta 2021. godine održan je stručni skup posvećen Nacrtu zakona o izmenama i dopunama Zakona o zabrani diskriminacije, kao i Nacrtu zakona o istopolnim zajednicama. Zbog okolnosti izazvanih pandemijom skup je održan u onlajn formatu, korišćenjem Zoom internet platforme. Skup su organizovali Koalicija protiv diskriminacije i Pravni fakultet Univerziteta Union u Beogradu, uz podršku Ambasada Holandije u Beogradu.
- Naučno-istraživački projekat „Analiza zakona i podzakonskih akata RS i propisa EU u oblasti upravljanja otpadom, sa posebnim osvrtom na obaveze lokalne samouprave, odnosno Grada Novog Sada” – PFUUB je 20. maja 2021. godine prezentovao rezultate naučno-istraživačkog projekta „Analiza zakona i podzakonskih akata RS i propisa EU u oblasti upravljanja otpadom, sa posebnim osvrtom na obaveze lokalne samouprave, odnosno Grada Novog

Sada<sup>7</sup>. Gradska uprava za zaštitu životne sredine na javnom konkursu za delu sredstava za sufinansiranje istraživačkih i razvojnih programa iz oblasti životne sredine na teritoriji Grada Novog Sada dodelila je Pravnom fakultetu Univerziteta Union u Beogradu ovaj projekat. Rezultati Projekta su publikovani u obliku zbornika radova koji su zajedno sa rezultatima bili predstavljeni na skupu.

- Okrugli sto povodom stogodišnjice donošenja Vidovdanskog ustava – Na Pravnom fakultetu Univerziteta Union u Beogradu je 28. juna 2021. godine održan Okrugli sto povodom stogodišnjice donošenja Vidovdanskog ustava. Skup je prigodnim obraćanjem otvorio dekan PFUUB-a prof. dr Nebojša Šarkić, a u temu okruglog stola je publiku koja je prisustvovala u sali, odnosno koja je pratila izlaganja putem Zoom platforme, uvela prof. dr Violeta Beširević, profesorka PFUUB-a. Kao uvodničar je govorio prof. dr Kristijan Nilssen sa Univerziteta Orhus u Danskoj, koji je govorio o ustavnim dilemama i problemima ustavnog definisanja u Jugoslaviji, ali i refleksijama tih problema nakon njenog raspada, u državama naslednicama. Nakon kraće diskusije usledila je besednička sekcija programa, koju je najavio rukovodilac škole besedništva na PFUUB-u Dejan Milić. U okviru ovog dela programa Nikola Bakić, student treće godine PFUUB-a, oživeo je delove prestone besede regenta Aleksandra Karađorđevića izgovorene na otvaranju Ustavotvorne skupštine, dok je koleginka Marija Filipović, studentkinja druge godine, izgovorila oštre kritičke reči vode komunističke opozicije Sime Markovića. Zatim je otpočela prva sesija kojom je predsedavala prof. dr Jelena Jerinić sa PFUUB-a. Dr Vladimir Petrović sa Instituta za savremenu istoriju u Beogradu govorio je o ključnim problemima vidovdanske ustavnosti u potonjim interpretacijama, a specifično o hrvatskoj perspektivi na sistem konstituisan Vidovdanskim ustavom govorio je prof. dr Hrvoje Klasić sa Sveučilišta u Zagrebu. Neke dileme o stvarnim dometima suverenosti naroda u kontekstu nastanka Kraljevine SHS izneo je prof. dr Marko Božić, sa PFUUB-a. Na drugoj sesiji, kojom je predsedavala prof. dr Violeta Beširević, učesnicima i slušaocima se obratio prof. dr Dragoljub Popović, takođe profesor na našem fakultetu, govoreći o paralelama između Vajmarskog i Vidovdanskog ustava. Na ovu temu nadovezalo se i izlaganje dr Srđana Miloševića, koji je govorio o agrarnopolitičkim odredbama Vidovdanskog ustava, kao delu socijalno-ekonomskog bloka ovog dokumenta. Nakon ovih izlaganja usledila je i završna diskusija, a zatim i još jedna besednička sekvenca, u kojoj se publici ponovo obratio Nikola Bakić, ovoga puta obraćanjem Ivana Ribara, predsednika ustavotvorne skupštine, a koleginica Aleksandra Živković, apsolvantkinja na našem fakultetu, govorom Ljube Davidovića, šefa Demokratske stranke. Kao završni čin Okruglog stola autorima nagrađenih priloga koji su pristigli na konkurs koji je ovim povodom organizovao PFUUB uručene su nagrade. Odlukom žirija u sastavu prof. dr Bogoljub Milosavljević, prof. dr Srđan Šarkić, prof. dr Dragoljub Popović, prof. dr Violeta Beširević i prof. dr Jelena Jerinić dodeljene su prva i treća nagrada. Prva nagrada pripala je Vukašinu Zoriću, doktorandu na Filozofskom fakultetu Univerziteta u Beogradu, a treća nagrada dodeljena je Jeleni Bakoč, studentkinji master studija na Pravnom fakultetu Univerziteta u Beogradu. Nagrade su uručili prof. dr Srđan Šarkić i prof. dr Dragoljub Popović.
- Skup „Zajedno smo jači” – Udruženje žrtava nasilja Hajr uz podršku Pravnog fakulteta Univerziteta Union u Beogradu je organizovalo tribinu pod nazivom „Zajedno smo jači” posvećenu borbi protiv nasilja. Skup je održan 25. avgusta

2021. godine, a uvodna izlaganja imali su: prof. dr Nebojša Šarkić, prof. dr Jovan Marić, dr Ilija Životić, stručnjak za bezbednost IPO Srbije, Ivana Josifović, sudija Višeg suda u Novom Sadu i predsednik UO UST, Stevan Đokić, predsednik DBA, i Aleksandra Rapajić, prvak Evrope u bodi-bildingu.

- „Zastarelost potraživanja – šta građani treba da znaju?” – Građani i građanke su 26. januara 2021. godine bili u mogućnosti da čuju izlaganja i postave pitanja sudijama, advokatu i pravnom stručnjaku na temu: „Zastarelost potraživanja – šta građani treba da znaju?”. Događaj je bio emitovan uživo na Fejsbuk stranici Otvorenih vrata pravosuda. Sagovornici su bili: Tanja Drob-njak, sudija Osnovnog suda u Novom Sadu, doc. dr Aleksa Radonjić, Pravni fakultet Univerziteta Union u Beogradu, Nebojša Stanković, advokat i predavač na Advokatskoj akademiji Advokatske komore Srbije, a moderator Ivan Milojić, sudija Osnovnog suda u Nišu i član Foruma sudija Srbije.
- Međunarodni seminar „Procesna ovlašćenja javnih izvršitelja u Republici Srbiji, Republici Crnoj Gori i Republici Severnoj Makedoniji” – Međunarodni seminar „Procesna ovlašćenja javnih izvršitelja u Republici Srbiji, Republici Crnoj Gori i Republici Severnoj Makedoniji” održan je u Vranju, 28. i 29. maja 2021. godine. Seminar je organizovan u saradnji Pravnog fakulteta Univerziteta Union u Beogradu i Komore javnih izvršitelja Republike Srbije. Na seminaru su razmatrana aktuelna i problematična pitanja izvršnog postupka u Republici Srbiji, Republici Crnoj Gori i Republici Severnoj Makedoniji uz prisustvo zapaženog broja učesnika. Između ostalih izlagača, svoje aktivno učešće su ostvarili i predsednici komora izvršitelja Crne Gore i Severne Makedonije. Organizovanjem ovog seminara ostvaren je nesumnjiv stručni doprinos u pogledu afirmacije ideje zakonitog, stručnog i efikasnog sprovođenja postupka prinudnog izvršenja. Učesnik-izlagač je bio doc. dr Vladimir Crnjanski, sa PFUUB-a, sa temom: „Pravo na zaštitu doma u izvršnom postupku: uporednopravni pregled”.
- Akcija „PODRŽI ĐAKE, PODRŽI ŠKOLE” – Pravni fakultet Univerziteta Union u Beogradu je u saradnji sa Društvom za održivu budućnost „Koraci” i našim proslavljenim karikaturistom Markom Somborcem realizovao akciju prikupljanja novca za nabavku maski, zaštitnih i dezinfekcionih sredstava za potrebe učenika i škola koji imaju teškoće da obezbede sredstva za zaštitu od zaraze virusom SARS-CoV-2 na početku i tokom školske godine. S velikim interesovanjem studenti su pratili razgovor koji je vodila doc. dr Jelena Arsić sa Pravnog fakulteta Univerziteta Union u Beogradu sa našim dragim gostima prof. dr Nevenkom Žegarac sa Fakulteta političkih nauka Univerziteta u Beogradu i Danilom Ćurčićem iz Inicijative A11. Na kraju smo svi uživali u nastupu umetnice Theodore Skrobonje i pisca Gorana Skrobonje, koji su svirali kantri muziku na bendžu i gitari.
- Projekcija filma „Pushback i opasne igre” – Pravni fakultet Univerziteta Union u Beogradu organizovao je emitovanje dokumentarnog filma „Pushback i opasne igre” autorke Bojane Lekić, koji je bio praćen panel-diskusijom sa studentima. Učešće u panelu uzeli su Bojana Lekić, novinarka i autorka filma, Ljubinka Mitrović, predstavnik kancelarije UNHCR-a u Beogradu, prof. dr Đorđe Alempijević, specijalista sudske medicine i član Evropskog komiteta za sprečavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja, i Nikola Kovačević, asistent. Panel-diskusiju je otvorio dekan Pravnog fakulteta prof. dr Nebojša Šarkić, koji je dao i kratak osvrt na društveni značaj

filma i probleme koji su kroz film prikazani. Bojana Lekić je sa studentima podelila svoje motive za snimanje svog dokumentarca i poruke koje je želela da pošalje. Ljubinka Mitrović je studentima objasnila mandat UNHCR-a i značaj zaštite koju Konvencija o statusu izbeglica pruža izbeglicama koje borave na teritoriji Srbije. Profesor Alempijević i asistent Nikola Kovačević su sa studentima podelili svoja iskustva u dokumentovanju slučajeva kršenja ljudskih prava na granicama i značaju multidisciplinarnog pristupa u radu sa žrtvama koji pored pravne mora imati i medicinsku i psiho-socijalnu komponentu. Celokupan panel bio je interaktivnog karaktera i studenti su postavljali pitanja, komentarisali i aktivno učestvovali u diskusiji.

## OSTALE VANNASTAVNE AKTIVNOSTI U ORGANIZACIJI FAKULTETA

- Besplatni kurs za rad sa elektronskom pravnom bazom „Paragraf Lex” – Fakultet je i ove godine u saradnji sa kompanijom Paragraf organizovao besplatnu obuku za rad sa elektronskom pravnom bazom „Paragraf Lex”. Svi polaznici koji su uspešno završili kurs dobili su sertifikat o osposobljenosti za osnovni nivo korišćenja elektronske pravne baze „Paragraf Lex”. Sertifikat se vrednuje kao dodatak diplomi u skladu sa Bolonjskom deklaracijom.
- Kurs: „Pravna retorika i savremeni odnosi s javnošću” – Ove kao i prethodnih petnaest akademskih godina Fakultet je organizovao kurs „Pravna retorika i savremeni odnosi s javnošću”. Predavač je bio Dejan Milić.
- Kurs: „Pisanje pravnih akata iz Građanskog prava” – Kurs se održava u zimskom i letnjem semestru. Namenjen je studentima našeg fakulteta, diplomiranim pravnicima koji pripremaju pravosudni ispit, ali i svim drugim zainteresovanim kolegincima i kolegama. Pored nastavnika našeg fakulteta, predavanja na kursu su držali sudije i advokati.
- Kurs: „Pisanje pravnih akata iz Krivičnog prava” – Kurs se održava u zimskom i letnjem semestru. Namenjen je studentima našeg fakulteta, diplomiranim pravnicima koji pripremaju pravosudni ispit i svim drugim zainteresovanim kolegincima i kolegama. Pored nastavnika našeg fakulteta, predavanja na kursu su držali sudije i advokati.
- Kurs: „Priprema za polaganje pravosudnog ispita” – Fakultet već dugi niz godina organizuje pripremnu nastavu za polaganje pravosudnog ispita. Kurs traje tri meseca sa ukupnim fondom od 180 časova. Predavači na kursu su: prof. dr Nebojša Šarkić, prof. dr Bogoljub Milosavljević, prof. dr Nataša Mrvić Petrović, prof. dr Zdravko Perović, prof. dr Slađana Jovanović, prof. dr Jelena Simić, mr Bojan Stanivuk, Ljubica Milutinović, sudija, Vida Petrović Škero, sudija, Vesna Čogurić, sudija, dr Miodrag Majić, sudija, Aleksandar Ivanović, sudija, Dragica Saveljić Nikolić, sudija, Siniša Važić, sudija, Mladen Nikolić, sudija, Tatjana Đurica, sudija, Tatjana Matković Stefanović, sudija, doc. dr Vladimir Crnjanski, prof. dr Slavko Đorđević, Tatjana Vlaisavljević, sudija, i drugi istaknuti stručnjaci iz oblasti prava. Nastava se realizuje regularno (klasično) u prostorijama fakulteta, a takođe postoji mogućnost da se nastava prati onlajn. Posle održanog predavanja postoji mogućnost preuzimanja audio-video zapisa.
- Seminari o primeni izvršnog postupka – Pravni fakultet Univerziteta Union u Beogradu organizovao je 12. marta, 16. aprila i 21. maja 2021. godine seminare

o primeni izvršnog postupka. U okviru seminara obrađene su sledeće teme: „Nadležnost i ovlašćenja javnih izvršitelja u postupku odlučivanja o predlohu za izvršenje na osnovu izvršne isprave”, „Odlaganje izvršenja i otklanjanje nepravilnosti u postupku sprovođenja izvršenja” i „Prodaja nepokretnosti putem neposredne prodaje”. Na seminaru su govorili prof. dr Nebojša Šarikić, Mladen Nikolić, sudija Privrednog apelacionog suda u Beogradu, Zoran Rogić, sudija Višeg suda u Beogradu, Nikola Stošić, sudija Prvog osnovnog suda u Beogradu i Damir Šite, javni izvršitelj. Učesnici seminara su tematska izlaganja pratili onlajn, putem Zoom platforme, ili neposrednim prisustvom, u skladu s epidemiološkim merama, u prostorijama Fakulteta. Nakon završenog seminara dobili su validan sertifikat. Seminar je podržan od Komore javnih izvršitelja.

- Pravne klinike – Zbog početka primene novog Zakona o besplatnoj pravnoj pomoći, Pravni fakultet Univerziteta Union u Beogradu do daljeg nije u mogućnosti da u okviru Pravne klinike za medicinsko pravo, Pravne klinike za porodično pravo, Pravne klinike za radno pravo i Pravne klinike za intelektualnu svojinu pruža besplatnu pravnu pomoć. Kada se steknu uslovi za nastavak rada, PFUUB će nastaviti da pruža besplatnu pravnu pomoć u okviru pravnih klinika.
- Program „Zelena transparentnost javnih nabavki u zdravstvu” – Pravni fakultet Univerziteta Union u Beogradu u saradnji sa organizacijom Pravni skener realizovao je program Zelena transparentnost javnih nabavki u zdravstvu. Od marta 2020. godine zbog pojave virusa kovid 19 odlaganje, transport i uništavanje medicinskog otpada je otvorilo brojne probleme u oblasti zaštite životne sredine. Prema propisanoj kategorizaciji maske, rukavice, skafanderi, viziri i druga zaštitna oprema koja se koristi u zdravstvenim ustanovama za lečenje pacijenata obolelih od kovida 19 spada u medicinski otpad. Od početka pandemije medicinski otpad se bitno uvećao zbog čega je bilo neophodno da zdravstvene ustanove prilagode postupak njegovog odlaganja, transporta i uništavanja. Prema Agenciji za zaštitu životne sredine, u prethodnom periodu na dnevnom nivou je bilo 1,5 kilograma medicinskog otpada po bolničkom krevetu. Program je bio posvećen pitanjima kao što su: veća odgovornost javnog sektora u sprovođenju javnih nabavki radi veće transparentnosti, smanjenja korupcije i zaštita životne sredine. Program je sastavljen iz dva dela. Prvi deo čini onlajn obuka (tri nedelje), a drugi deo predstavlja prikupljanje podataka putem zahteva za slobodan pristup informacijama od javnog značaja od strane studenata koji su završili obuku. Po završenom programu, studenti dobijaju sertifikat o učešću.
- Zajednički projekat Pravnog fakulteta Univerziteta Union u Beogradu i New School, New York, USA – The course is a collaborative project between the New School, New York, USA and the Union University School of Law in Belgrade, Serbia. The New School and the Union Law School students worked in pairs on a specific area of law or policy where human rights issues have been compromised and are difficult to access for local communities in Serbia. Students were encouraged to use comparative cases from the US and elsewhere around the world to deepen their understanding of challenges and problem-solving opportunities in different contexts. Some of the topics which were covered by the course are: access to information, environmental protection, housing and healthcare rights, minority rights, monitoring human rights protection, advocacy and campaigning, research methods and data collection

techniques. The course offered skills training through a workshop-oriented structure. Students learnt how to conduct human rights focused research, assess information for accuracy and translate legal and technical information into a more accessible language. Students also learnt how to present information and pressure for change. Students worked in groups comprising both Serbian and US students.

## UČEŠĆE NAŠIH NASTAVNIKA NA NAUČNIM KONFERENCIJAMA I TRIBINAMA I PRISUSTVO U MEDIJIMA

- Prof. dr Tatjana Papić je bila diskutant na akademskom forumu „Uticaj evropskih institucija na vladavinu prava i demokratiju“, 15. januara 2021. godine, koji su organizovali Novi univerzitet iz Ljubljane (Slovenija) i ogranak za Centralno-istočnu Evropu Međunarodnog udruženja za javno pravo (ICON-S Central and Eastern European Chapter). Akademski forum je bio posvećen diskusiji o knjizi profesora pomenutog univerziteta Mateja Abelja i Jerneja Letnara Černiča, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart Publishing, 2020).
- Prof. dr Tatjana Papić je imala izlaganje na Pravnom fakultetu Univerziteta u Beogradu, na simpozijumu Beogradske grupe za teoriju prava (Belgrade Legal Theory Group Symposium) naslovljenom „Filozofija međunarodnog prava“, povodom knjige prof. dr Miodraga Jovanovića *The Nature of International Law* (CUP, 2019), na temu „Neizvesnost u međunarodnom pravu“, 18. juna 2021. godine.
- Prof. dr Nataša Mrvić Petrović je učestvovala na naučnoj konferenciji „Uvod u šerijatsko pravo“ koja je održana 25. januara 2021. godine u organizaciji Instituta za uporedno pravo Beograd i Departmana za pravne nauke Državnog univerziteta u Novom Pazaru sa temom: „Božja kazna za zločin krađe“.
- Prof. dr Violeta Beširević predstavila je onlajn rad „Rethinking Horizontal Application of Constitutional Rights in Digital Time“, na konferenciji COST projekta *Global Digital Human Rights Network*, održanoj u Koimbri, Portugallija, 21. septembra 2021. godine, u hibrid formatu.
- Prof. dr Violeta Beširević predstavila je rad „Militant Democracy and Populism: A Response to Tom Ginsburg and Aziz Huq“, na konferenciji Međunarodnog udruženja za javno pravo (ICON-S) koja je održana onlajn 6–9. jula 2021. godine.
- Prof. dr Violeta Beširević je održala predavanje na temu „Ustavna zabrana diskriminacije“ na Seminaru za pripadnike MUP-a u organizaciji Poverenika za zaštitu ravnopravnosti i OSCE 1–2. jula 2021, u Vrdniku.
- Prof. dr Slađana Jovanović je gostovala u emisiji Pravo na dostojanstvo, Sučeljavanje, emitovanoj na RTV Vojvodina 27. oktobra 2020. godine.
- Prof. dr Slađana Jovanović učestvovala je na Međunarodnom naučnom skupu „The right to human dignity“ u organizaciji Pokrajinskog zaštitnika građana, 30. oktobra 2020. godine.
- Prof. dr Slađana Jovanović učestvovala je na skupu Okrugli sto „Poverenje u institucije – Kome prijaviti nasilje?“ u organizaciji Pokrajinskog zaštitnika građana, 7. juna 2021. godine u Novom Sadu.

- Prof. dr Slađana Jovanović učestvovala je na Plenarnom skupu „Poverenje u institucije – Celovita podrška žrtvi” u organizaciji Pokrajinskog zaštitnika građana, 8–10. septembra 2021. godine, Novi Bečej.
- Prof. dr Slađana Jovanović izlagala je koautorski rad na temu „Maloletni učinioci krivičnih dela i droga: gde smo danas?” na Međunarodnom naučnom tematskom skupu „Droga i narkomanija – pravni, kriminološki, sociološki i medicinski problemi” u organizaciji Instituta za kriminološka i sociološka istraživanja, 29–30. septembra 2021. godine na Paliću.
- Prof. dr Mario Lukinović održao je 29. oktobra 2020. godine, studentima El Instituto Tecnológico y de Estudios Superiores de Monterrey u Meksiku predavanje na temu: „Blockchain tehnologije i kriptovalute: uporednopravna perspektiva”.
- Doc. dr Slobodan Vukadinović održao je po pozivu dva predavanja na temu „Značaj parlamentarnog nadzora i pregled kontrolnih mehanizama Narodne skupštine” i „Dostupni mehanizmi nadzora i njihova primena” na Uvodnom seminaru za nove narodne poslanike Narodne skupštine Republike Srbije 10. decembra 2020. godine.
- Doc. dr Tamara Ilić održala je predavanje na tribini FORVM ROMANVM u organizaciji Pravnog fakulteta Univerziteta u Beogradu, 2. aprila 2021. godine.
- Doc. dr Tamara Ilić učestvovala je sa saopštenjem na VII nacionalnoj konferenciji vizantologa, u organizaciji Komiteta za vizantologiju, 22–25. juna 2021. godine.
- Doc. dr Vladimir Crnjanski učestvovao je na Međunarodnoj naučnoj konferenciji „International Scientific Conference The impact of the Covid-19 pandemic on the economy and the environmental in the era of the fourth industrial revolution, Book of Abstracts” / „Uticaj kovida-19 na ekonomiju i životnu sredinu u eri četvrte industrijske revolucije”, Knjiga apstrakata, (V. Crnjanski, D. Gašić, Certificate of vaccination against the Covid –19 and the principle of equal access to justice / Potvrda o vakcinaciji protiv kovida 19 i načelo jednake dostupnosti pravosuđa), održanoj u Beogradu, 22–24. aprila 2021. godine, pod pokroviteljstvom Ministarstva prosvete, nauke i tehnološkog razvoja i Ministarstva zaštite životne sredine Republike Srbije.
- Doc. dr Vanda Božić predstavila je rad „Pravni okvir za zaštitu voda u pravu Evropske unije / Legal Framework for Water Protection in European Union Law” na Četvrtom naučno-stručnom skupu sa međunarodnim učešćem „Savremeni izazovi u očuvanju voda, u organizaciji Univerziteta Union – Nikola Tesla, u Beogradu, 15. oktobra 2020. godine.
- Doc. dr Vanda Božić predstavila je rad „Trgovanje ljudima s posebnim osvrtom na žrtve – komparativni prikaz rješenja kaznenog zakonodavstva i analiza sudske prakse u Hrvatskoj i Srbiji” i rad „Istraga poreskih krivičnih dela” na XI međunarodnom naučnom skupu „Izazovi pravnom sistemu”, koji je organizovao Pravni fakultet Univerziteta u Istočnom Sarajevu, 24. oktobra 2020. godine.
- Doc. dr Vanda Božić predstavila je rad „(Ne)odgovornost banaka kod otkrivanja pranja novca stečenog poreskom utajom – nedoumice u ekonomskoj teoriji i praksi” na Međunarodnoj konferenciji „Актуальные проблемы экономического развития”, Белгородский государственный технологический университет им. В. Г. Шухова Институт экономики и менеджмента Белгород, Rusija, u oktobru 2020.

- Doc. dr Vanda Božić predstavila je rad „Poreska utaja kao jedno od krivičnih dela u lancu organizovane kriminalne delatnosti / Tax fraud as one of the criminal offenses in the chain of organized criminal activity” na Naučnom skupu sa međunarodnim učešćem „Pravna tradicija i integrativni procesi”, u organizaciji Univerziteta u Prištini sa privremenim sedištem u Kosovskoj Mitrovici, u onlajn formatu, u oktobru 2020.
- Doc. dr Vanda Božić predstavila je rad „The presumption of innocence and the institute of the agreement between parties in Croatian criminal proceedings – pro et contra”, na International Crime and Punishment Festival, Faculty of Law, u Istanbulu, 20–26. novembar 2020. godine.
- Doc. dr Vanda Božić predstavila je rad „Poreska krivična dela kao vodeći oblik privrednog kriminaliteta / Tax crimes as the leading form of Economic crime” na XXIX Susretu pravnika u privredi Srbije, u organizaciji Udruženja pravnika u privredi Srbije i časopisa „Pravo i privreda”, u onlajn formatu, 27. novembra 2020. godine.
- Doc. dr Vanda Božić predstavila je rad „Kaznenopravni prikaz i analiza zaštite od nasilja na športskim natjecanjima u Hrvatskoj uz osvrt na međunarodnopravna rješenja / Criminal-law review and analysis of protection against violence at Sports competitions in Croatia with reference to International Law solutions”, na Susretu Kopaoničke škole prirodnog prava / Slobodan Perović / Unifikacija prava i pravna sigurnost, u onlajn formatu, decembar 2020.
- Doc. dr Vanda Božić predstavila je rad „Zločini genocida u logoru smrti Jasenovac / Crimes of Genocide in Jasenovac death camp”, na osmoj naučnoj konferenciji sa međunarodnim učešćem „Suffering of Serbs, Jews, Roma and others in the former Yugoslavia / Belgrade: Faculty for Business Studies and Law in Belgrade Faculty of Information Technology and Engineering University „Union – Nikola Tesla”, Belgrade Museum of Genocide Victims, Belgrade, 2021.
- Doc. dr Vanda Božić je predstavila rad „Water protection as a condition for preservation and improvement of the environment and population health”, Međunarodna istraživačka akademija znanosti i umjetnosti – Mianu, Odjel za Republiku Hrvatsku, international research academy of science and art – Irasa, Department for Republic of Croatia Irasa Treći međunarodni naučni skup, Nauka, obrazovanje, tehnologija i inovacije, SETI III 2021.
- Doc. dr Vanda Božić predstavila je rad „Cyber kriminalitet s osvrtom na pandemiju Covid-19” na IX međunarodnom naučnom skupu „Covid-19 – izazovi i posljedice”, Evropski univerzitet Brčko Distrikt, Evropski univerzitet Kallos Tuzla, Brčko 2021.
- Doc. dr Vanda Božić predstavila je rad „Trgovanje ljudima u kaznenom zakonodavstvu hrvatske i srbije – distinkcije” u okviru sedme međunarodne konferencije „Law, Economy and Management in modern ambience”, Univerzitet „Union – Nikola Tesla”, Beograd, Lemima 2021, 23. aprila 2021. godine.
- Doc. dr Vanda Božić predstavila je rad „Usluge i ugovor o alotmanu”, XVII majsko savetovanje, Međunarodni naučni skup „Usluge i vladavina prava”, u organizaciji Pravnog fakulteta Univerziteta u Kragujevcu i Instituta za društvene nauke, 28. maja 2021. godine.
- Doc. dr Vanda Božić predstavila je rad „Tajni nadzor komunikacije – normativni okvir i pojedina pitanja u sudskoj praksi” u okviru Međunarodne naučno-stručne konferencije „Adekvatnost državne reakcije na kriminalitet i

upotreba tehničkih sredstava u krivičnom postupku” u organizaciji Srpskog udruženja za krivičnopravnu teoriju i praksu Beograd i Centra za edukaciju sudija i tužilaca Republike Srpske, Bijeljina, BiH, 28. maja 2021. godine.

- Doc. dr Vanda Božić predstavila je rad „Izazivanje prometne nesreće u cestovnom prometu u hrvatskom kaznenom zakonodavstvu” na XVI međunarodnoj konferenciji „Bezbednost saobraćaja u lokalnoj zajednici”, Kopaonik, 16–19. juna. 2021. godine, Kriminalističko policijski univerzitet, Agencija za bezbjednost saobraćaja, Saobraćajni fakultet.
- Doc. dr Vanda Božić predstavila je rad „Sprečavanje pranja novca tokom pandemije – rizici i prognoze bankarskog poslovanja / Prevention of money laundering during a pandemic – risks and forecasts of banking”, Institut ekonomskih nauka, na Okruglom stolu „Poslovanje u periodu pandemije – izazovi i šanse”, u organizaciji Instituta ekonomskih nauka i Zoom platforme, u Beogradu, 23. juna 2021. godine.
- Doc. dr Vanda Božić predstavila je rad „Prison sentences in the Republic of Serbia with an analysis of court practice”, u okviru Osme međunarodne naučne konferencije „Social Changes in the Global World”, u organizaciji Pravnog fakulteta Univerziteta „Goce Delčev”, Štip, Republika Severna Makedonija, 2–3. septembra 2021.
- Doc. dr Vanda Božić predstavila je rad „Protection of human rights in the age of the Covid-19 pandemic / Zaštita ljudskih prava u doba pandemije Covid-19”, na XVIII međunarodnom naučnom skupu Pravnički dani – „Prof. dr Slavko Carić” „Pravo i društvo u uslovima pandemije”, u organizaciji Pravnog fakulteta za privredu i pravosuđe Univerziteta Privredne akademije u Novom Sadu, 24. septembra 2021. godine.

## GOSTOVANJA DOMAĆIH PREDAVAČA

- Prof. dr Dragoljub Popović je 14. decembra 2020. godine održao onlajn, preko Zoom platforme, predavanje na temu: „Pravo na mirno uživanje imovine u praksi Evropskog suda za ljudska prava”. Profesor Dragoljub Popović je od 2005. do 2015. bio sudija Evropskog suda za ljudska prava u Strazburu, obavljao je dužnost ambasadora Jugoslavije i potom Srbije i Crne Gore u Švajcarskoj, a danas radi kao profesor na više univerziteta. Autor je više knjiga, samostalnih i koautorskih, a učestvovao je i u izradi nekoliko ustavnih nacrti, kako za Srbiju, tako i za državnu zajednicu Srbija i Crna Gora. Objavio je i dva romana.

## ODRŽAVANJE ONLAJN NASTAVE ZA VREME PANDEMIJE KOVIDA 19

- Pravni fakultet Univerziteta Union u Beogradu je prilagodio pohađanje nastave u akademskoj 2020/2021. godini zbog epidemiološke situacije izazvane pandemijom kovid 19. Naši studenti su imali priliku da predavanja i vežbe prate putem sredstava elektronske komunikacije na taj način što se nastava odvijala putem onlajn platforme za nastavu na daljinu u redovnim terminima predviđenim po uobičajenom rasporedu. Pravni fakultet Univerziteta Union u Beogradu je jedini od svih pravnih fakulteta organizovao onlajn nastavu iz

svih predviđenih predmeta. Uspeli smo da na efikasan i brz način prilagodimo održavanje nastave novonastalim otežanim okolnostima, te na taj način omogućimo studentima da nastavu prate od kuće. Zahvaljujući efikasnoj organizaciji Fakulteta, plan i program nastave za svaki predviđeni predmet je kvalitetno i potpuno sproveden, te je ova po svemu teška i specifična školska godina odlično završena.

## USPESI NAŠIH STUDENATA

- Okrugli sto „Govornik u Nušićevom i u našem vremenu” – Studenti našeg Fakulteta Nikola Bakić i Marija Filipović, pod mentorstvom predavača Pravne retorike Dejana Milića, učestvovali su 27. i 28. avgusta 2021. godine na Okruglom stolu „Govornik u Nušićevom i u našem vremenu”, koji je u okviru tradicionalne manifestacije Nušićijada održan u Ivanjici. Tom prilikom održan je javni čas retorike na kojem su, pored naših studenata, učestvovali studenti Fakulteta političkih nauka Univerziteta u Beogradu i Pravnog fakulteta Univerziteta u Prištini sa sedištem u Kosovskoj Mitrovici. Oboje studenata Pravnog fakulteta Univerziteta Union održali su zapažene besede. Odlukom stručnog žirija Okruglog stola kolega Nikola Bakić dobio je Nušićev govornički venac za najbolje kazanu besedu na javnom času, dok je koleginya Marija Filipović javno pohvaljena za nadahnuto kazivanje besede o Nadeždi Petrović. Dejanu Miliću, predavaču Pravnog fakulteta Univerziteta Union u Beogradu, ukazana je čast da održi uvodno predavanje, nakon čega je određen za moderatora Okruglog stola.

## NAGRADE NAJBOLJIM STUDENTIMA

- Odlukama dekana od 22. decembra 2020. godine studentkinja Sandra Stojanović je zbog ostvarene prosečne ocene 9,92 u celosti oslobođena plaćanja školarine za upis četvrte godine studija u akademskoj 2020/2021. godini, dok su studentkinja Ana Bogdanović zbog ostvarene prosečne ocene 9,46 i student Aleksa Softić zbog ostvarene prosečne ocene 8,92 oslobođeni obaveze plaćanja polovine iznosa školarine za upis četvrte godine studija u akademskoj 2020/2021. godini.

## STUDENTSKE PRAKSE I STUDIJSKE POSETE

- Prakse – Studenti su u toku akademske 2020/2021. godine učestvovali na sledećim studentskim praksama: praksa kod javnog izvršitelja, praksa kod javnog beležnika, praksa kod Zaštitnika građana, praksa u Gradskom javnom pravobranilaštvu, kod Poverenika za pristup informacijama od javnog značaja, Poverenika za zaštitu podataka o ličnosti, praksa u Građanskom i Krivičnom odeljenju Prvog osnovnog suda u Beogradu, praksa u Građanskom i Krivičnom odeljenju Drugog osnovnog suda u Beogradu, praksa u Građanskom i Krivičnom odeljenju Trećeg osnovnog suda u Beogradu, praksa u Višem sudu u Beogradu, praksa u Privrednom sudu u Beogradu, praksa u Prekršajnom sudu, praksa u OTP banci, praksa u Advokatskoj kancelariji Cvjetičanin & Partners.

## SPISAK STUDENATA KOJI SU DIPLOMIRALI

Redni broj	Ime i prezime	Datum diplomiranja
1.	Sandra Stojanović	24. 9. 2021.
2.	Sara Kovačević	17. 9. 2021.
3.	Tijana Stanković	10. 9. 2021.
4.	Ana Bogdanović	10. 9. 2021.
5.	Tanja Živadinović	10. 9. 2021.
6.	Aleksa Sovtić	10. 9. 2021.
7.	Sofija Popović	10. 9. 2021.
8.	Petar Prlja	6. 9. 2021.
9.	Jovana Draganović Timotijević	2. 9. 2021.
10.	Petar Mihajlović	23. 8. 2021.
11.	Stefan Rajić	14. 7. 2021.
12.	Marija Vladejić Vojnić	9. 7. 2021.
13.	Milica Conić	7. 7. 2021.
14.	Katarina Petrović	7. 7. 2021.
15.	Bojan Savković	7. 7. 2021.
16.	Lazarela Mastilović	5. 7. 2021.
17.	Natalija Krnić	1. 7. 2021.
18.	Uroš Popović	29. 6. 2021.
19.	Jovana Vukašinović	11. 6. 2021.
20.	Zoja Đerković	1. 6. 2021.
21.	Tanja Milenković	21. 5. 2021.
22.	Mladen Milinović	19. 5. 2021.
23.	Danka Radanović	18. 5. 2021.
24.	Dušica Žižić	14. 5. 2021.
25.	Dubravka Dražić	11. 5. 2021.
26.	Sara Petrušić	28. 4. 2021.
27.	Nina Bratović	27. 4. 2021.

Redni broj	Ime i prezime	Datum diplomiranja
28.	Simona Videnović	23. 4. 2021.
29.	Filip Dimitrijević	21. 4. 2021.
30.	Nikola Marinković	10. 3. 2021.
31.	Filip Poledica	10. 3. 2021.
32.	Nemanja Čokorilo	10. 3. 2021.
33.	Aleksandar Bogdanović	10. 3. 2021.
34.	Aleksa Jakovljević	10. 3. 2021.
35.	Marija Lečić	9. 3. 2021.
36.	Aleksandar Marjanović	9. 3. 2021.
37.	Marija Pisarov	5. 3. 2021.
38.	Aleksandra Novaković	5. 3. 2021.
39.	Nemanja Karanac	12. 2. 2021.
40.	Kristina Kolaković	12. 2. 2021.
41.	Stefan Stojković	10. 2. 2021.
42.	Ratka Tomić	9. 2. 2021.
43.	Jana Bukacel	9. 2. 2021.
44.	Natalija Mirković	8. 2. 2021.
45.	Marko Brus Vilijem	5. 2. 2021.
46.	Uroš Anđelković	5. 2. 2021.
47.	Andrej Stošić	5. 2. 2021.
48.	Aleksandra Đorđević	29. 1. 2021.
49.	Dunja Lazić	29. 1. 2021.
50.	Maja Mladenović	26. 1. 2021.
51.	Velimir Dobrosavljević	19. 1. 2021.
52.	Nikola Lukić	15. 1. 2021.
53.	Nađa Romić	18. 12. 2020.
54.	Bojana Arsenijević	18. 12. 2020.
55.	Marijana Marinković	18. 12. 2020.

Redni broj	Ime i prezime	Datum diplomiranja
56.	Nevena Dikić	16. 12. 2020.
57.	Dejana Đorđević	16. 12. 2020.
58.	Dušan Krajnović	14. 12. 2020.
59.	Luka Hajduković	14. 12. 2020.
60.	Petar Ivanović	14. 12. 2020.
61.	Miloš Todorović	14. 12. 2020.
62.	Stanka Popović	14. 12. 2020.
63.	Hristina Živić	11. 12. 2020.
64.	Filip Rakić	9. 12. 2020.
65.	Julija Tripković	9. 12. 2020.
66.	Janko Nikolić	9. 12. 2020.
67.	Petar Knežević	9. 12. 2020.
68.	Milica Ćuk	8. 12. 2020.
69.	Bojan Milankov	16. 11. 2020.
70.	Jovana Tujković	13. 11. 2020.
71.	Nikola Kovačević	13. 11. 2020.
72.	Milan Panić	10. 11. 2020.
73.	Đorđe Janković	23. 10. 2020.
74.	Marija Knežević	22. 10. 2020.
75.	Milena Popović	20. 10. 2020.
76.	Strahinja Kovačević	19. 10. 2020.
77.	Nemanja Tričković	8. 10. 2020.
78.	Maja Đonović	7. 10. 2020.

Dostavljeno Uredništvu: 10. novembra 2021. godine

## UPUTSTVO ZA AUTORKE I AUTORE

Časopis *Pravni zapisi* objavljuje naučne članke, komentare zakonodavne i sudske prakse, pravne polemike i prikaze knjiga. U *Pravnim zapisima* se objavljuju isključivo radovi koji nisu ranije objavljeni niti su ponuđeni drugim časopisima na objavljivanje. Časopis ne objavljuje radove koji su u izvornom obliku preuzeti iz odbranih master radova, doktorskih disertacija ili knjiga.

Objavljuju se radovi pisani na srpskom ili engleskom jeziku. Ukoliko je rad pisan na engleskom jeziku, pre prijave, rukopis mora biti lektorisan od strane stručne osobe kojoj je engleski maternji jezik ili od strane prevodioca za engleski jezik. Rukopisi na engleskom jeziku koji ne zadovoljavaju jezičke standarde neće biti razmatrani radi objavljivanja.

Rukopis treba pripremiti u MS Word formatu i dostaviti ga putem sistema za elektronsko uređivanje časopisa *SCindeks Asistent* (<http://aseestant.ceon.rs/index.php/pravzap/login> ako imate registrovan nalog, odnosno: <http://aseestant.ceon.rs/index.php/pravzap/user/register> ukoliko nalog u ovom sistemu nemate). Elektronsko uređivanje časopisa omogućava autorima da prate proces objavljivanja rukopisa.

*Pravni zapisi* objavljuju prikaze u formi naučnog članka ili naučne kritike uređene u skladu sa ovim Uputstvima. Prikaz u formi naučnog članka ili naučne kritike podleže recenzijama.

*Pravni zapisi* objavljuju prikaze u formi priloga koji treba da budu uređeni u skladu sa Uputstvima u pogledu citiranja i podnaslova. Pored toga prikaz:

- treba da ima do 1500 reči;
- uključuje punu bibliografsku referencu knjige na koju se odnosi: ime i prezime autora/urednika, naziv knjige, izdavača, godinu izdavanja, broj strana;
- ukazuje na glavne ideje, kvalitete i kritiku knjige; prepričavanje sadržaja ili prekomerno citiranje delova knjige treba izbegavati;
- ne uključuju kritiku autora zato što nije napisao knjigu po „ukusu” autora prikaza;
- izbegava neumereno hvaljenje autora/urednika ili knjige;
- ukazuje na auditorijum kojem je knjiga namenjena;
- sadrži afilijaciju i e-mail adresu autora prikaza;

Pre nego što pošaljete prikaze u formi priloga, autorke i autori treba da kontaktiraju Glavnu i odgovornu urednicu radi provere zainteresovanosti časopisa za objavljivanjem predloženog prikaza. Kontakt e-mail: [pravni.zapisi@pravnofakultet.rs](mailto:pravni.zapisi@pravnofakultet.rs)

## PRIPREMA RUKOPISA

Naučni članci po pravilu ne prelaze dužinu od 15.000 reči, u fontu Times New Roman, 12 pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Uredništvo može odobriti duže radove u izuzetnim slučajevima.

Naučni članci se objavljuju na srpskom jeziku latiničkim pismom sa apstraktom na engleskom jeziku na kraju teksta (do 1.000 karaktera), ili na engleskom jeziku sa apstraktom na srpskom jeziku (do 1.000 karaktera) na kraju teksta.

**Ime autora/autorke** piše se u desnom uglu sa zvezdicom koja u delu za fusnote otvara referencu sa titulom, institucijom i e-mail adresom. Potom mogu da slede izjava zahvalnosti, naziv projekta čiji članak deo, izvor finansijske podrške i dr:

Primer:

Petar Petrović\*

Redovni profesor, Pravni fakultet Univerziteta u Beogradu; e-mail: petrovic.petar@gmail.com

**Apstrakt** na početku naučnog članka, do 1.000 karaktera, sadrži cilj istraživanja, metode, rezultate i zaključak. Posle apstrakta sledi do 10 ključnih reči.

**Ostali tekstovi** se objavljuju na srpskom ili engleskom jeziku latiničkim pismom bez rezimea, apstrakta i ključnih reči. Ako tekst sadrži tabelu, sliku ili grafikon, oni se posebno dostavljaju Redakciji, u originalnom formatu, sa istim fontom i poredom kao za osnovni tekst.

**Fusnote** se pišu u fontu Times New Roman, 10 pt.

**Podnaslove** treba pisati na sledeći način:

## 1. VELIKA SLOVA BOLD

### 1.1. VELIKA SLOVA REGULAR

#### 1.1.1. Mala slova regular

Molimo da u radu ne koristite više od tri nivoa podnaslova.

**Za efekat upozorenja, skretanje pažnje ili najave** molimo da u tekstu ne koristite **bold** i *italic* slova. *Italic* slova u tekstu treba koristiti samo za strane reči, sudske odluke i tekst koji, u punoj formi i uz znake navoda, preuzimate od drugog, tj. citirate.

**Obavezno je navođenje referenci na kraju rada.**

U spisku referenci navode se svi materijali korišćeni, odnosno pomenuti u radu grupisani prema sledećem redosledu: literatura, propisi, sudska praksa, izvori sa interneta, ostali izvori.

Reference se numerišu rednim brojevima. Spisak literature organizuje se alfabetski prema: početnom slovu prezimena prvog autora; početnom slovu prve reči u nazivu organizacije ukoliko autor nije poznat ili početnom slovu u naslovu reference ako nisu poznati ni autor ni organizacija.

Kada autor u svom imenu ima predlog (de, della, van, von, zu i sl.) koji se piše posle imena, prilikom citiranja imena autora u fusnoti i u popisu literature predlog se navodi posle imena (npr. Jean de Page navodi se kao: Page, J. de), a redosled u literaturi određuje se prema prvom slovu prezimena.

## PRAVILA CITIRANJA

### Članci

Vodinielić, V., 2015, Zabrana plagiranja i pravo citiranja u nauci, *Pravni zapisi*, 1, str. 126–200.

Naziv časopisa *Pravni zapisi* prilikom citiranja treba uvek pisati na srpskom jeziku.

Salacuse, J., Sullivan, N., 2005, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, *Harvard International Law Journal*, Vol. 46, No. 1, p. 109.

### Monografije

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija, str. 25.

Mitrović, D., Kumpan, A., 2010, *Osnovi međunarodnog privatnog prava*, Beograd, Pravni fakultet Univerziteta Union, str. 50.

Ako ima više od tri autora:

Varadi, T. *et al.*, 2007, *Međunarodno privatno pravo*, Beograd, Pravni fakultet Univerziteta u Beogradu, str. 55.

Upućivanje samo na monografiju (bez navođenja stranica):

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija.

#### Prilozi u zbornicima i serijskim publikacijama

Dimitrijević, N., Militantna demokratija, konstitucionalna demokratija i osnovna prava: da li su prijatelji demokratije neprijatelji slobode?, u: Beširević, V., (ur.), 2013, *Militantna demokratija – nekada i sada*, Beograd, Pravni fakultet Univerziteta Union & Službeni glasnik, str. 31–60.

Dimitrijević, V., 1963, Nacrt deklaracije Ujedinjenih nacija o pravu azila i neka aktuelna pitanja azila i izbeglištva, *Međunarodni problemi*, 4, str. 55–66.

Kada se navodi autor čiji doprinos u kolektivnom delu ne predstavlja prilog sa zasebnim nazivom, u popisu literature navodi se samo kolektivno delo (što je najčešće slučaj sa komentarima).

Npr. ako je Jovanović napisao neke stranice u komentaru koji je uredio Popović, u fusnoti će pisati:

Jovanović, J. u: Popović, P. (ur.), *Komentar*, a u popisu literature na kraju članka samo: Popović, P. (ur.), *Komentar*.

Kada prilog ima svoj naziv, u fusnoti će pisati: Jovanović, J., Nehat, u: Popović, P. (ur.), *Komentar*.

Tada se i u fusnoti i u literaturi prilog vodi po imenu autora priloga, dakle: Jovanović, J., Nehat, u: Popović, P. (ur.), *Komentar*.

#### Propisi

Zakon o izvršnom postupku, *Sl. glasnik RS*, br. 125/04 (u daljem tekstu: ZIP)

Ako se pomenuti zakon citira i kasnije: ZIP

Ako je propis menjan i dopunjavan:

Zakon o društvenoj brizi o deci, *Sl. glasnik RS*, br. 49/92, 29/93, 53/93, 67/93, 8/94.

Ako se citira zakon koji više ne važi:

Zakon o opštem upravnom postupku, *Sl. list SRJ*, br. 33/97, 31/01.

Prilikom ponovljenog citiranja treba navesti godinu: ZUP, 1997.

Označavanje člana/članova, stava/stavova i tačke/tačaka propisa u tekstu: član 7. stav 2. tačka 4. Zakona; član 8. st. 3– 4. Zakona; član 9. stav 5. tač. 6–7. Zakona.

U fusnotama: čl. 3–5. i 7. Zakona; čl. 5–9. Zakona; čl. 5, st. 1–3, čl. 7, 9. i 12. itd.

#### Dokumenti UN

Naslov dokumenta, odrednica da je u pitanju dokument UN (UN doc.) posle koje sledi službena numeracija UN, a potom u zagradi navesti datum kada je dokument usvojen.

UNSC Resolution 1244, UN doc. S/RES/1244 (10 June 1999).

Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Serbia*, UN dok. CCPR/C/SRB/CO/2 (20 May 2011).

### Dokumenti EU

Commission Decision 93/42/EEC of 21 December 1992 concerning additional guarantees relating to infectious bovine rhinotracheitis for bovines destined for Denmark.

### Praksa međunarodnih sudova

Opšta pravila:

1. Imena slučajeva treba navesti u kurzivu.
2. „Versus” treba da bude skraćeno u „v.”
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 međdržavnih 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 tribunal

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://\\*\\*\\*](http://***), DATUM), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema*, ICTR-95-1, Judgment of 7 June 2001 ([http://\\*\\*\\*](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. Ministero 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.

Case Opinion 2/13, *Opinion of the Court*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 79.

### Citiranje tekstova sa interneta

Gajin, S., 2012, *Ljudska prava, Pravno-sistemski okvir*, Beograd, Pravni fakultet Univerziteta Union u Beogradu, ([http://www.pravnifakultet.rs/images/2012/Sasa\\_Gajin\\_-\\_Ljudska\\_prava\\_E\\_izdanje.pdf](http://www.pravnifakultet.rs/images/2012/Sasa_Gajin_-_Ljudska_prava_E_izdanje.pdf), 1. 1. 2013).

Kod sadržaja veb-stranica vrlo često se autori i ne navode. Ukoliko ime autora postoji, navesti ime. U krajnjem slučaju, navesti samo internet adresu.

Walter, M., Konaguchi, J., *Multicriteria analysis*, (<http://www.gigabook/multicriteriaanalysis.pdf>, 5. 5. 2005)

ili

[http://www.echr.coe.int/echr/homepage\\_EN](http://www.echr.coe.int/echr/homepage_EN).

### Prilozi iz dnevne štampe (štampana izdanja)

Milikić, M., 2013, Sudije već tri godine niko ne ocenjuje, *Danas*, 12–13. januar, str. 4, stubac a.

### Prilozi iz dnevne štampe (dostupni na internetu)

Derikonjić, M., 2011, Apel stručnjaka zbog propusta u reformi pravosuđa, *Politika Online*, (<http://www.politika.rs/rubrike/Hronika/Apel-strucnjaka-zbog-propusta-ure-formi-pravosudja.lt.html>, 12. 1. 2011).

### Master radovi i doktorske disertacije

Karamarković, L., 2003, *Poravnanje i medijacija*, doktorska disertacija, Pravni fakultet Univerziteta Union u Beogradu.

### Ponovljeno citiranje

- Citiranje samo jednog teksta određenog autora: Poznić, B., 1993, str. 55.
- Citiranje teksta sa više stranica koje su tačno određene: Poznić, B., 1993, str. 55–60.
- Citiranje više stranica koje se ne određuju tačno: Poznić, B., 1993, str. 55 i d.
- Ako je citirano više naslova istog autora iz iste godine, prilikom ponovljenog citiranja oznakama a, b, c itd. označiti naslov po redosledu navođenja u članku: Petrović, M., 2001a.
- Citiranje podatka sa iste stranice istog dela kao u prethodnoj fusnoti: *Ibid*.
- Citiranje podatka iz istog dela kao u prethodnoj fusnoti, sa različite stranice: *Ibid*, str. 75.

### Ostale napomene

Prilikom navođenja literature na stranom jeziku, koristiti odgovarajuće skraćenice za strane (p. 5; pp. 2–8).

Radovi prezentovani na konferencijama, objavljeni u zbornicima radova sa konferencija: Brown, C., 2008, Multicriteria analysis, pp. 89–112, *Operational Research Conference*, London, September 17–19.

## GUIDELINES FOR AUTHORS

*Pravni zapisi*, Union University Law School Review, requires exclusive submissions written in the Serbian or English language. 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.

In principle, a book review should be written in the form of an article and edited following the Instructions for Authors of this journal. It will be subjected to the anonymous review process.

A book review, no longer than 1500 words, may also be published, if written and edited following the Instructions for Authors of this journal and provided that:

- it includes the book's full information: Author/Editor Name, Book Title, Publisher, Year of Publication, Number of Pages;
- it includes the main ideas, the strength and weaknesses of the book and avoids summarizing the book or extensive quotations from the book;
- the reviewer avoids criticizing the author for failing to write the book that the reviewer had in mind;
- it avoids immoderate cheerleading for the book or author;
- it includes the intended audience for the book;
- it includes affiliation and email of the reviewer.

Before writing a book review, please contact Editor-in-Chief to inquire if the journal is interested in reviewing the suggested book. Contact email: pravni.zapisi@pravni-fakultet.rs

## PREPARATION OF MANUSCRIPT

**Length and File Format:** Manuscripts (scholarly articles) should not exceed 15000 words, in Times New Roman font, 12 pt, 1,5 spacing, left margin 3,5 cm, right margin 3 cm. Footnotes are written in 10 pt font. In exceptional cases, the Editorial Board may approve for the publication a longer manuscript than required. Longer manuscripts may be accommodated in multiple issues. Manuscripts should be submitted in Microsoft Word for Windows format.

**Language and Script:** Manuscript should be written either in the Serbian language, in Latin script with an abstract in English at end of the text (up to 1.000 characters) or in English language with an abstract in Serbian at end of the text (up to 1.000 characters). When written in English, American-English spelling should be used. If your first language is not English, you may wish to have it professionally edited by a native speaker or a professional translator. The authors are liable for the costs of language editing. Manuscripts written in poor English are not going to be considered for the publication.

**The author's name** should be written in the right corner and followed by the information in the footnote on the title, affiliation, and email. A title and affiliation reference may include acknowledgments, the title of the related project, an indication of the financial research support, etc.:

Ruth White\*

Professor, Union University Law School Belgrade; e-mail: rwhite@gmail.com

**Abstract:** An abstract at the beginning of the scholarly article (up to 1.000 characters) should contain the research goal, methods, results and conclusions.

**Key Words:** The abstract should be followed by up to 10 key words.

**Subtitles:** Subtitles should be written in the following way:

## 1. CAPITAL LETTERS BOLD

### 1.1. CAPITAL LETTERS REGULAR

#### 1.1.1. Sentence Case

Please do not use more than three levels of subtitles.

**References:** Footnotes rather than endnotes should be used. The list of references should be included at the end of the manuscript.

**List of References:** Reference list at the end of the text must be included. The list of references should contain all the materials used, *i.e.* mentioned in the text. In the list of references, bibliography should be numbered and separated from legislation, case law, internet and other sources. The list of references should be structured in the following way:

- bibliography
- legal acts
- case law
- internet sources
- other sources

Bibliography is organized in alphabetical order according to:

- the first letter of the author's surname;
- the first letter of the first word in the name of the organization if the author is unknown or the first letter in the title of the reference if neither the author nor the organization is known.

When an author has a preposition in his name (de, della, van, von, zu or similar) written after the first name, the preposition is written after the first name of the author in the footnote and bibliography (*e.g.* Jean de Page is referenced as: Page, J. de) and the order in the bibliography is determined according to the first letter of the author's surname.

**Use of bold, italic, or underline:** To make emphasis in the text, please do not use bold, italic, or underline. *Italic* letters should be used in the text for Latin or foreign language words, judicial cases, and full-text citations.

## RULES OF CITATION

### Books

Sunstein, C., 2001, *Designing Democracy: What Constitutions Do*, New York, Oxford University Press .

Barak, A., 2008, *The Judge in a Democracy*, Princeton, Princeton University Press, p. 28.

Kommers, D., Miller, R., 2012, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham, Duke University Press, p. 196.

For more than three authors:

Dorsen, N., *et al.*, 2003, *Comparative Constitutionalism: Cases and Materials*, St. Paul, Minnesota, West Group, p. 286.

#### Journal Articles

Tushnet, M., 2002, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, *North Carolina Law Review*, Vol. 80, No. 4, pp. 1203–1235.

When quoted, the name of the journal *Pravni zapisi* should always be written in Serbian.

#### Chapters in Edited Books

Hirschl, R., The Judicialization of Politics, in: Caldeira, G., Kelemen, D., Whittington, K., (eds.), 2008, *The Oxford Handbook of Law and Politics*, Oxford, Oxford University Press, pp. 119–141.

#### Citation of theses and dissertations

Karamarković, L., 2003, *Poravnanje i medijacija*, doctoral dissertation, Union University Law School Belgrade.

#### Citation of texts from newspapers (printed editions)

Milikić, M., 2013, Sudije već tri godine niko ne ocenjuje, *Danas*, 12–13 January, p. 4, column a.

#### Citation of texts from newspapers (available on Internet)

Derikonjić, M., 2011, Apel stručnjaka zbog propusta u reformi pravosuđa, *Politika Online*, (<http://www.politika.rs/rubrike/Hronika/Apel-strucnjaka-zbog-propusta-ureformiprivosudja.lt.html>, 12. 1. 2011)

#### Repeated citation

Citation of a single text by an author: Poznić, B., 1993, p. 55.

Citation of a text on a number of pages which are accurately determined: Poznić, B., 1993, pp. 55–60.

Citation of a number of pages which are not accurately determined: Poznić, B., 1993, p. 55 etc.

If more titles of the same author from the same year are cited, for repeated citation these titles should be marked with a, b, c etc. in order of appearance in the article: Petrović, M., 2001a.

For citation of data on the same page of the same work as in the previous footnote please use *ibid.*

For citation of data from the same work as in the previous footnote, on another page: *Ibid.*, p. 75.

### Works presented in published conference proceedings

Brown, C., 2008, Multicriteria analysis, pp. 89–112, *Operational Research Conference*, London, September 17–19.

### Citation of legislation

Advertising Law, *Official Gazette of the RS*, No. 79/05. (Further in the text: AL)

If the mention legislation is cited later: AL.

For amended legislation: Law on the Constitutional Court, *Official Gazette of the RS*, Nos. 109/07, 99/11 and 18/13.

For legislation which is no longer in force: Act on Administrative Procedure, *Sl. list SRJ*, br. 33/97, 31/01.

If the mention legislation is cited later: AAP, 1997.

Presenting articles, paragraphs and items of the legislation in the **text**: Article 7 para. 2 item 4 of the Law; Article 8 paras. 3–4 have the Law; Article 9 para. 5 items 6–7 of the Law;

In **footnotes**: Art. 3–5. and 7. of the Law; Art. 5–9. of the Law; Art. 5, paras. 1–3, para. 7, 9. and 12. etc.

### Citation of international case law

General rules:

1. Titles of cases should be written in *italic*.
2. *Versus* should be abbreviated to “v.”.
3. Where appropriate, the abbreviated title of the case should be listed in parentheses, also in *italic*.
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.

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.

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.

### Permanent Court of International Justice

PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B, No. 5, p. 7.

### International criminal tribunals

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.

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://\\*\\*\\*](http://***), DATE), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema*, ICTR-95-1, Judgment of 7 June 2001 ([http://\\*\\*\\*](http://***), DATE), para. 85.

### 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.

ECtHR, *Osman v. the United Kingdom*, no. 23452/94, Judgment of 28 October 1998, para. 116.

When decisions of the Grand Chamber are cited, its English abbreviation in square parentheses should be written after the date.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], para. 70.

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.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], Concurring Opinion of Judge Bonello, para. 3.5.

### Court of Justice of the European Union

English abbreviation of the court's name (CJEU), case number, full title of the case *in italic*, type of decision and date, ECLI identifier, paragraph in which the cited part of the text is.

CJEU, case C-399/11, *Stefano Melloni v. Ministero Fiscal*, Judgment of 26 February 2013, ECLI:EU:C:2013:107, para. 11.

When citing the opinion of the Advocate General or the opinion of the CJEU, a type of decision should not be included:

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.

Case Opinion 2/13, *Opinion of the Court*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 79.

### UN documents

Title of the document, determination that it is a UN document (UN doc.) followed by the official numeration of the UN and the date of adoption of the document in parenthesis.

UNSC Resolution 1244, UN doc. S/RES/1244 (10 June 1999).

Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Serbia*, UN doc. CCPR/C/SRB/CO/2 (20 May 2011).

### Citation of EU documents

Commission Decision 93/42/EEC of 21 December 1992 concerning additional guarantees relating to infectious bovine rhinotracheitis for bovines destined for Denmark.

### Citation of texts from the Internet

Gajin, S., 2012, *Ljudska prava, Pravno-sistemski okvir*, Belgrade, Pravni fakultet Univerziteta Union u Beogradu, ([http://www.pravnifakultet.rs/images/2012/Sasa\\_Gajin\\_-\\_Ljudska\\_prava\\_E\\_izdanje.pdf](http://www.pravnifakultet.rs/images/2012/Sasa_Gajin_-_Ljudska_prava_E_izdanje.pdf), 1. 1. 2013).

In materials from the Internet authors are often not listed. If the name of the author exists it should be given in the reference. In the worst case, provide only the Internet address.

Walter, M., Konaguchi, J., Multicriteria analysis, (<http://www.gigabook/multicriteria-analysis.pdf>, 5. 5. 2005)

or

[http://www.echr.coe.int/echr/homepage\\_EN](http://www.echr.coe.int/echr/homepage_EN).

IZDANJA PFUUB  
2010–2021

Udžbenici

Vesna Ž. ALEKSIĆ, Poresko pravo, 2. izmenjeno izdanje, 2018.

Katarina Lj. DAMNJANOVIĆ, Vladimir MARIĆ, Intelektualna svojina, 4. izmenjeno i dopunjeno izdanje, 2012.

Katarina Lj. DAMNJANOVIĆ, Saobraćajno pravo, 2015.

Vladimir-Đuro DEGAN, Berislav PAVIŠIĆ, Violeta BEŠIREVIĆ, Međunarodno i transnacionalno krivično pravo, 2011.

Vojin DIMITRIJEVIĆ, Obrad RAČIĆ, Međunarodne organizacije, 5. izdanje [1. u izdanju Pravnog fakulteta Univerziteta Union i Službenog glasnika, Beograd], 2011.

Momčilo GRUBAČ, Krivično procesno pravo, 7. izmenjeno i dopunjeno izdanje, 2011.

Zoran IVOŠEVIĆ, Radno pravo, 10. izmenjeno i dopunjeno izdanje, 2020.

Dušan KITIĆ, Međunarodno privatno pravo, 3. izdanje, 2019.

Srećko KOSANOVIĆ, Krivično procesno pravo, 2018.

Srećko KOSANOVIĆ, Kriminologija, 2014.

Mario LUKINOVIĆ, Intelektualna svojina, 2019.

Bogoljub MILOSAVLJEVIĆ, Dragoljub M. POPOVIĆ, Ustavno pravo, 7. izmenjeno i dopunjeno izdanje, 2019.

Bogoljub MILOSAVLJEVIĆ, Upravno pravo, 7. izmenjeno i dopunjeno izdanje, 2019.

Bogoljub MILOSAVLJEVIĆ, Uvod u teoriju ustavnog prava, 2011.

Monika MILOŠEVIĆ, Alternativno rešavanje sporova s posebnim osvrtom na medijaciju, 2014.

Monika MILOŠEVIĆ, Uvod u medijaciju, 2011.

Dobrosav MITROVIĆ, Ana KUMPAN, Osnovi međunarodnog privatnog prava, 7. izdanje, 2014.

Dragan MRKŠIĆ, Zdravko PETROVIĆ, Katarina IVANČEVIĆ, Pravo osiguranja, 6. izmenjeno i dopunjeno izdanje, 2014.

Nataša MRVIĆ-PETROVIĆ, Krivično pravo: opšti deo, 5. izdanje, 2019.

Nataša MRVIĆ-PETROVIĆ, Krivično pravo: posebni deo, 6. izmenjeno i dopunjeno izdanje, 2019.

Mladen NIKOLIĆ, Milan POČUČA, Nebojša ŠARKIĆ, Đorđe SIBINOVIĆ, Pravo pravosudnih profesija, 2020.

Milan POČUČA, Nebojša ŠARKIĆ, Porodično pravo i porodičnopravna zaštita, 6. izdanje, 2020.

Dragoljub POPOVIĆ, Uvod u uporedno pravo, 5. izdanje, 2011.

Borivoje POZNIĆ, Vesna RAKIĆ-VODINELIĆ, Građansko procesno pravo, 17. izmenjeno i dopunjeno izdanje [1. u izdanju Pravnog fakulteta Univerziteta Union i Službenog glasnika, Beograd], 2015.

Dragan PRLJA, Mario RELJANOVIĆ, Pravna informatika, 4. izdanje, 2017.

Vesna RAKIĆ-VODINELIĆ, Pravosudno organizaciono pravo, 2. izmenjeno i dopunjeno izdanje [1. u izdanju Pravnog fakulteta Univerziteta Union], 2012.

Zlatko STEFANOVIĆ, Međunarodno privredno pravo, 5. izmenjeno i dopunjeno izdanje, 2011.

Zlatko STEFANOVIĆ, Kompanijsko pravo, 8. izmenjeno i dopunjeno izdanje, 2020.

Zlatko STEFANOVIĆ, Pravo Evropske unije, 7. izdanje, 2016.

Zlatko STEFANOVIĆ, Privredno ugovorno pravo, 7. izmenjeno i dopunjeno izdanje, 2019.

Nebojša ŠARKIĆ i dr., Pravo informacionih tehnologija, 3. izdanje, 2011.

Nebojša ŠARKIĆ, Dejan RADULOVIĆ, Milan POČUČA, Posebni građanski postupci: izvršni postupak, javno beležništvo (notarski postupak), vanparnični postupak i

stečajni postupak, 2. izmenjeno i dopunjeno izdanje, 2019.

Srđan ŠARKIĆ, Osnovi pravne istorije, 6. izdanja, 2017.

Srđan ŠARKIĆ, Osnovi rimskog prava, 3. izdanje, 2020.

Vladimir V. VODINELIĆ, Državina: pojam, priroda, zaštita i razlog zaštite, 2015.

Vladimir V. VODINELIĆ, Građansko pravo: uvod u građansko pravo i opšti deo građanskog prava, 4. izdanje, 2020.

Vladimir V. VODINELIĆ, Građansko pravo: uvodne teme, 2. neizmenjeno izdanje, 2012.

Dušan VRANJANAC, Goran DAJOVIĆ, Osnovi prava, 6. izmenjeno i dopunjeno izdanje, 2017.

Mihailo VELIMIROVIĆ, Stečajno pravo, 3. izdanje, 2012.

#### Monografije

Predrag BLAGOJEVIĆ, Kultura u pravnom sistemu Srbije, 2016.

Katarina Lj. DAMNJANOVIĆ, Prava intelektualne svojine i pravo konkurencije Evropske unije, 2011.

Saša GAJIN, Ljudska prava: pravno-sistemski okvir, 2. izdanje, 2012.

Nenad B. GRUJIĆ, Raskid ugovora zbog neispunjenja i pravna dejstva raskida, 2016.

Jelena JERINIĆ, Sudska kontrola uprave, 2012.

Srećko KOSANOVIĆ, Nedoželjena trgovina, 2010.

Snežana LAKIĆEVIĆ, Socijalni dijalog i kolektivno pregovaranje, 2014.

Mario LUKINOVIĆ, Milan STAMATOVIĆ, Nebojša ŠARKIĆ, Inovacije: pravno-ekonomski aspekti, 2017.

Dragana MALETIĆ, Štrajk glađu: pravni, etički i sociomedicinski aspekti, 2012.

Tatjana PAPIĆ, Odgovornost međunarodnih organizacija, 2019.

Vesna RAKIĆ-VODINELIĆ, Ana KNEŽEVIĆ BOJOVIĆ, Mario RELJANOVIĆ, Reforma pravosuđa u Srbiji: 2008–2012, 2012.

Jelena SIMIĆ, Lekarska greška: građanska odgovornost zbog lekarske greške, 2018.

Dejan ŠUPUT, Kaznenopravna zaštita sporta, 2011.

Dušan VRANJANAC, Džeremi Bentam: jedan pokušaj konstruisanja pravne norme, 2011.

#### Zbornici, komentari i priručnici

Violeta BEŠIREVIĆ (ur.), Militantna demokratija – nekada i sada, 2013.

Aleksandra ČAVOŠKI, Ana KNEŽEVIĆ BOJOVIĆ (ur.), Ekologija i pravo, 2012.

Marija DRAŠKIĆ, Nebojša ŠARKIĆ, Jelena ARSIĆ (prir.), Porodični zakon – dvanaest godina posle: tematski zbornik radova, 2018.

Katarina IVANČEVIĆ (ur.), Međunarodna naučna konferencija Zaštita kolektivnih interesa potrošača (2020; Beograd), Zbornik radova / Međunarodna naučna konferencija Zaštita kolektivnih interesa potrošača održana 24. oktobra 2020. godine u Beogradu, 2021.

Dragiša JOVANOVIĆ, Osnovna stručna obuka službenika obezbeđenja za poslove fizičko-tehničke zaštite lica i imovine i održavanja reda na sportskim priredbama, javnim skupovima i drugim mestima okupljanja građana: priručnik izrađen prema evropskom uputstvu za osnovnu stručnu obuku službenika obezbeđenja, 2014.

Ljubiša LAZAREVIĆ, Komentar Krivičnog zakonika, 2. izmenjeno i dopunjeno izdanje [1. u izdanju Pravnog fakulteta Univerziteta Union], 2011.

Miloš M. MILOŠEVIĆ, Priručnik za izvršitelje: odabrane teme za praktičnu primenu propisa o izvršenju, 2. izmenjeno i dopunjeno izd. [1. u izdanju Pravnog fakulteta Univerziteta Union i Službenog glasnika], 2012.

Mladen NIKOLIĆ, Nebojša ŠARKIĆ, Komentar Zakona o izvršenju i obezbeđenju: sudska praksa i propisi s posebnim dodatkom o građanskom izvršnom postupku: prema stanju zakonodavstva od

1. januara 2020. godine, 2. izmenjeno i dopunjeno izdanje, 2020.

Ivana PAJIĆ, Ljiljana PRLJINČEVIĆ, Kompjuteri i pravo: izabrana jugoslovenska bibliografija: 1964–2006, 1. izdanje, 2011.

Nebojša ŠARKIĆ, Nikola BODIROGA, Mario LUKINOVIĆ (prir.), Četrdeset godina izvršnog zakonodavstva u građanskim postupcima: zbornik radova, 2018.

Gavrilo ŠĆEPANOVIĆ, Zoran STANKOVIĆ, Zdravko PETROVIĆ (ur.), Sudskomedicinsko veštačenje nematerijalne štete, 2011.

Tihomir VASILJEVIĆ, Momčilo GRUBAČ, Komentar Zakonika o krivičnom postupku, 12. izmenjeno i dopunjeno izdanje, 2011.

#### Ostala izdanja

Tamara ILIĆ, Marko BOŽIĆ (ur.), Nomenclax: zbornik radova u čast Srđana Šarčića, 2020.

Borislav V. IVOŠEVIĆ, Časlav PEJOVIĆ, Pomorsko pravo: (uporednopravna studija), 2019.

Mario LUKINOVIĆ, Pravna informatika, 2021.

SAVETOVANJE Nezavisnost pravosuđa, Beograd, 24. maj 2019. godine: zbornik sažetaka (apstrakata), 2020.

Nebojša ŠARKIĆ, Milan POČUČA, Mario LUKINOVIĆ (ur.), Analiza zakona i podzakonskih akata Republike Srbije i propisa Evropske unije u oblasti upravljanja otpadom, sa posebnim osvrtom na obaveze lokalne samouprave, odnosno grada Novog Sada, 2021.

Srđan ŠARKIĆ, Pravne i političke ideje u Istočnom rimskom carstvu: od početka Konstantinove do kraja Justinijanove vladavine, 2017.

Miloš ŽIVKOVIĆ (ur.), Liber amicorum: Vladimir Vodinelić, 2019. (Zajedničko izdanje PFUB i PFUUB)

#### Priručnici za pravosudni ispit

Vladimir CRNJANSKI, Stvarno pravo, 2021.

Vladimir ČOLOVIĆ, Međunarodno privatno pravo, 2021.

Srećko KOSANOVIĆ, Krivično procesno pravo, 2020.

Bogoljub MILOSAVLJEVIĆ, Jelena JERINIĆ, Upravno pravo, 2020.

Bogoljub MILOSAVLJEVIĆ, Ustavno pravo, 2020.

Nataša MRVIĆ-PETROVIĆ, Krivično pravo: (opšti deo), 2020.

Zdravko PETROVIĆ, Leposava KARAMARKOVIĆ, Zoran IVOŠEVIĆ, Obligaciono pravo, 2020.

Vida PETROVIĆ ŠKERO, Građansko procesno pravo, 2021.

Nebojša ŠARKIĆ, Mladen NIKOLIĆ, Izvršni i stečajni postupak, 2020.

Nebojša ŠARKIĆ, Milan POČUČA, Porodično pravo, 2020.

Nebojša ŠARKIĆ, Milan POČUČA, Pravosudno organizaciono pravo, 2020.

Nebojša ŠARKIĆ, Zoran VAVAN, Radno pravo, 2020.

Milena TRGOVČEVIĆ-PROKIĆ, Vanparnični i javnobeležnički postupak, 2020.

Milena TRGOVČEVIĆ-PROKIĆ, Nasledno pravo i postupak za raspravljanje zaostavštine, 2020.

Slobodan VUKADINOVIĆ, Građansko pravo: opšti deo, 2021.



CIP – Каталогизacija y publikaciji  
Народна библиотека Србије, Београд

34

**PRAVNI zapisi** : časopis Pravnog fakulteta  
Univerziteta Union u Beogradu = Union University Law  
School Review / glavna i odgovorna urednica Violeta  
Beširević. – [Štampano izd.]. – God. 1, br. 1 (2010)–  
– Beograd : Pravni fakultet Univerziteta Union, 2010–  
(Beograd : Dosije studio). – 23 cm

Polugodišnje. – Drugo izdanje na drugom medijumu:  
Pravni zapisi (Online) = ISSN 2406-1387

ISSN 2217-2815 = Pravni zapisi

COBISS.SR-ID 176292108

***Lektura i korektura / Language Proofreading***

Svetlana Stojković

***Tehnička urednica / Layout Editor***

Irena Đaković

***Štampa / Print***

Dosije studio, Beograd

Tiraž: 100 / Circulation: 100 copies

**Časopis izlazi šestomesečno / The journal is published twice a year**

***Kontakt / Contact***

Pravni fakultet Univerziteta Union u Beogradu,

Bulevar maršala Tolbuhina 36, 11070 Beograd

Tel.: (011) 2095 501; Faks: (011) 3196 379

E-mail: [pravni.zapisi@pravnofakultet.rs](mailto:pravni.zapisi@pravnofakultet.rs)

[www.pravnozapisi.rs](http://www.pravnozapisi.rs)

***Indeksiranost / Indexing and Abstracting***

HeinOnline

ERIH PLUS

Serbian Citation Index (SCIndex)

Directory of Open Access Journals (DOAJ)

Central and Eastern European Online Library (CEEOL)

Sherpa Romeo

EBSCO Discovery Service

Google Scholar

***Pretplata / Subscription***

[pravni.zapisi@pravnofakultet.rs](mailto:pravni.zapisi@pravnofakultet.rs)

## SADRŽAJ / TABLE OF CONTENTS

### UVODNI ESEJ / GUEST EDITORIAL

Marko Milanović, *The Compatibility of Covid Passes with the Prohibition of Discrimination*

### ČLANCI / ARTICLES

Petra Bárd, *Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust*

Dragoljub Popović, *Constitutional Design and Destiny of the States: The Weimar Constitution and the St Vitus Day Constitution in Comparative Perspective*

Marko Božić, *The Law Unveiled: On Burka Ban, Kanzelparagraph and Militant Secularism in the Socialist Yugoslavia*

Tamara Mladenović, *Pravo na anonimni porođaj naspram prava deteta na identitet*

Jelena Danilović, *Etički kodeksi farmaceutskih kompanija kao akti autonomnog prava i njihovo mesto na Fulerovoj moralnoj lestvici*

### SIMPOZIJUM O KNJIZI / BOOK SYMPOSIUM

#### PREDGOVOR / PREFACE

Bojan Spaić, *Preface to Book Symposium: Miodrag Jovanović, The Nature of International Law (Cambridge University Press, 2019)*

#### ČLANCI / ARTICLES

Goran Dajović, *Normativnost međunarodnog prava*

Tatjana Papić, *In Defense of Uncertainty: Values Behind Indeterminate Rules of International Law*

Miloš Hrnjaz, *Nature of Customary International Law: All We Need Is Practice*

Ana Zdravković, *Obligations Erga Omnes – Jus Cogens in Statu Nascendi? A Theory Inspired by "The Nature of International Law"*

Jernej Letnar Črnič, *Institutional Actors as International Law-Makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and Beyond*

#### PRILOG / CONTRIBUTION

Miodrag Jovanović, *The Nature of International Law and Beyond: A Reply to Commentators*

#### POLEMIKA / DEBATE

Marko Božić, *Sekularizam i ustavna sekularnost (Odgovor Srđanu Miloševiću)*

#### KOMENTAR ODLUKE / CASE NOTE

Tijana Kojović, *EPIC v. APPLE: An Antitrust Experiment*

#### PRIKAZI / BOOK REVIEWS

Vladeta Janković, *Ogledalo običaja, slika istine: Tibor Varadi, Protivnarodni osmeh, Akademska knjiga, prevod s mađarskog Arpad Vicko, Novi Sad, 2021, 288 str.*

Jelena Jerinić, *Two Hundred Years of Serbian Constitutional History, Dragoljub Popović, Constitutional History of Serbia, Brill, 2021, 249 pp.*

#### HRONIKA / CHRONICLE

*Hronika PFUUB (2020/2021)*, priredila Jovana Popović

ISSN 2217-2815



9 772217 281008